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Xenophobic Discrimination

Shreya Atrey*

This article presents a general account of xenophobic discrimination in international law. It shows that the dominant grounds-based approach to addressing xenophobic discrimination as either (i) racial discrimination or (ii) discrimination based on nationality or citizenship, fails to capture what is wrong about xenophobic discrimination. Likewise, the suggestion to address xenophobic discrimination via a dedicated ground like foreignness may also fail given the inherently intersectional character of foreignness as in turn constituted by other grounds. Instead, xenophobic discrimination can be understood as a *sui generis* category of discrimination which is not necessarily based on a particular ground, but which leads to the particular 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 article thus makes three contributions: first, it proposes a shift away from a grounds-based to a harm-based approach to discrimination in international law; secondly, it delineates the nature of harm entailed in xenophobic discrimination; and thirdly, it shows why such harm should be treated as prima facie wrongful in international law.

INTRODUCTION

International law is no stranger to xenophobic discrimination. The Vienna Declaration and Programme of Action in 1993 and later the Durban Declaration and Plan of Action in 2002 have led the movement against xenophobia and xenophobic discrimination for over three decades.[1] The mandate of the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has existed since 1993.[2] Successive reports of mandate holders have engaged with xenophobic

*Associate Professor in International Human Rights Law, Bonavero Institute of Human Rights and Faculty of Law, University of Oxford. Sandra Fredman and Martin Scheinin provided extensive comments on earlier drafts of this article. Participants in the Migration and Ethnic Discrimination seminar at the Centre on Migration, Policy and Society (COMPAS) in Oxford in January 2023 generously engaged with the arguments in this article. Two peer reviewers for Modern Law Review saw in this article what was yet unrealised and gave critical feedback for the final draft. I am grateful to all of them.

1 UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23 (Vienna Declaration); United Nations, Durban Declaration and Plan of Action, adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Violence, 8 September 2001, endorsed by the GA Resolution 56/266 of 15 May 2002 (Durban Declaration).

2 Office of the High Commissioner for Human Rights, 'Measures to combat contemporary forms of racism, racial discrimination, xenophobia and related intolerance' Commission on Human Rights resolution 1993/20 (2 March 1993).

discrimination in great detail.[3] The Committee on the Elimination of Racial Discrimination established under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[4] too has adopted a General Recommendation on discrimination against non-citizens in 2004 as has the Office of the United Nations High Commissioner for Human Rights which released a lengthy document titled the Rights of Non-Citizens in 2006.[5]

Yet, xenophobic discrimination remains elusive. No international treaty mentions xenophobia or xenophobic discrimination. As the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance notes: 'there is no internationally recognized legal definition of xenophobia, not even in the various international and regional policy instruments that seek to combat this phenomenon.'[6] Likewise, there is neither a clear understanding nor an explicit prohibition of xenophobic discrimination as a legal wrong under international law.

This lacuna has been sought to be addressed by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance in their 2016 report by adopting a definition of xenophobia understood as 'behaviour specifically based on the perception that the other is foreign to or originates from outside the community or nation'.[7] Correspondingly, xenophobic discrimination is understood as a 'form of discrimination where those who are considered "foreigners" or "outsiders" are targeted on the basis of the prohibited grounds of discrimination',[8] or as the-then mandate

3 See Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, 'The Phenomenon of Xenophobia and its Conceptualization, Trends and Manifestations' (2016) A/HRC/32/50 (Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, 2016 Report); 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' (2018) A/HRC/38/52 (Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, 2018 Report). See also the following reports of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance: (1994) A/49/677; (1995) A/50/476, (1996) A/51/301; (2004) A/59/329; (2005) A/60/283.

4 International Convention on the Elimination of All Forms of Racial Discrimination 1965, 660 UNTS 195 (ICERD).

5 Committee on the Elimination of Racial Discrimination, General Recommendation No XXX on Discrimination Against Non-Citizens, CERD/C/64/Misc.11/rev.3 (2004) (CERD, General Recommendation No XXX); Office of the United Nations High Commissioner for Human Rights, 'The Rights of Non-Citizens' (2006) HR/PUB/06/11.

6 Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, 2016 Report, n 3 above at [26].

7 *ibid* at [26] (citing International Labour Organization, International Organization for Migration, and Office of the United Nations High Commissioner for Human Rights, *International Migration, Racism, Discrimination and Xenophobia* (2001) at https://publications.iom.int/system/files/pdf/international_migration_racism.pdf [https://perma.cc/7XR5-95BB].

8 Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, 2018 Report, n 3 above at [30]; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, 2016 Report, n 3 above at [34].

holder, E. Tendayi Achiume described, simply as discrimination on the ground of foreignness.[9]

This grounds-based approach to tackling xenophobic discrimination is inherently attractive. It provides an easy route to the recognition of a category of discrimination under the general right to equality and non-discrimination in international law which in turn is grounds-based.[10] Thus, the recognition of a particular ground can lead to the prohibition of discrimination based on that ground. For example, the recognition of sexual orientation as a ground has led to the prohibition of discrimination on that basis.[11] Similarly, the recognition of foreignness as a ground can lead to discrimination based on foreignness, ie xenophobic discrimination, being considered prohibited under international law. This requires no new treaties but provides an alternative for treaty bodies which have a mandate to interpret the right to equality and non-discrimination, to interpret the right broadly enough to include foreignness as a ground and consequently to prohibit xenophobic discrimination on that basis.

The article queries this approach. It explores whether the move to define xenophobic discrimination via a dedicated ground of discrimination such as foreignness is licit and ultimately shows that a grounds-based approach makes the legal category of xenophobic discrimination no less elusive, either conceptually in terms of understanding the meaning of xenophobic discrimination or practically in terms of finding for xenophobic discrimination in international law.

The article begins by showing how the extant discourse in international law falls short of dealing with xenophobic discrimination adequately. The next section traces the trajectory of development of international law around xenophobia and xenophobic discrimination and examines two dominant approaches to addressing xenophobic discrimination: first as racial discrimination under ICERD;[12] and second as nationality or citizenship discrimination under ICCPR.[13] It shows that neither approach gets to grips with xenophobic discrimination in a substantive sense. Thus, under their respective individual communications procedures, while the Committee on the Elimination of Racial Discrimination seems stuck with determining whether the ground in question is racial; the Human Rights Committee (HRCttee) seldom connects discrimination based on grounds like nationality to the harm of xenophobia or xenophobic discrimination squarely, given its emphasis on the standard of review rather than the reason why such discrimination is wrong.

9 E. Tendayi Achiume, 'Beyond Prejudice: Structural Xenophobic Discrimination Against Refugees' (2014) 45 *Georgetown Journal of International Law* 323, 331-335; E. Tendayi Achiume, 'Governing Xenophobia' (2018) 51 *Vanderbilt Journal of Transnational Law* 333, 353.

10 International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR), Art 26; International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3, Art 2(2); ICERD, n 4 above, Art 2(1).

11 Human Rights Committee, *Toonen* v *Australia* (1994) CCPR/C/50/D/488/1992. See generally Dominic McGoldrick, 'The Development and Status of Sexual Orientation Discrimination under International Human Rights Law' (2016) 16 *Human Rights Law Review* 613.

12 ICERD, n 4 above.

13 ICCPR, n 10 above.

The article then explores whether the substantive harm of xenophobic discrimination is captured by an independent ground like foreignness. It shows that foreignness is an unusual ground because of its intersectional nature. Because of its unusual form – of being co-constituted by a range of grounds – foreignness does not 'fit' the grounds-based approach to discrimination which requires a more precise determination of the personal characteristic at stake in a ground, and the particular groups defined by that ground. Thus, the problem lies both with the selection of grounds of xenophobic discrimination, and also the grounds-based approach itself.

The article argues that xenophobic discrimination may be identified not necessarily as based on particular grounds like race, nationality, citizenship or foreignness, but through the particular xenophobic harm of disbelongingness which makes people appear as foreigners or outsiders who do not belong to communities they find themselves in and hence excludes them from the social, political, economic and cultural life of those communities. This harm, as opposed to the prevailing understanding in international law, exceeds marginalisation from political processes and extends to all aspects of human flourishing of which participation in community life of a village, town, city, state or nation-state is an essential ingredient. The essence of xenophobic discrimination thus lies not in the criteria it is based on but the precise harm it leads to which could in turn be based on a host of criteria or grounds of discrimination. Its recognition ultimately rests on appreciating it as a *sui generis* category rather than forcing it into the mould of the traditional grounds-based approach to discrimination.

With this, the article presents a general account of xenophobic discrimination in international law. This account, conceived in reference to the general right to equality and non-discrimination,[14] is broader than the one imagined so far in the context of refugee law and migration studies.[15] Its purpose is to collate a range of examples of potential claims of xenophobic discrimination and to show what is wrong about them in a substantive sense. Importantly, it delineates the meaning of xenophobic discrimination but does not consider how xenophobic discrimination can be justified under international law such as in the context of migration.[16] For example, the article does not explain when immigration control is justified and on what basis, or when exclusion of refugees in host

14 See the contours of the right explored in Wouter Vandenhol, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Antwerpen: Intersentia, 2005); Warwick A. McKean, *Equality and Discrimination Under International Law* (Oxford: OUP, 1985).

15 See especially the account offered by E. Tendayi Achiume in the context of refugee law and migration in 'Beyond Prejudice' and 'Governing Xenophobia', both n 9 above.

16 Excellent contributions have emerged recently at the intersection of discrimination and migration law such as the *AJIL Unbound* special issue titled 'Undoing Discriminatory Borders' (2021) 115 *AJIL Unbound*, as well as the *International Journal of Discrimination Law* special issue titled 'Contesting and Undoing Discriminatory Borders' (2022) 22 *International Journal of Discrimination Law*. See Colm Ó Cinnéide, 'Why Challenging Discrimination at Borders is Challenging (and Often Futile)' (2021) 115 *AJIL Unbound* 362; Cathryn Costello and Michelle Foster, '(Some) Refugees Welcome: When is Differentiating between Refugees Unlawful Discrimination?' (2022) 22 *International Journal of Discrimination and the Law* 244; Michelle Foster and Timnah Baker, 'Racial Discrimination in Nationality Laws: A Doctrinal Blind Spot of International Law?' (2021) 11 *Columbia Journal of Race and Law* 83; Antje Ellermann, 'Discrimination

States may be classified as xenophobic discrimination.[17] Instead, the discussion establishes a norm considering xenophobic discrimination, where xenophobic discrimination exists, to be *prima facie* (not *a posteriori*) wrongful because it leads to the harm of disbelongingness. The article makes a case for treating such harm as normatively unacceptable in international law no matter the 'status' of people as reflected in legal documents such as visas or passports, or personal characteristics to do with national or ethnic origin, colour, language etc. The aim is to contribute towards rectifying what Colm Ó Cinnéide has identified as the 'lack of normative development in this area of human rights law' from an anti-discrimination perspective.[18]

XENOPHOBIC DISCRIMINATION IN INTERNATIONAL LAW

The recognition of xenophobic discrimination in international law can be traced back to the use of the term 'xenophobia' for the first time in the Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights in 1993.[19] The five references to xenophobia therein were generalist or colloquial, identifying xenophobia as a problem in the same breath as poverty and hunger, but said nothing more about its meaning or status in international law. Almost a decade later, the Durban Declaration adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance in 2001 started the trend of linking xenophobia with racism and treating ICERD as the principal instrument in international law to combat xenophobia.[20] Even though ICERD did not use the term xenophobia anywhere, the Durban Declaration used it over 250 times, mostly in conjunction with racism and racial discrimination. Yet no precise conceptual or legal definition of xenophobia was offered to help understand how it related to racism, racial discrimination and other 'related intolerances' including slavery[21] and colonisation.[22]

In fact, the Durban Declaration made xenophobia subordinate to racism and racial discrimination, by declaring that 'racism, racial discrimination,

in Migration and Citizenship' (2020) 46 *Journal of Ethnic and Migration Studies* 2463; Marie-Bénédicte Dembour, *When Humans Become Migrants* (Oxford: OUP, 2015).

17 E. Tendayi Achiume, 'The Fatal Flaw' (2018) 56 *Columbia Journal of Transnational Law* 257, 258-259. cf Liav Orgad, 'When is Immigration Selection Discriminatory?' (2001) *AJIL Unbound* 345 (developing a three-part test for discrimination in the context of immigration selection). The only definite limitation of this principle is in relation to the State's non-refoulment obligations which prohibit extradition when there are substantial grounds for believing that a person may be persecuting a person on the basis of, inter alia, their nationality. See International Convention for the Protection of All Persons from Enforced Disappearance 2006, 2716 UNTS 3, Art 13(7). See also International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990, 2220 UNTS 3, Arts 1 and 7 (prohibiting discrimination on the basis of nationality, though the prohibition is not absolute in nature).

18 Ó Cinnéide, n 16 above, 366.

19 Vienna Declaration, n 1 above.

20 Durban Declaration, n 1 above.

21 *ibid* at [13].

22 *ibid* at [14].

xenophobia and related intolerance, *where they amount to racism and racial discrimination*, constitute serious violations of and obstacles to the full enjoyment of all human rights'.[23] It went on to recognise that 'racism, racial discrimination, xenophobia and related intolerance *occur on the grounds of race, colour, descent or national or ethnic origin* and that victims can suffer multiple or aggravated forms of discrimination based on other related grounds such as sex, language, religion, political or other opinion, social origin, property, birth or other status'.[24] In this way, the Durban Declaration only tackled xenoracism or xenophobia based on racial grounds, including when racial grounds intersected with non-racial grounds.[25] While it did acknowledge that xenophobia 'is one of the main contemporary sources and forms of discrimination and conflict',[26] it said little about how xenophobia manifested itself as xenophobic discrimination or was addressed in international law on its own or when it did not amount to racial discrimination.

As the following section shows, this initial characterisation of xenophobic discrimination has endured and been largely overshadowed by racism and racial discrimination with the result that xenophobic discrimination not explicitly constituted by racial grounds has escaped the contours of ICERD. Moreover, ICERD excludes from its ambit 'distinctions between citizens and non-citizens'[27] and 'legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality'.[28] But this has provided the HRCttee the opportunity to address discrimination based on nationality and citizenship within the ambit of ICCPR. This has succeeded to an extent in terms of finding for such discrimination but that has come at the expense of recognising both racism and the specific harm occasioned by xenophobic discrimination. Xenophobic discrimination thus remains concealed by the focus on grounds of race or nationality and citizenship alike.

Xenophobic discrimination as racial discrimination

This section explores the ubiquity of instances of possible claims of xenophobic discrimination. The jurisprudence of the Committee on the Elimination of Racial Discrimination (CERD or the Committee) which has had to deal with xenophobic discrimination more than any other treaty body, shows a vast breadth of claims brought under the individual communications procedure of

23 *ibid*, preamble (emphasis added).
24 *ibid* at [2] (emphasis added).
25 Kyoo Lee, 'Xenoracism and Double Whiteness: How Ben Franklin, "True-blue English/First American", Still Confuses Us' (2014) 2 *Critical Philosophy of Race* 46, 51 (xenoracism is defined as 'the amalgamated categorical interactions of xenophobia and racism, a porous sub(terranean) genre rather than sealed subset of xenophobia or racism, where the foreign is racialized and particular "aliens" become further alienized at once with catalytic, categorical reciprocity, through this double lens of whiteness that is both racial and ethno-cultural.').
26 Durban Declaration, n 1 above, preamble.
27 ICERD, n 4 above, Art 1(2).
28 ICERD, n 4 above, Art 1(3).

ICERD which were claims of discrimination against actual or perceived foreigners. Claims such as *Dawas and Shava* v *Denmark*[29] (*Dawas and Shava*), *SA* v *Denmark*,[30] *Habasi* v *Denmark*[31] (*Habasi*), *BJ* v *Denmark*,[32] *MB* v *Denmark*[33] and *Qureshi* v *Denmark (II)*[34] serve as excellent examples which failed to be assessed for xenophobic discrimination given the Committee's focus on racial discrimination as based exclusively on the grounds listed in Article 1(1) of ICERD: race, colour, descent, or national or ethnic origin. Now, the competence of the Committee is indeed limited to these enumerated grounds. So, perhaps the Committee could not have expanded its jurisdiction to cover discrimination based on foreignness or foreigner status. Equally, the views of the Committee are framed in response to the petitioner's own submissions which in turn may be limited to begin with. The Committee may be well advised in not exceeding what is pleaded. The article does not doubt the legitimacy of these limitations. It in fact takes them seriously and instead interrogates the reigning view that xenophobic discrimination is covered under ICERD, especially when the Committee has hardly engaged with this idea despite having encountered one too many individual communications of the kind. This section thus aims to show that the result of the inordinate emphasis on racial discrimination when speaking of xenophobic discrimination has resulted in an obliteration of the category of xenophobic discrimination all together.

For example, *Dawas and Shava* was brought by two petitioners who were Iraqi citizens recognised as refugees in Denmark. While they were being beaten as their family home was ransacked by a mob, one of the attackers shouted 'go home', while another spoke into his phone about 'problems with some *perkere* [foreigners].'[35] A 'No Blacks allowed' sign was placed outside the house after the incident, forcing the petitioners to flee the municipality permanently due to fear of violence and discrimination. The petitioners complained that the State Party had failed to interrogate the racist element of the attack and thus deprived them of an effective remedy for the violations. The Committee agreed that given the seriousness of the circumstances 'where the petitioners were subjected, in their own house, to a violent assault by 35 offenders, some of them armed, enough elements warranted a thorough investigation by public authorities into the possible racist nature of the attack against the family.'[36] As the State Party had instead set aside the criminal investigation, the Committee concluded that it had violated Article 6 and Article 2(1)(d) of ICERD.[37] The claim was thus decided primarily as a *failure to investigate* racial discrimination rather than *as* racial discrimination.

29 (2012) CERD/C/80/D/46/2009.
30 (2016) CERD/C/97/D/58/2016.
31 (1999) CERD/C/54/D/10/1997.
32 (2000) CERD/C/56/D/17/1999.
33 (2002) CERD/C/60/D/20/2000.
34 (2005) CERD/C/66/D/33/2003.
35 *Dawas and Shava* n 29 above at [2.3] ('According to the petitioners, the attacker in that case was carrying a baseball bat and reportedly shouted at the victim "what are you looking at perker svine?" (Danish pejorative slang for "foreigner"').
36 *ibid* at [7.4].
37 *ibid* at [8].

The curious aspect, however, is what the Committee perceived to be possible 'racial elements' such as epithets like 'go home' or 'problems with *perkere* [foreigners]' all pointed to xenophobic discrimination against refugees in Denmark. Even the 'No Blacks allowed' sign can be translated as a reference to the outsider-status of refugees in the prevailing political context of Denmark which is dominated by highly nationalistic and xenophobic attitudes.[38] Unlike the North American context and its racial discourse on colour, the vilified discourse against refugees in Denmark is not one (chiefly) marked by colour, but (predominantly) by the lack of belongingness of non-Danes to Danish society.[39] The point is that, although the discourses on racism and xenophobia can and do overlap in many instances,[40] xenophobic elements of discrimination ('perkere', 'go home') cannot be subsumed by apparently racist elements ('No Blacks allowed').

Furthermore, while 'No Blacks allowed' could well be a racist epithet, in a context such as an attack on refugees when they are directly identified as *perkere* or foreigners, it is worth questioning that assumption, and instead to ask whether these could have been xenophobic references directed towards Iraqi refugees who did not belong to the particular space or community of the neighbourhood, city or country they found themselves in. In this light, *Dawas and Shava* begins to appear as a paradigmatic case of xenophobic discrimination against refugees, which may or may not have been a claim of racial discrimination. But given the exclusive focus of the Committee on racial grounds enumerated in Article 1(1) of ICERD, this possibility was never explored.

SA v *Denmark* confirms this indifference to xenophobic discrimination. The claim involved a Danish citizen of Bosnian origin who had applied for income support when he had failed to secure a job. He was denied income support because of his 'foreign sounding name' which led to a presumption that he did not have Danish nationality – a requirement for receiving income support.[41] The Committee concluded that the amount of compensation granted to the petitioner for racial discrimination was inadequate and did not reflect the mental anguish and humiliation caused by being considered a foreigner and consequently, the threat of deportation to Bosnia – a country the petitioner

38 Peter Hervik, 'Ending Tolerance as a Solution to Incompatibility: The Danish "Crisis of Multiculturalism"' (2012) 15 *European Journal of Cultural Studies* 211; Erik Berggren, 'Danish Xenophobia – Power Logic in Motion' in Erik Berggren and others (eds), *Irregular Migration, Informal Labour and Community: A Challenge for Europe* (Maastricht: Shaker Publishing, 2007) 372; Olga Iakimova, 'Exploring the Dynamics of Xenophobia in the Nordic Countries' (2018) 2 *Changing Societies and Personalities* 17.

39 See Andres Hellström and Peter Hervik, 'Feeding the Beast: Nourishing Nativist Appeals in Sweden and in Denmark' (2014) 15 *Journal of International Migration and Integration* 449; Peter Hervik, 'Xenophobia and Nativism' in Neil J. Smelser and Paul B. Baltes (eds), *International Encyclopedia of the Social and Behavioural Sciences* (Elsevier, 2nd ed, 2015) 796.

40 Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, 2018 Report, n 3 above at [37]; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, 2016 Report, n 3 above at [27]-[28]. See also Jens Rydgren, 'Meso-level Reasons for Racism and Xenophobia' (2003) 6 *European Journal of Social Theory* 48; Ronald R. Sundstrom and David Haekwon Kim, 'Xenophobia and Racism' (2014) 2 *Critical Philosophy of Race* 20.

41 *SA* v *Denmark* n 30 above at [2.2].

had not lived in for years. While discrimination was directly based on a 'foreign sounding name', the Committee seems to have had no objections in seeing it as a proxy for racial discrimination. This was because the national authorities had seen discrimination in this light. But there was no real evidence of this. The Committee just assumed that the real reason for discrimination was not the one apparent on the face of the record – ie, the petitioner's 'foreign sounding name' or a mistaken belief of him lacking Danish nationality or citizenship – but one of the grounds enumerated in Article 1(1) of ICERD: race, colour, descent, or national or ethnic origin.

In other instances, the Committee has assumed so more explicitly and imposed positive obligations on States Parties to investigate whether proxies such as name or nationality serve as placeholders for racial grounds and thus lead to racial discrimination. Thus, in *Habasi*, the Committee found a violation of ICERD for the failure of the State Party to investigate whether a demand to show a Danish passport for obtaining a loan for an alarm set for a car was racially motivated. The Committee was unequivocal that 'financial means are often needed to facilitate integration in society. To have access to the credit market and be allowed to apply for a financial loan on the same conditions as those which are valid for the majority in the society is, therefore, an important issue.'[42] Failure to initiate a proper investigation into 'the real reasons behind the bank's loan policy vis-à-vis foreign residents'[43] was thus held to be a violation of rights guaranteed in ICERD.[44]

Habasi though is an outlier. It appears that unless the circumstances reach a particular threshold of harm, the Committee is not always inclined to rule against the State Party for a failure to investigate either. Claims such as *BJ* v *Denmark* and *MB* v *Denmark* show that 'classic' cases of xenophobic discrimination – such as denial of entry into public spaces viz restaurants and clubs for being an actual or perceived foreigner – frequently fail. In *BJ* v *Denmark*, a Danish citizen of Iranian origin was denied entry into a discotheque because, as he was told by the doorman, he was a 'foreigner'.[45] While agreeing that compensation must be made even in cases where no bodily harm is inflicted 'but where the victim has suffered humiliation, defamation or other attack against his/her reputation and self-esteem',[46] the Committee did not find a violation in the case. Similarly, in *MB* v *Denmark*, two Brazilians living in Denmark were denied entry into a club. They demanded 'an investigation into the real reasons behind the "treatment" … in order to ascertain whether or not criteria involving racial discrimination have been applied'.[47] The Committee held that an incomplete investigation in this instance did not establish a violation of ICERD. Both *BJ*

42 *Habasi* n 31 above at [9.2].
43 *ibid* at [9.3].
44 Elspeth Guild, Stefanie Grant and C.A. Groenendijk (eds), *Human Rights of Migrants in the 21st Century* (London: Routledge, 2018) 9 ('There can be a human rights problem with the duty of non-discrimination when prohibited grounds of discrimination lurk behind a State's claim to the legitimacy of differential treatment between citizens and migrants or between migrants only on the basis of their nationality.')
45 *BJ* v *Denmark* n 32 above at [2.1].
46 *ibid* at [6.2].
47 *MB* v *Denmark* n 33 above at [3.1].

v *Denmark* and *MB* v *Denmark* seem to have been compromised because of: (i) the lack of an immediate link to Article 1(1) grounds such as race, colour or descent; and (ii) the neglect of other grounds enumerated in Article 1(1), namely, national or ethnic origin, where a link to petitioner's foreignness or status as a foreigner could potentially be made.

Coincidentally, the imposition of an obligation to investigate racial discrimination may be significant for xenophobic discrimination. It may help identify both cases of racial discrimination when they coincide with xenophobia and also cases of xenophobic discrimination which exist on their own, even if they would then fall outside the ambit of ICERD. Thus, in the case of *MB* v *Denmark* when the duo was denied entry into a club because they were not 'regulars' – the petitioner was right to insist that the police investigate the 'real reason' behind the denial. If the reason was related to one of the grounds mentioned in Article 1(1) of ICERD, it would have been direct racial discrimination; but if the reason was to do with excluding those perceived as outsiders or foreigners as not 'regulars', it would still have revealed direct xenophobic discrimination, making the discrimination no less problematic than if it were racial discrimination. So, even if the Committee itself does not examine overt xenophobic elements, the possibility that they may yet be examined by the States Parties via an obligation to investigate racial discrimination remains open. However, the inconsistency between decisions which impose such an obligation and those which do not only confirms the lack of a principled stance towards these claims, all of which were directly based on xenophobic, *not* racialised, elements on the face of it (viz 'go back home', 'foreign sounding name', 'perkere', 'foreigner'). But the Committee not only fails to consider these as potential claims of xenophobic discrimination as such, but also claims of xenophobic discrimination based on grounds such as national or ethnic origin which *are* enumerated in Article 1(1) of ICERD.

More immediately, it matters to ask the reason why discrimination occurred in claims which plead for a finding of discrimination rather than simply a finding of the breach of an obligation to investigate potential discrimination.[48] CERD has however reduced an inquiry into discrimination to a narrow search for *some* racial grounds to be implicated, namely, race, ethnicity, colour and descent, to the exclusion of other racial grounds, namely, national or ethnic origin. This has led to not only xenophobic discrimination but also intersectional discrimination being cast away.

For example, in *Qureshi* v *Denmark (II)*, the petitioner complained to the Committee about the offensive statements made by a member of the Progressive Party of Denmark against 'foreigners'.[49] The Committee was unequivocal that: 'a general reference to foreigners does not at present single out a group of persons, contrary to article 1 of the Convention, on the basis of a specific race, ethnicity, colour, descent or national or ethnic origin'.[50] It held that the statements did not amount to an act of racial discrimination. The Committee imposed an artificial requirement for the reference to foreigners to be a reference

48 See also *Saada Mohamad Adan* v *Denmark* (2010) CERD/C/77/D/43/2008.
49 *Qureshi* v *Denmark (II)* n 34 above at [2.2]-[2.4].
50 *ibid* at [7.3].

to *a single* group defined by race, ethnicity, colour, descent or national or ethnic origin; when the category foreigners could include several groups marginalised on the basis of race, ethnicity, colour, descent or national or ethnic origin, as is indeed the case in Denmark.[51] In fact, such a requirement, viz of showing discrimination against a 'particular nationality' in order to prove discrimination exists only under Article 1(3) and does not apply to grounds enumerated in Article 1(1) of ICERD. Thus, for example, discrimination on grounds of national or ethnic origin could potentially be based on a general reference to all foreigners as opposed to Danes understood in reference to Danish national or ethnic origin. The Committee foreclosed this possibility unjustifiably.

The following set of claims: *Sefic* v *Denmark*,[52] *LG* v *Korea*,[53] *Benon Pjetri* v *Switzerland*[54] and *AMM* v *Switzerland*[55] illustrate the futility of looking for specific racial grounds or a singular group in the context of xenophobic discrimination.

In *Sefic* v *Denmark*, a Bosnian citizen, residing in Denmark, complained of having been denied car insurance because he did not speak Danish. The insurance company justified the language requirement as necessary for communication with customers, and for being a small company with limited resources to train its employees in different languages. The Committee found no violation under ICERD. The Committee was sparse in its reasoning, but the unarticulated assumption seems to be that the language requirement was not per se to be considered racially discriminatory especially since credible justifications were offered for it.

Language requirements though, can be understood as gatekeepers of communities in that they have the immediate and lasting impact of excluding those considered foreigners or outsiders from participating in community life, such as by accessing goods and services,[56] like in *Sefic* v *Denmark*, by impeding car insurance and hence car ownership and the possibilities of work and leisure associated with it. Language requirements thus exist within the 'political economy of xenophobia'.[57] *Sefic* v *Denmark* makes clear that unless language requirements can be shown to impact identifiable racial minorities they are not actionable under ICERD *as* xenophobic discrimination on their own.

The Committee's insistence on certain racial grounds and groups is so strict that it even misses intersectional discrimination or discrimination where racism and xenophobia combine. *LG* v *Korea* is an important example in this regard. *LG* v *Korea* concerned a foreign national working and living in Korea as a language teacher. The government introduced a requirement

51 See *Kamal Quereshi* v *Denmark*, (2005) CERD/C/66/D/33/2003 at [7.3] ('a general reference to foreigners does not at present single out a group of persons…on the basis of a specific race, ethnicity, colour, descent or national or ethnic origin').
52 (2005) CERD/C/66/D/32/2003.
53 (2015) CERD/C/86/D/51/2012.
54 (2016) CERD/C/91/D/53/2013.
55 (2014) CERD/C/84/D/50/2012.
56 Ruth Wodak, 'Language, Power and Identity' (2015) 45 *Language Teaching* 215; M.C. Kgari-Masondo and S. Masondo, '"For Peace Sake": African Language and Xenophobia in South Africa' (2019) 6 *Journal of African Foreign Affairs* 87.
57 John Roemer and Karine Van der Straeten, 'The Political Economy of Xenophobia and Distribution: The Case of Denmark' (2006) 108 *Scandinavian Journal of Economics* 251.

for all teachers who were not Korean nationals or who were not of Korean ethnicity to submit to mandatory HIV and drug testing as a precondition for approval or renewal of visa. The petitioner argued that the requirement served to reinforce prejudice against non-ethnic Korean teachers.[58] Korean nationals of any ethnicity and ethnic Koreans were both exempt from such testing. The testing was thus drawn neither on the basis of nationality nor ethnicity alone but both at the same time. The Committee held that 'the mandatory testing policy limited to foreign teachers of English who are not ethnic Koreans does not appear to be justified on public health grounds or any other ground, and is a breach of the right to work without distinction as to race, colour, or national or ethnic origin'.[59] It further recommended that in addition to the State Party taking appropriate measures to address racial discrimination, it also 'counter any manifestation of xenophobia, such as stereotyping or stigmatizing, of foreigners'.[60] While the Committee showed clear awareness of xenophobia in its recommendations, its finding was limited to racial discrimination alone. That is, it did not find for xenophobic discrimination or more precisely, xenoracism in this case where discrimination was directed against the petitioner because of *both* her nationality and ethnicity, presumably because no particular nationality was being discriminated against.[61] Indeed, Korean nationals of non-Korean ethnicity were excluded from the testing requirements, making nationality inextricable from the ethnic discrimination at stake. The Committee showed little appreciation of this and thus the intersection of xenophobic and racial discrimination which was at the heart of this claim.

This appreciation matters most in those cases which cannot succeed without a clear understanding of intersectional discrimination. The point is borne out in two cases brought against Switzerland. On the one hand is *Benon Pjetri* v *Switzerland* which concerned a petitioner who was born in Albania and had lived in Switzerland since he was 18 years old. The petitioner had a speech impairment and used a wheelchair. His application for naturalisation was rejected by the municipal assembly because he was considered not to have integrated into Swiss society. On evidence was a statement of one of the members of the municipal assembly that 'Kosovo-Albanians left a bitter taste in the mouth'[62] and a record of a hostile environment targeting the petitioner, including in the media. The petitioner complained that the national authorities had failed to deal with 'double discrimination on the grounds of his origin and disability' experienced against 'the general xenophobic and racist atmosphere in the Rhine valley'[63] and had failed to adjust the criteria of integration to properly reflect the limitations of his disability.[64] The Committee was unconvinced. First, it held that the criteria for rejection of naturalisation was based on lack of integration and not racial grounds and thus rejected the claim of racial discrimination. Secondly, it held that 'pursuant to article 1 of the Convention, it is not competent

58 *LG* v *Korea* n 53 above at [2.4].
59 *ibid* at [7.4].
60 *ibid* at [9].
61 ICERD, Art 1(3).
62 *Benon Pjetri* v *Switzerland* n 54 above at [2.2].
63 *ibid* at [4.5], [5.10].
64 *ibid* at [3.5].

to consider the separate claim of discrimination on the grounds of disability."[65] In essence, the Committee failed to: (i) scrutinise a criterion like 'integration' which is chiefly about demarcating between 'us' and 'them' and thus has the potential for being applied not only along racial lines but also for excluding disabled migrants and non-citizens; and (ii) to consider disability discrimination not as a 'separate claim' but as one entwined with other forms of discrimination such as in this context where disabled migrants of racialised groups would have found a requirement like 'integration' insurmountable in comparison with non-disabled migrants of racialised groups. The fact that the petitioner's situation in this case was intersectionally defined potentially by his race, disability and nationality presented a hurdle the Committee neither confronted nor surmounted.

On the other hand, *AMM* v *Switzerland* concerned a Somali national living in Switzerland on what was known as temporary 'F' status as an asylum seeker. The status came with limitations of work and travel which restricted the petitioner to poorly paid and precarious jobs, and affected his ability to complete vocational training in maritime navigation which required mandatory travel and access to proper medical services. In addition, the petitioner repeatedly received letters asking him to attend courses in 'Swiss life and customs' and 'living in an apartment' even though he had lived in Switzerland for many years. In light of the wider discourse in Switzerland which the petitioner considered hostile to foreigners, the petitioner asked the Committee to determine 'to what extent the social, economic and cultural context in Switzerland is a factor in discrimination against particular groups of the foreign population"[66] and assess the validity of the 'F' status which was characterised by a high degree of surveillance, inability to access rights such as the right to work without the permission of the migration board or the right to non-emergency medical treatment. Although the Committee noted the abundance of examples of discrimination in accessing work, vocational training and health services, and even acknowledged 'the complexity of the issue raised in this case, which highlights the negative effects of the Swiss 'temporary admission' status ('F' permit for foreigners) on some groups of foreigners who can also be distinguished by ethnic or national origin' it held that the petitioner had not 'unequivocally established that the discriminatory acts … were based on his ethnic origin or Somali nationality *and not on his status as a foreigner* admitted on a temporary basis as provided by Swiss law."[67]

Thus, while the Committee seems to plainly admit that there was discrimination based on the petitioner's *status as a foreigner*, the same seems to preclude racial discrimination. So, on the one hand, in the absence of a structural analysis pleaded by the petitioner of the prevailing conditions in Switzerland marked by open hostility towards foreigners with minority ethnic backgrounds, the Committee failed to link xenophobic discrimination to racial grounds, a link deemed necessary for a claim to fall within Article 1(1) of ICERD. On the

65 *ibid* at [7.6].
66 *AMM* v *Switzerland* n 55 above at [5.2].
67 *ibid* at [8.6] (emphasis added).

other hand, the Committee also succeeded in completely ousting xenophobic discrimination based on foreigner status from the purview of ICERD by interpreting foreigner status as outside the purview of grounds listed in Article 1(1).

As a result of the Committee's insistence on making all these claims 'fit' the mould of racial discrimination, it has never been able to appreciate either xenophobic discrimination on its own as discrimination against actual or perceived foreigners; or as intersectional discrimination where racial grounds such as ethnicity, colour, descent or national origin are entangled with other grounds such as nationality, citizenship, disability, language etc. Again, there may be good reasons for this in that the Committee may be legitimately restricting itself to grounds explicitly enumerated in Article 1(1) of ICERD, having no mandate to address discrimination on other grounds. The article does not challenge this. Its only aim here is to show that the frequent juxtaposition of xenophobic discrimination with racial discrimination is hardly mirrored in treaty body jurisprudence concerning potential claims of xenophobic discrimination.[68] Yet, paradoxically, as this section has shown, the very claims which have failed to be seen as xenophobic discrimination also show that such discrimination *does* exist. Can such discrimination be better recognised as based on other grounds like nationality or citizenship than when pegged to grounds enumerated under Article 1(1) of ICERD? The next section turns to this.

Xenophobic discrimination as nationality or citizenship discrimination

The Human Rights Committee (HRCttee) has taken the opportunity to address xenophobic discrimination often in cases which are not based on racial grounds such as those listed in Article 1(1) of ICERD.[69] The presence of an open-ended list of grounds under Article 26 of the ICCPR which prohibits discrimination on 'other status'[70] has enabled individual communications on unenumerated grounds like nationality and citizenship.[71] Textually, Article 26 of the ICCPR is also not confined to non-discrimination in respect of rights

68 See for example CERD, General Recommendation No XXX, n 5 above; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, 2018 Report, n 3 above; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, 2016 Report, n 3 above.

69 See also Olivier de Schutter, 'Links between Migration and Discrimination' (European network of legal experts in gender equality and non-discrimination, July 2016) at https://www.statewatch.org/media/documents/news/2017/jan/ep-study-migration-discrimination.pdf [https://perma.cc/9W8U-N82C] (exploring the strides made by the HRCttee in this regard).

70 ICCPR, Art 26 provides that: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

71 See generally Tufyal A. Choudhury, 'Interpreting the Right to Equality under Article 26 of the International Covenant on Civil and Political Rights' [2003] *European Human Rights Law Review* 24.

guaranteed under the ICCPR.[72] The right to equality and non-discrimination under Article 26 is general and extends to statutory rights and policies enacted by the State. Its broad scope thus has allowed the HRCttee to go beyond the limitations that have beset CERD.

Early developments in this regard can be traced back to the spate of individual communications relating to expropriation where the HRCttee consistently held that restitution of property confiscated by a State cannot be based on grounds such as nationality and citizenship lest it constitutes discrimination under Article 26.[73] At first blush, these claims may not seem to have much to do with foreignness or xenophobic discrimination. On another look and in the context of Iron Curtain, they seem to be paradigmatic cases of xenophobic discrimination. Nationality or citizenship were intimately connected to property in that the loss of one went hand-in-hand with the loss of the other. In reality, expropriation was a means of coercing expulsion or conveying hostility upon return.[74] The harm at the heart of these cases was one of excluding those who were no longer considered insiders (because they had left the country or had a political opinion which diverged from the official/government line) from property ownership, thus conveying that those whose properties were confiscated did not or no longer belong(ed) to the nation-state. The harm was thus material both in terms of deprivation of property and the deprivation of a sense of belonging tied to both nationality or citizenship and property in the form of land, home and business around which people build their lives. Importantly, these early claims show that the harm of xenophobic discrimination cannot be confined to limitations to enter, leave or remain in a country, ie immigration policies often affecting migrants, asylum seekers, refugees, displaced or stateless persons. They show that, depending on the political climate, the possibility of 'insiders' being rendered 'outsiders' by States remains real for anyone. These claims, although successful, were a missed opportunity in laying bare the nature of xenophobic harm.

The HRCttee's decision in *Gueye* v *France*[75] (*Gueye*) is perhaps the most instructive example of a broad conception of harm in claims based on nationality. The claim was brought by an author who was joined by 742 other retired Sene-

72 cf ICCPR, n 4 above, Art 2(1).

73 See *Victor Drda* v *Czech Republic* (2010) CCPR/C/100/D/1581/2007; *Jaroslav* v *Czech Republic* (2009) CCPR/C/96/D/1574/2007; *Jaroslav Persan* v *Czech Republic* (2009) CCPR/C/95/D/1479/2006; *Olga Amundson* v *Czech Republic* (2009) CCPR/C/95/D/1508/2006; *Ivanka Kohoutek* v *Czech Republic* (2008) CCPR/C/93/D/1448/2006; *Richard Preiss v Czech Republic* (2008) CCPR/C/93/D/1497/2006; *Miroslav Blazek, George A. Hartman and George Krizek* v *Czech Republic* (2001) CCPR/C/72/D/857/1999; *Vlcek* v *Czech Republic* (2008) CCPR/C/93/D/1485/2006; *Lnenicka* v *Czech Republic* (2008) CCPR/C/92/D/1484/2006; *Süsser* v *Czech Republic* (2008) CCPR/C/92/D/1488/2006; *Ondracka* v *Czech Republic* (2007) CCPR/C/91/D/1533/2006; *Gratzinger* v *Czech Republic* (2007) CCPR/C/91/D/1463/2006*; Polacková and Polacek* v *Czech Republic* (2007) CCPR/C/90/D/1445/2006; *Kríz* v *Czech Republic* (2005) CCPR/C/85/D/1054/2002; *Marik* v *Czech Republic* (2005) CCPR/C/84/D/945/2000; *Des Fours Walderode and Kammerlander* v *Czech Republic* (2001) CCPR/C/73/D/747/1997.

74 Mariana Karadjova, 'Property Restitution in Eastern Europe: Domestic and International Human Rights Law Responses' (2004) 29 *Review of Central and East European Law* 325.

75 (1989) CCPR/C/35/D/196/1985.

galese people who had served in the French Army. At the time of their service, they were considered French subjects as Senegal was colonised by France. They were guaranteed pensions on an equal basis with French nationals. Yet, after their retirement, their pensions were reduced as Senegal had since achieved independence in 1960. The authors averred that this constituted discrimination on the basis of race and nationality. The HRCttee agreed that this was nationality discrimination but disagreed that it was also racial discrimination. According to the HRCttee, there was no evidence of discrimination based on colour, as alleged by the authors.[76] However, the HRCttee found for discrimination based on nationality as a ground covered within 'other status' under Article 26 of the ICCPR. It reasoned that because nationality was not a condition for entitlement to pensions at the time of service, it could not have been made a condition after retirement for reasons to do with Senegalese independence, difficulty in ascertaining who was owed what, and the differences in social, financial and economic conditions between the countries.[77]

The decision of the HRCttee in respect of racial discrimination is manifestly ill-founded given that it failed to see the links between colonisation and racial discrimination. The reason Senegalese soldiers became entitled to pensions was because of their service in the army of their coloniser and for their service to the Empire. Equally, the reason they were disentitled from pensions was because their coloniser decided to disregard their service after the Empire ended. Both were direct results of the coloniser using race as the basis of oppression for colonisation.[78] The ignoring of colonisation and its inextricable relationship with racial discrimination is untenable.

But so is the ignoring of the intersection of nationality discrimination with racial discrimination. The HRCttee did find for nationality discrimination. Based on a reasonableness or rationality review, it struck down spurious justifications such as administrative inconvenience in identifying those to whom the pensions were due, and the socio-economic differences between the countries as if the poverty of the creditor could be a reason for reducing the debtor's burden. Importantly, the Committee appreciated that nationality was wholly exterior to the entitlement to pension which was due to service in the army and not based on nationality in the first place. It thus outlawed nationality discrimination on the simple logic of labour law. However, it neither named or termed such discrimination to be xenophobic in character nor did it examine it for its links with racial discrimination which were wholly obvious and material in the context of colonisation.

Later claims such as *Karakurt* v *Austria*[79] (*Karakurt*) only confirm the HRCttee's steadfast assertion of its competence over issues of discrimination to do with nationality or citizenship. In *Karakurt*, the HRCttee was explicit that it was 'not reasonable to base a distinction between aliens concerning their

76 *ibid* at [8.3] [9].
77 *ibid* at [9.5].
78 Bridget Anderson, *Us and Them? The Dangerous Politics of Immigration Controls* (Oxford: OUP, 2013) 36.
79 (2002) CCPR/C/74/D/965/2000.

capacity to stand for elections for a work council solely on their nationality."[80] In justifying the HRCttee's competence in assessing the claim despite a reservation made by Austria to Article 26 which allowed 'differential treatment of Austrian nationals and aliens, as is also permissible under article 1, paragraph 2, of [ICERD]',[81] in their joint individual opinion, Nigel Rodley and Martin Scheinin confirmed that: 'in its practice the Committee has not addressed distinctions based on citizenship from the perspective of race, colour, ethnicity or similar notions but as a self-standing issue under article 26. In our view distinctions based on citizenship fall under the notion of "other status" in article 26 and not under any of the grounds of discrimination covered by article 1, paragraph 1, of the CERD."[82]

The statement is important because it recognises that challenges to nationality or citizenship discrimination are substantively within the scope of ICCPR and not only a matter of racial discrimination under ICERD. It thus shows an appreciation of the 'self-standing' nature of discrimination based on nationality or citizenship as a form of discrimination independent of racial discrimination. It does not, as a corollary, mean that such discrimination cannot either be a form of racial discrimination or intersect with racial discrimination as the HRCttee had done earlier in *Gueye*. *Karakurt*, especially the joint individual opinion of Nigel Rodley and Martin Scheinin, left those possibilities open in principle.

Yet, the line between asserting competence over nationality and citizenship discrimination and ignoring racial discrimination is thin in practice. Thus, the HRCttee jurisprudence has oscillated between realising the possibility of finding for intersectional discrimination on these grounds, and shunning the possibility entirely.

The HRCttee's recent decision in *Andrea Vandom* v *Korea*[83] (*Vandom*) capitalises on these possibilities. It finds for xenophobic discrimination (without calling it as such) not only on the basis of nationality but also ethnicity, treating it as a case of intersectional discrimination rather than simply as a case of nationality discrimination. The claim concerned substantially the same facts as in *LG* v *Korea* which came up before CERD, where an American national working and living in Korea as a language teacher challenged the government requirement for all teachers who were not Korean nationals or who were not of Korean ethnicity to submit to mandatory HIV and drug testing as a precondition for approval or renewal of visa. Korean nationals of any ethnicity and ethnic Koreans were both exempt from such testing. The testing requirement was thus imposed on the grounds of both nationality and ethnicity. The HRCttee agreed that the requirement constituted discrimination on the basis of nationality and ethnicity affecting the group of foreign teachers of non-Korean ethnicity in particular.[84] The difference between the HRCttee's reasoning in *Vandom* and ICERD Committee's reasoning in *LG* v *Korea* is stark because unlike the latter,

80 *ibid*.
81 *ibid* at [2].
82 *ibid* (see text of the individual opinion co-signed by Committee members Nigel Rodley and Martin Scheinin appended to the main document).
83 (2018) CCPR/C/123/D/2273/2013.
84 *ibid* at [8.4].

the former did not end up subsuming the claim into one type of discrimination and clearly saw that given that Korean nationals were exempted from the testing requirement, the claim was one of both nationality and ethnicity-based discrimination against foreigners. The significance of this intersectional approach cannot be overstated. After years of neglecting intersectional discrimination,[85] the HRCttee in *Vandom* showed a clear appreciation of it, that too in relation to a ground which is not explicitly enumerated in Article 26 and only included within 'other status' (viz nationality).

But just two weeks after *Vandom*, the HRCttee in *MSP-B* v *Netherlands*[86] (*MSP-B*) failed to apply an intersectional approach to a claim concerning race, nationality, residence, socio-economic disadvantage and disability. *MSP-B* was brought by an author with Surinamese nationality who had joined her father in the Netherlands. The author's daughter who had accompanied her was diagnosed with a rare metabolic deficiency which required intensive care and resources (such as food for a ketogenic diet) which were better available in the Netherlands than Suriname. The author had consistently failed to obtain general child benefit to look after her daughter while her Dutch residence permit was pending approval. In the meanwhile, the author and her daughter lived in abject poverty, relying on handouts and charity from the father's employer and the daughter's school, and still failed to meet a minimum level of subsistence. The author argued that the failure to take into account the special circumstances of her daughter in granting access to full general child benefit because of their residence status and nationality amounted to a violation of Article 26. The HRCttee rejected the claim on the basis that the author had not demonstrated that the level of assistance the State allowed non-residents and non-nationals had materially disadvantaged the author and her daughter in comparison with the general child benefit scheme. That is, according to the HRCttee, the author had failed to establish that the differential treatment on the basis of residence and nationality failed to meet the criteria of reasonableness, objectivity and legitimacy.

The sovereign right of the State to exclude foreigners from social assistance trumped the material harm and extreme poverty experienced by foreigners like the author, lawfully present in the State but facing extraordinarily difficult circumstances beyond their control. First, this shows that not all kinds of harm or disadvantages are treated equally in respect of discrimination based on 'other status' such as nationality and citizenship. In particular, there appear clear limitations in how the HRCttee has treated material harm, especially poverty, which is often a result of (amongst other things) the lack of access to social security which in turn is bluntly limited by States on the basis of nationality and/or citizenship. Curiously, the HRCttee has been more sympathetic to material harm such as loss of property as we saw in claims of State expropriation. Secondly, this shows the application of a procedural and rather low standard of review by the HRCttee. This standard of review based on reasonableness,

85 Shreya Atrey, 'Fifty Years On: The Curious Case of Intersectional Discrimination in ICCPR' (2017) 35 *Nordic Journal of Human Rights* 220 (critiquing the neglect of intersectionality by the HRCttee).

86 (2018) CCPR/C/123/D/2673/2015.

objectivity and legitimacy checks only for excesses of State power and allows for sweeping justifications to be made by the State in the absence of a substantive understanding of discrimination, and in particular discrimination based on nationality or citizenship which has escaped any conceptual consideration for its links with xenophobia. Thirdly, this shows a narrow reading of nationality discrimination as detached from other forms of discrimination. The HRCttee in *MSP-B* adopted an isolated understanding of nationality discrimination and ignored intersectional discrimination that it had found for earlier in *Vandom*. There is thus a clear lack of consistency in the HRCttee's approach to dealing with intersectional discrimination when grounds such as nationality combine with other grounds such as race, class and disability in cases like *Gueye* and *MSP-B*.

In sum, the HRCttee overcomes the main hurdle faced by CERD which overlooks xenophobic discrimination through an overly selective and restricted reading of grounds enumerated in Article 1(1) of ICERD.[87] The HRCttee thus recognises discrimination based on unenumerated grounds such as nationality and citizenship under Article 26 of ICCPR, though it has never labelled such discrimination 'xenophobic'. But as this section has shown, claims based on nationality or citizenship are often xenophobic in character when they exclude actual or perceived foreigners. Such discrimination is often also based on racial or other grounds, in addition to nationality or citizenship. The HRCttee has however lacked substantive insight into what such xenophobic discrimination means (why it is wrong), as well as consistency in appreciating its intersectional nature.

Thus, importantly, neither CERD nor the HRCttee seem to address xenophobic discrimination in a substantive sense to really articulate and address xenophobic discrimination for what it is in terms of the harm it inflicts. In fact, the grounds-based approach to xenophobic discrimination arrests the discrimination inquiry at the point of identifying the specific grounds involved or groups affected, and detracts us from identifying the substantive harm implicated in xenophobic discrimination. What is this harm, and can it be better appreciated via a dedicated ground for xenophobic discrimination such as foreignness? The next part considers this.

XENOPHOBIC DISCRIMINATION AS A *SUI GENERIS* CATEGORY

A third, more recent approach to addressing xenophobic discrimination in international law has been developed in the successive reports of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, which have in turn been inspired by the work of the fifth mandate holder, E. Tendayi Achiume (2017-22). In fact, no other piece of work may be said to have pored over the category of xenophobic

87 Shreya Atrey, 'Understanding Xenophobia as Intersectional Discrimination' (2022) 79 *Washington and Lee Law Review* 1007.

discrimination better than Achiume's 2014 article titled 'Beyond Prejudice'.[88] Therein she defined xenophobic discrimination as discrimination based on foreignness where foreignness was 'the status of being an actual or perceived outsider to a given political community (typically a nation state).'[89] While acknowledging that foreignness was context dependent, she identified its 'universal feature' as 'that its construction rests on multiple, intersecting classifications' including 'the grounds of race, colour, descent, or national or ethnic origin, including in combination with other grounds, such as religion, gender and disability'.[90] In her words, foreignness was thus 'a composite category at the intersection of multiple classifications' which performed the function of distinguishing in-groups designated as native from out-groups or foreigners 'deserving of exclusions and [a] broad spectrum of harm'.[91] This understanding was adopted by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance in their 2016 report on 'the phenomenon of xenophobia and its conceptualization, trends and manifestations',[92] and later reiterated in the 2018 report on 'citizenship, nationality and immigration'.[93] Together they represent, what could be deemed the most recent, concerted and detailed account of xenophobic discrimination within the discourse of international law.[94]

Does foreignness as a ground address xenophobic discrimination of the kind described in the claims discussed in the previous section? Does it capture the essence of xenophobic discrimination as a wrong in international law? This section explores these two questions. In the final analysis, it shows that neither foreignness nor any other individual ground is a good 'fit' for xenophobic discrimination because the grounds-based approach to discrimination fails to reflect the *sui generis* category of xenophobic discrimination both in terms of: (i) its form as based on several intersecting grounds at once; and (ii) the substantive harm it inflicts in dislocating a person not only from the political community of a nation-state but the civic community of fellow humans in a wider social, economic and cultural sense.

Xenophobic discrimination as foreignness discrimination

What is the basis of xenophobic discrimination? That is, on what basis are people othered as foreigners? Is it to do with clothing, appearance, language, accent,

88 Achiume, 'Beyond Prejudice' n 9 above.
89 *ibid*, 331; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, 2018 Report, n 3 above at [30].
90 Achiume, *ibid*, 331, 334. See also UNHCR, 'Combating Racism, Racial Discrimination, Xenophobia and Related Intolerance Through a Strategic Approach' (2009) Guidance Note [12].
91 Achiume, *ibid*, 335 (references removed).
92 Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, 2016 Report, n 3 above at [34].
93 *ibid* at [30].
94 Needless to say, these reports are not themselves law in a formal or positive sense. But given that there is no formal or explicit reference to xenophobia, xenophobic discrimination or foreignness in any of the human rights treaties or treaty body jurisprudence more widely, the reports of the special mechanisms in international law are normatively significant.

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.

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'[95] 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).[96]

Given the variable and intersectional basis of xenophobic discrimination, to say that it is based on the ground of 'foreignness' would be both conceptually misleading and practically unhelpful. First, there is nothing like a personal characteristic called 'foreignness' which could be deemed akin to '*certain types of characteristics* that persons have, such as race, sex, religion, weight, sexual orientation, age, disability, eye-colour, physical appearance, and marital status'[97] which make those personal characteristics 'grounds … *in a technical sense*.'[98] Secondly, establishing foreignness as a ground of xenophobic discrimination when it is in turn based on a whole range of grounds could be both cumbersome and futile if other grounds are at play ultimately. Both points need elaboration.

To be fair, the recognition of foreignness as a ground specifically attached to xenophobic discrimination, can provide a formal basis for the recognition of a category of discrimination which although omnipresent in instruments such as the Durban Declaration and in special procedures, has had little uptake in treaty body jurisprudence. The category remains unnamed in treaty body jurisprudence perhaps for lack of a designated ground to which it can be attached.

95 Achiume, 'Beyond Prejudice' n 9 above, 335; Atrey, n 87 above.

96 Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, 2018 Report, n 3 above at [30]; E. Tendayi Achiume, 'Race, Refugees and International Law' in Cathryn Costello, Jane McAdam and Michelle Foster (eds), *The Oxford Handbook of International Refugee Law* (Oxford: OUP, 2021). See, for example, detailed accounts of the intersection of citizenship and nationality with gender: Catherine Briddick, 'Precarious Workers and Probationary Wives: How Immigration Law Discriminates Against Women' (2020) 29 *Social and Legal Studies* 201; Nira Yuval-Davis, 'Women, Citizenship and Difference' (1997) 57 *Feminist Review* 3.

97 Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford: OUP, 2015) 29 (emphasis added).

98 *ibid*.

This is indeed how other categories of discrimination exist, ie in reference to a ground. Thus, 'discrimination against women' is defined as 'any distinction, exclusion or restriction made on the basis of sex'[99] and '"discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability'.[100] Defining xenophobic discrimination as discrimination on the basis of foreignness thus seems like the key to unlocking xenophobic discrimination within this grounds-based framework of discrimination in international law.

Yet, unlike other grounds like sex or disability, foreignness is constructed by a host of other attributes (clothing, appearance, language, accent, nationality, citizenship, employment-status, colour, race, ethnicity, religion, gender etc) and affects a range of groups (migrant workers, displaced persons, stateless persons, asylum-seekers, refugees, linguistic minorities, second and third generation citizens etc). Other grounds of discrimination are not so defined. Discrimination on the grounds of race or sex is based on the identification of determinable groups such as Black people or women which can be compared with 'cognate' groups such as white people or men to prove race or sex discrimination respectively.[101] While groups can be diverse from within such that both white and Black people can have many religions, disabilities, ages, genders, sexualities etc, in the way the comparative grounds-based approach to discrimination is constructed, these groups are at least not meant to be diverse or overlapping in relation to the ground in question and hence 'mirror' one another 'but for' the personal characteristic in question. Thus, white and Black people are distinguishable, despite the diversity of those who constitute these groups, because they are believed to have different (actual or perceived) 'race' or 'colour'. The same holds for sex. That no matter other shared characteristics between men and women such as religion, caste or culture – they are at least wholly distinguishable in one respect: their sex (when we hold that as a constant).[102]

This complicates matters for 'foreignness' whose 'universal feature', as Achiume identifies, of being constructed by an 'intersection of multiple classifications' resists precisely reflecting the classifications or criteria it is actually based on and the specific groups it is meant to protect. Causally, because xenophobic discrimination may be based on many classifications and affect several groups at once, it makes it difficult (if not impossible) in a specific case to determine the basis of xenophobic discrimination as necessarily or mainly based on a single or a definitive set of grounds and affecting a clearly defined group as against another group where the two groups are then wholly distinguished by the ground

99 Convention on the Elimination of All Forms of Discrimination Against Women 1979, 1249 UNTS 13, Art 1.

100 Convention on the Rights of Persons with Disabilities 2007, 2515 UNTS 3, Art 2.

101 Khaitan, n 97 above, 29-31; John Gardner, 'On the Ground of Her Sex(uality)' (1998) 18 *Oxford Journal of Legal Studies* 167.

102 The article does not defend this view. It only presents the comparative approach to discrimination as a consequence of the dominant grounds-based approach to discrimination, and ultimately rejects the grounds-based approach (and as a corollary, the comparative approach) as problematic. See for a critique of the comparative approach to discrimination: Suzanne B. Goldberg, 'Discrimination by Comparison' (2011) 120 *Yale Law Journal* 728; Beverly Baines, 'Comparing Women in Canada' (2012) 20 *Feminist Legal Studies* 89; Sophia Reibetanz Moreau, 'Equality Rights and the Relevance of Comparator Groups' (2006) 5 *Journal of Law and Equality* 81.

of 'foreignness'. Unless an instance of xenophobic discrimination uses the term 'foreignness' or foreigner-status directly, under a grounds-based approach to discrimination, determining the particular classifications implicated *in foreignness* and groups affected *as foreigners* would be both cumbersome and futile.

For example, hypothetically speaking, it would help if foreignness as a ground is made available to a treaty body receiving a claim like *Dawas and Shava*, where the petitioners (Iraqi refugees) were explicitly attacked *as foreigners* in Denmark. Because foreignness is mentioned explicitly by the perpetrators, a treaty body can simply find for xenophobic discrimination on the basis of foreignness, if foreignness is a ground. But this literal approach to xenophobic discrimination will only catch those claims where foreigner-status is invoked directly by the perpetrator. That would hardly solve much and instead create further problems.

First, it would do little for claimants who are not directly targeted on the basis of foreigner-status but on the basis of their clothing, appearance, language, accent, nationality, citizenship, employment-status, colour, race, ethnicity, religion or gender etc. Even though foreignness can be presumed to be co-constituted by a range of grounds, this presumption would not help claimants who are discriminated against explicitly, say on the basis of an enumerated ground like colour, or an unenumerated ground like accent, to directly claim discrimination on the basis of foreignness without showing more. The availability of foreignness as a ground does not perforce provide a link to explaining claims based on other grounds as claims of xenophobic discrimination. Thus, for example, if in *Dawas and Shava* the perpetrators had made no reference to the claimants as *perkere* or foreigners, but only shouted 'go home', the availability of foreignness as a ground would not by itself have helped the claimant establish xenophobic discrimination.

Secondly, the recognition of foreignness as a ground would do little in actually establishing claims of indirect discrimination which are based on a neutral criterion, practice or provision, such as *Sefic* v *Denmark* where a loan was denied based on language. The route to establishing indirect xenophobic discrimination in such a case would be to show that language requirements exclude 'foreigners' from obtaining loans in comparison with 'others'. That would involve ascertaining which groups constitute the group of foreigners in the context of Denmark. This is because the proof of indirect discrimination involves identifying the *particular* group impacted by a *particular characteristic* like foreignness as *compared* to another group – a comparative exercise which evades foreignness as a ground which cuts across grounds and groups. The identification of the particular group of foreigners indirectly affected by their foreignness as compared to others would thus be a mammoth task, made no easier by simply making a ground like foreignness available.[103]

Foreignness thus appears unwieldy within a grounds-based framework of discrimination. Instead of forcing it into this framework, international law may be better served by recognising the *sui generis* nature of xenophobic discrimination not necessarily as based on the ground of foreignness but as reflecting

103 As the CERD has maintained: 'a general reference to foreigners does not at present single out a group of persons … on the basis of a specific race, ethnicity, colour, descent or national or ethnic origin', *Kamal Quereshi* v *Denmark*, n 51 above at [7.3].

the specific nature of harm occasioned by xenophobic discrimination. What is this harm and why should it be considered wrongful in international law? The following section answers this question.

Xenophobic discrimination as disbelongingness

The principal question so far evaded by treaty bodies is what is wrong about xenophobic discrimination. The answer from the mandate of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance – political exclusion from a nation-state – is the only precise and substantive offering that has been made in international law thus far. It is important to test whether this offering has merit.

Few groups may be considered more politically marginalised than groups of actual or perceived foreigners who are excluded from the political processes of the State, such as groups of migrant workers, displaced persons, stateless persons, asylum-seekers and refugees.[104] These groups are located firmly outside the political community of the nation-state whose exercise of sovereignty is perforce considered to include the ability to exclude them from the nation-state.[105] These groups should thus attract maximal protection of the right to equality and non-discrimination in international law which is considered 'representation-reinforcing' or 'participation-enhancing' because it protects the interests of minorities which fail to find representation in the political processes of the State.[106]

The problem is that political exclusion as a criterion for protection is considered to apply only to those who positively, or in strong sense, 'belong' to a political community as citizens or nationals of a State.[107] The right to equality and non-discrimination is thus often seen as confined in its application to those who are considered political equals and who are yet treated unequally on other bases such as race or sex.[108] As considered in the previous section, the

104 *Andrews* v *Law Society of British Columbia* (1989) 56 DLR (4th) 1, 32 ('Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among "those groups in society to whose needs and wishes elected officials have no apparent interest in attending."').

105 Joan Fitzpatrick, 'The Human Rights of Refugees, Asylum-Seekers, and Internally Displaced Persons: A Basic Introduction' in Joan Fitzpatrick (ed), *Human Rights Protection for Refugees, Asylum-Seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedures* (Leiden: Brill, 2002) 1.

106 See John Hart Ely, *Democracy and Distrust* (Cambridge, MA: Harvard University Press, 1980); Sandra Fredman, *Discrimination Law* (Oxford: OUP, 3rd ed, 2022) 206, 210; *United States* v *Carolene Products Company* (1938) 304 US 144, 152.

107 Kok-Chor Tan, *Justice Without Borders: Cosmopolitanism, Nationalism, and Patriotism – Contemporary Political Theory* (Cambridge: CUP, 2004) 6 ('it is also *a basic assumption of most political philosophies* that principles of justice apply primarily to individuals in the context of a "closed society" (i.e., to citizens) rather than to individuals taken as such') (emphasis added). cf this assumption challenged in Ruvi Ziegler, *Voting Rights of Refugees* (Cambridge: CUP, 2017).

108 See the decision of the South African Constitutional Court in *Rafoneke and Others* v *Minister of Justice and Correctional Services and Others (Makombe Intervening)* (CCT 315/21, CCT 321/21, CCT 06/22) [2022] ZACC 29, where the Court held that discrimination against foreigners was not unconstitutional since: 'The activity which the applicants seek constitutional protection for is the enjoyment to choose one's vocation and as such this cannot be held to amount to unfair

clearest embodiment of this limitation appears in Articles 1(2)-(3) of ICERD. Likewise, even if there is no such limitation apparent in the text of Article 26 of ICERD which has now been read to include non-discrimination on the basis of nationality or citizenship, as the previous section explained, there are no significant implications of this reading on 'xenophobic' discrimination per se and that in any case such discrimination is considered justifiable on a mere rational basis. The jurisprudence of CERD or HRCttee thus does not challenge the normative assumption that the right to equality extends to those who belong to a political community and not to those who may belong to other political communities, and hence may be limited by nationality or citizenship. Two responses – each challenging the narrowness of this normative conception of the right to equality and non-discrimination as limited by political belongingness and the corresponding meaning of xenophobic discrimination as political exclusion – are in order.

First, the assumption that actual or perceived foreigners belong to other political communities (other than those they find themselves in) is misplaced. For example, for groups of displaced persons, stateless persons, asylum-seekers and refugees, the idea of belongingness to a State from which they are fleeing persecution or expelled, is plainly flawed. Likewise, for groups such as second or third-generation migrants who are often presumed to be foreigners and treated as eternal outsiders, the idea of political belongingness to a State where one may have never visited or lived, is an illusion.[109] Similarly, for the so-called more privileged 'economic' migrants who may have a (hypothetical or real) choice to return to their State of nationality or citizenship, belongingness to the originating State one has physically moved away from, is, in actuality, an overestimation. The practicalities of accessing work, education, goods and services, and of engaging with people as colleagues, neighbours, friends etc, inevitably entangles one in the community of the adopted State, even if one is not considered a political equal nor has political rights such as the right to vote or the right to stand for elections; and thus consequently away from the originating State where one may no longer have a social, cultural, economic and political life as practised on an everyday basis even though they may have political rights in theory. Belongingness to a political community where one originates from or has citizenship is thus more fictional than real in all these cases.

Evolutionarily, belongingness is considered 'central to human existence and culture'.[110] Socially, a sense of belongingness is deemed crucial by psychologists for ensuring the mental health and wellbeing of persons.[111] Scholars isolate the

discrimination, as this right does not fall within a sphere of activity protected by a constitutional right available to foreign nationals such as the applicants' *ibid* at [101].

109 Kay Hailbronner, 'Nationality in Public International Law and European Law' in Rainer Baubock and others (eds), *Acquisition and Loss of Nationality* vol 1 (Amsterdam: Amsterdam University Press, 2006) 36.

110 Glenn P. Malone, David R. Pillow and Augustine Osman, 'The General Belongingness Scale (GBS): Assessing Achieved Belongingness' (2012) 52 *Personality and Individual Differences* 311.

111 B.M. Hagerty and others, 'Sense of Belonging: A Vital Mental Health Concept' (1992) 6 *Archives of Psychiatric Nursing* 172; Chanokruthai Choenarom and others, 'The Role of Sense of Belonging and Social Support on Stress and Depression in Individuals with Depression' (2005) 19 *Archives of Psychiatric Nursing* 18.

'need to belong' as not only 'one among many equally important and potent social motives' but rather 'a fundamental social motive that underlies and helps to explain a great deal of human behavior', making it 'the first premise' of any social or cultural behavioral theory.[112] Belongingness, or as Martha Nussbaum calls it –'affiliation' – is thus a key capability or 'an essential factor in creating meaning in life'.[113]

Seen this way, belongingness seems to have no necessary connection with nationality or citizenship or legal statuses defined by visas and travel documents. Indeed, the position of actual or perceived foreigners may be characterised as dis-belongingness from *both* the originating *and* the receiving or adopted State at the same time. Their political exclusion may thus be comprehensive, not only from an adopted State but from *any* nation-state. In this sense, 'citizens of the world' *are* truly 'citizens of nowhere',[114] not because they actually lack citizenship and are stateless, but because their citizenship – a proxy for belongingness to a political community whether of the originating or adopted State or both – is paradoxically characterised by disbelongingness. What this shows is that disbelongingness has little to do with formal statuses assumed in relation to nation-states and is more fundamental to human flourishing than the idea of political exclusion.

Secondly, consequently, disbelongingness is not chiefly political. That is, it is not confined – to borrow the famed *Carolene Products* formula – to political processes of the State.[115] Disbelongingness is comprehensive in another sense in that actual or perceived foreigners are rendered outsiders not only to the nation-state but to all civic communities such as the neighbourhood, village, town, city or state they find themselves in, and are hence excluded from the social, political, economic and cultural life which defines those communities. The difference between exclusion from the political community of the nation-state and exclusion from the whole range of civic communities is this: (i) the latter is not centred around nation-states and their relationship with their citizens and is instead to do with all kinds of political communities people organise themselves in in a civic sense or more broadly in a humanist sense to enable human interaction;[116] and (ii) although the exclusion is from a 'political' community

112 Mark R. Leary and Cody B. Cox, 'Belongingness Motivation: A Mainspring of Social Action' in James Y. Shah and Wendi L. Gardner (eds), *Handbook of Motivation Science* (New York, NY: Guildford Press, 2008) 27.

113 Tyler F. Stillman and Roy F. Baumeister, 'Uncertainty, Belongingness, and Four Needs for Meaning' (2009) 20 *Psychological Inquiry* 249; Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, MA: Harvard University Press, 2011) 34.

114 See Theresa May's Brexit speech of 5 October 2016 at https://www.spectator.co.uk/article/full-text-theresa-may-s-conference-speech/ [https://perma.cc/C89Y-Q3H8].

115 *United States* v *Carolene Products Company* (1938) 304 US 144, 152.

116 The distinction being drawn here is between the traditional republican values centred around self-governance and active citizenship versus humanist values especially those which came to be championed by Italian thinkers under the banner of 'civic humanism' which centred around communal life (or life in a community especially a city) which was not chiefly organised around political principles but brought together by a high level of social, cultural and educational thought and creativity. See especially Hans Baron, *The Crisis of the Early Italian Renaissance: Civic Humanism and Republican Liberty in an Age of Classicism and Tyranny* vol 1 & 2 (Princeton, NJ: Princeton University Press, rev ed, 1966); Hans Baron, *The Search of Florentine Civic Humanism. Essays on the*

in that the communities are constituted with the idea of enabling civic engagement (as opposed to communities of religion, football clubs, care homes etc), the exclusion itself is not political alone and extends to social, economic and cultural forms of exclusion because communities organised around townships, neighbourhoods, towns and cities all enable both civic *and* other forms of engagement.

Both of these features of disbelongingness bear out in the instances of xenophobic discrimination outlined in the previous sections. On the face of it, none of the instances had much to do with political processes of the nation-state such as eligibility to vote or to stand for elections. They involved instances of violent assault (*Dawas and Shava*), denial of loan (*Habasi*), denial of insurance (*Sefic*), denial of pension (*Gueye*), denial of entry to public spaces (*BJ* and *MB*), denial of minimal level of subsistence (*MSP-B*), denial of conditions of integration in a society (*AMM*), mandatory HIV+ testing (*LG* v *Korea* and *Vandom*) and so on. Whatever the criteria that led to harm in each of these cases (colour, appearance, language, foreign-sounding name, employment status, nationality, citizenship etc), the harm that ensued was not chiefly political, but more broadly, participative in a civic sense where people were excluded from the social, economic and cultural life of the communities surrounding them. At stake was something as simple as obtaining a loan or an insurance, which could open doors to other opportunities such as owning a car or a home and thus travelling to work or for pleasure which in turn could allow for human interaction and growth. The harm was thus wide-ranging and deprived those considered foreigners of something fundamental – their opportunity to engage with fellow humans in a community.

The idea of engagement with fellow humans in a community is essentially 'civic' in character, or as Iris Marion Young describes it, a matter of 'civic association' which lies between private and public forms of association.[117] It is neither about personal relationships which people form with their kith and kin nor about formal relationships of citizens with the State. Instead, it straddles the space in between where people exist as civic beings – not just two extreme ends of the spectrum as their private selves or as citizens – as people in the particular social, political, economic and cultural communities they find themselves in and in relation to those who inhabit that context and are shaping and being shaped by that context. These communities are often more granular than the nation-state and at the same time broader than the self and the most intimate relationships people form around themselves. Thus, in the context of *Dawas and Shava*, the community was the Danish neighbourhood in which a family of Iraqi refugees was attacked or in the contexts of *BJ* v *Denmark* and *MB* v *Denmark*, it was the discotheque and the club respectively, which perceived the claimants as not simply of a different race, ethnic or national origin or citizenship, but more immediately as not belonging to the immediate space or context they found themselves in: of the particular discotheque and club.

Transition from Medieval to Modern Thought vol 1 & 2 (Princeton, NJ: Princeton University Press, 1988).

117 Iris Marion Young, *Inclusion and Democracy* (Oxford: OUP, 2000) 164.

Disbelongingness as a paradigm thus rejects both the literal paradigm of xenophobia as the fear or hatred of the stranger as well as the limited paradigm in international law of political exclusion from a nation-state. Disbelongingness as a normative paradigm provides a comprehensive and hence a more accurate rendering of the harm entailed in xenophobic discrimination which is neither confined to feelings of hostility nor to costs of political exclusion alone. Importantly, the paradigm is agnostic to the reasons or processes which lead to xenophobia such as poverty, unemployment, stereotyping, stigma, jealousy, competition, nativism, racism etc.

Law, especially international law, gives in to the logic of disbelongingness when it fails to identify disbelongingness as something bad or wrong and regards it instead as something chiefly political and limited to nation-states and hence either justifiable as a matter of nationality or citizenship status or simply non-discriminatory to begin with. Yet, if the logic of the right to equality and non-discrimination is truly representation-reinforcing or participation-enhancing, this position must be flipped. International law should take seriously any exclusion of actual or perceived foreigners because it could lead to the harm of disbelongingness or civic ostracisation in the widest sense.[118]

Beyond a grounds-based approach to discrimination

The harm-based inquiry into xenophobic discrimination would work by asking whether the harm suffered by a claimant such as a migrant worker, displaced person, stateless person, asylum-seeker, refugee and a second or third generation citizen, is xenophobic in character, that is whether it excludes the claimant from the life of communities they are part of in comparison with others. The inquiry into the specific grounds such othering may be based on would not be necessary because we would proceed from the understanding that xenophobic discrimination could be based on *any* ground such as clothing, appearance, language, accent, nationality, citizenship, employment-status, colour, race, ethnicity, religion, gender etc. A claim of xenophobic discrimination would then simply proceed by asking the substantive question about xenophobic discrimination: was the claimant excluded from participating in the social, political, economic and cultural life of the communities they find themselves in?[119]

118 The claim is not that discrimination against actual or perceived foreigners is wrongful ab initio and cannot ever be justified. The claim is that, ab initio, they deserve the protection of the right to equality and non-discrimination *as actual and perceived foreigners* rather than be considered to be outside of the scope of that protection in international law because of *that* status. See a similar argument admitting citizenship as a ground of discrimination by the Supreme Court of Canada in *Andrews* v *Law Society of British Columbia*, n 104 above, and by the South African Constitutional Court in *Larbi-Odam and Others* v *Member of the Executive Council for Education (North-West Province) and Another* 1997 (12) BCLR 1655; *Khosa and Mahlaule* v *Minister for Social Development* 2004 (6) BCLR 569. Albeit, as this article argues, nationality or citizenship discrimination as relating to political exclusion is narrower and does not cover xenophobic discrimination which is far broader in terms of the harm it occasions.

119 This article is suggesting a substantive harm-based test for xenophobic discrimination specifically and not a general test for discrimination. But this substantive harm-based inquiry could well feed

The harm-based inquiry offers a corrective to the ground-based approach to discrimination which is seen as having left 'undisturbed the broadest systemic inequalities … and intact the material, cultural and social inequalities'.[120] By keeping the nature of harm at the heart of discrimination – in the case of xenophobic discrimination, of disbelongingness – treaty bodies can be reoriented towards the effect or impact of a particular act, omission, policy, or practice, rather than the formal criteria or grounds it may be based on because the latter hardly reveal what is salient about discrimination.

The harm-based inquiry however can be distinguished from an effects-based approach to discrimination.[121] Here, discrimination may be examined via a broad but particular conceptual understanding of discrimination rather than simply the effects or the impact of a particular instance of discrimination as accruing to a particular group.[122] The discrimination inquiry is thus not about individualised effects on particular groups; rather about the production and reproduction of broad structural oppression or systems of disadvantage which can be brought about both directly as well as indirectly.[123] The approach thus moves away from pigeonholing discrimination either via grounds or groups or via direct or indirect approaches to discrimination but rather anchors particular categories of discrimination such as 'sex discrimination', 'race discrimination' or 'xenophobic discrimination' to a 'grand [political] theory'[124] of the structural harm caused by such discrimination (sex discrimination: patriarchy; race discrimination: racism; xenophobic discrimination: disbelongingness; disability discrimination: ableism; sexuality discrimination: homophobia etc) rather than to the attributes of persons who suffer such harm (sex, race, foreignness, disability, sexuality).[125]

Consequently, this reorientation moves us towards a structural conception of equality and non-discrimination rather than what it has come to be in international law: an emphasis on certain formal characteristics or grounds themselves as if greater attention to categories like 'sex', 'race' or 'foreignness' can itself be sufficient in addressing structures of oppression aka patriarchy, racism and xenophobia underpinning sex discrimination, racial discrimination and xenophobic

into general tests for discrimination such as the four-part test for substantive equality developed by Fredman, n 106 above, or the model of inclusive equality adopted by the Committee on the Rights of Persons with Disabilities in its General Comment No 6 (2018) on equality and non-discrimination, CRPD/C/GC/6 (2018) at [11], both of which take a broad approach to testing violations in human rights law and hence could accommodate specific forms structural discrimination such as xenophobic discrimination.

120 Nausica Palazzo, 'Equality in Canada: A Tale of Non-Normative Groups Struggling with Grounds of Discrimination' (2020) 10 *Oñati Socio-legal Series* 88.

121 *Egan* v *Canada* [1995] 2 SCR 513, 551-552 per L'Heureux Dube J.

122 Douglas Kropp, 'Categorial Failure: Canada's Equality Jurisprudence-Changing Notions of Identity and the Legal Subject' (1997) 23 *Queen's Law Journal* 201, 277.

123 Shreya Atrey, 'Structural Racism and Race Discrimination' (2021) 74 *Current Legal Problems* 1.

124 Denise Réaume, 'Of Pigeonholes and Principles: A Reconsideration of Discrimination Law' (2002) 40 *Osgoode Hall Law Journal* 113.

125 Sarah Hannett, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' (2003) 23 *Oxford Journal of Legal Studies* 65; Daphne Gilbert, 'Time to Regroup: Rethinking Section 15 of the Charter' (2003) 48 *McGill Law Journal* 627; Coleen Shephard, 'Grounds of Discrimination: Towards an Inclusive and Contextual Approach' (2001) 80 *Canadian Bar Review* 893.

discrimination respectively.[126] In other words, this approach has the benefit of putting structures of oppression before categories or identities of people they attach to.[127]

I have argued that this reorientation is necessary for addressing xenophobic discrimination in international law because of its *sui generis* nature. But it may well be an opportunity for other categories of discrimination to be reoriented towards this structural analysis of harm because, as Kate Malleson asserts, 'a grounds-based system which constructs social groups on the basis of fixed attributes with clear boundaries between them *will always* fail to reflect the variety and complexity of human experience and identity.'[128] Thus, for example, redefining categories of discrimination such as racial discrimination from the standpoint of harm implicated in racism, rather than the classification or construct of racial grounds enumerated in Article 1(1) of ICERD, could reengineer the category to do more work in human rights law by uncovering structural injustice and root causes of racism – an orientation lacking in the wider UN human rights system as well.[129] This article has attempted to provide a template for bringing about such reorientation in defining one category of discrimination. The hope is that, with the example of xenophobic discrimination, other categories of discrimination too can begin to be redefined not as *based on* certain ground(s) but as *reflecting* the harm associated with particular structures of disadvantage.

CONCLUSION

Paradigmatic cases of xenophobic discrimination – expressed in statements like 'go back home' – discriminate against actual or perceived foreigners because they are not considered as belonging to the particular social, political, economic and cultural communities they find themselves in. Such discrimination falls by the wayside of international law because the dominant model of proving such discrimination as either racial discrimination or discrimination based

126 This trend is mirrored in comparative discrimination law. See Anne Bayefsky, 'Defining Equality Rights' in Anne Bayefsky and Mary Eberts (eds), *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985); Dianne Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (2001) 13 *Canadian Journal of Women and Law* 37; Jessica Eisen, 'Grounding Equality in Social Relations: Suspect Classification, Analogous Grounds and Relational Theory' (2017) 42 *Queen's Law Journal* 41, 44.

127 Most famously set out by McLachlin J in the Canadian Supreme Court decision in *Miron* v *Trudel* (1995) 2 SC 418, 485. See also *Corbiere* v *Canada* [1999] 2 SCR 203.

128 Kate Malleson, 'Equality Law and the Protected Characteristics' (2018) 81 MLR 598, 602 (emphasis added). See also Aileen McColgan, 'Reconfiguring Discrimination Law' [2007] PL 74, 77 (exploring the 'lack of "fit" between a grounds-led approach and the complexity of identity').

129 Susan Marks, 'Human Rights and Root Causes' (2011) 74 MLR 57; E Tendayi Achiume, 'Black Lives Matter and the UN Human Rights System: Reflections on the Human Rights Council Urgent Debate' *EJIL: Talk!* 15 December 2020 at https://www.ejiltalk.org/black-lives-matter-and-the-un-human-rights-system-reflections-on-the-human-rights-council-urgent-debate/ [https://perma.cc/Q4BQ-HALJ]; Sejal Parmar, 'The Internationalisation of Black Lives Matter at the Human Rights Council' *EJIL: Talk!* (26 June 2020) at https://www.ejiltalk.org/the-internationalisation-of-black-lives-matter-at-the-human-rights-council/ [https://perma.cc/27PV-3EZX].

on nationality and citizenship does not capture the specific harm occasioned by xenophobic discrimination. This article has thus argued that claims of xenophobic discrimination may be better understood and addressed by: (i) recognising how xenophobic discrimination has its basis in grounds which cannot easily be disentangled into independent grounds or coagulated into a single composite ground of foreignness, and (ii) judging xenophobic discrimination via the harm it inflicts, of disbelongingness which excludes people from participating in the social, political, economic and cultural lives of communities which they find themselves in.

(2024) 87(1) MLR 80–110