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Publication Date

2016-06-12

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BEYOND PREJUDICE: STRUCTURAL XENOPHOBIC DISCRIMINATION AGAINST REFUGEES

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ABSTRACT

In this Article, I argue that the UN Refugee Agency's global policy for addressing foreignness or xenophobic discrimination is inadequate. By focusing narrowly on harm to refugees resulting from explicit anti-foreigner prejudice, it ignores pervasive structural xenophobic discrimination—rights violations that result from the disproportionate effect of facially neutral measures on refugees due to their status as foreigners. I argue that the international human rights law that the UN Refugee Agency has used to compel regulation of explicit prejudice-based xenophobic discrimination also requires regulation of structural xenophobic discrimination. As a result, the UN Refugee Agency should adopt an inclusive approach that targets both forms of xenophobic discrimination.

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* Binder Teaching Fellow, UCLA School of Law, J.D., Yale Law School, B.A. (distinction) Yale College. I would like to thank the following for their valuable comments on earlier drafts of this Article: Richard Abel, Ann Carlson, Scott Cummings, Ingrid Eagly, Laura Gomez, Oona Hathaway, Seana Shiffrin, and Noah Zatz. I also owe special gratitude to the following for their valuable comments, and for being so generous with their time in the development of this project: Asli Bali, Devon Carbado, Gabriel Greenberg, Hiroshi Motomura, and Joanna Schwartz. I benefitted from the insights of participants of the following workshops and conferences, at which I presented earlier drafts: the Junior International Law Scholars Association, the Southern California Junior Law Faculty Forum, the UCLA Law Fellows Workshop, the Yale Law School Critical Race Theory Conference, and the Canadian Association for Refugees and Forced Migrations Studies 2012 Conference. I thank Jessica Eby and Brandon Golob for superb research assistance. Finally, I owe a great debt to my former colleagues and clients at Refugee and Migrants Rights Programme of Lawyers for Human Rights. All errors are my own. © 2014, E. Tendayi Achiume.

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I. INTRODUCTION

There were 15.4 million refugees¹ in the world at the end of 2012, and global trends suggest that this number will only continue to rise.² According to the United Nations Refugee Agency (UNHCR)—the most influential refugee protection actor in the world—xenophobic or “foreignness”³ discrimination is among the greatest challenges to refugees globally.⁴ Sometimes this discrimination is violent. Brutal attacks

1. Under international law, a refugee is a person who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.” United Nations Convention Relating to the Status of Refugees, art. 1, § A(2), Jul. 28, 1951, *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx>.

2. See United Nations High Commissioner for Refugees (UNHCR), *Displacement: The New 21st Century Challenge*, UNHCR GLOBAL TRENDS 2012, at 5-6 (June 2013).

3. I use the term foreignness to mean the status of being an actual or perceived outsider to a given political community or nation state.

4. Committee on the Elimination of Racial Discrimination, Thematic Discussion, “Racial Discrimination Against People of African Descent,” Statement by Alice Edwards, UNHCR Division of International Protection 1 (Mar. 7, 2011), *available at* <http://www2.ohchr.org/english/bodies/cerd/docs/UNHCR7March2011.pdf> [hereinafter *UNHCR CERD Thematic Discussion*] (citing xenophobic discrimination as among “the greatest threats to the rights of refugees and asylum seekers, in Europe and elsewhere”); *UNHCR Issues Guidelines to Counter Discrimination, Intolerance*, UNHCR (Dec. 22, 2009), <http://www.unhcr.org/4b30fd089.html> (“Xenophobia and racism are often at

against foreign nationals threaten the lives of refugees in contexts as varied as Libya, Greece, the United Kingdom, India, Malaysia, Thailand, Ukraine, and even the United States.⁵ This is the case regardless of whether they possess legal documentation authorizing their presence in these countries. Refugees are also regular targets of verbal and physical harassment by private citizens and even public authorities, such as police officers. Where xenophobic discrimination is not violent, it can nonetheless be a severe threat to refugee livelihood. Refugees are regularly denied access to vital public services such as health care and basic education on account of foreignness. Even where they have been granted the right to work, as foreigners they also face grave challenges to securing formal employment, regardless of their skills, training, and experience.⁶ This often has the effect of threatening their very ability to subsist. Unsurprisingly, UNHCR has placed xenophobic discrimination on its list of strategic priorities for refugee protection.

International law does not explicitly state what constitutes unlawful xenophobic discrimination, and there is no established consensus view. As a result, global actors such as UNHCR, the International Organization for Migration, and even the International Labour Organization have grappled with this question.⁷ In doing so, they have identified international human rights law as the most important anchor for the legal prohibition of xenophobic discrimination.⁸ However, much conceptual muddiness remains regarding the extent and nature of this prohibition. What constitutes unlawful xenophobic discrimination, and what obligations does this legal standard impose on states with respect to refugees? How should UNHCR, whose policy on such questions affects refugees everywhere, go about formulating a

the root of discrimination and intolerance against asylum seekers and refugees . . . Many UNHCR offices have identified negative public attitudes towards persons of concern as a significant obstacle to the provision of international protection.”).

5. HUMAN RIGHTS FIRST, *COMBATING XENOPHOBIC VIOLENCE: A FRAMEWORK FOR ACTION* 1, 3-4 (2011), available at http://www.humanrightsfirst.org/wp-content/uploads/pdf/UNHCR_Blueprint.pdf [hereinafter *COMBATING XENOPHOBIC VIOLENCE*].

6. See *infra* Part II.

7. INT’L LABOUR ORG. ET AL., *INTERNATIONAL MIGRATION, RACISM, DISCRIMINATION AND XENOPHOBIA* 3 (2001), available at <http://www.unesco.org/most/migration/imrdx.pdf>.

8. International human rights law does not use the term “xenophobic discrimination,” but it prohibits a broad spectrum of the harm that refugees and other groups face on account of their status as foreigners. Thus, although this body of law does not define the term “xenophobic discrimination,” it nonetheless regulates conduct and measures that discriminate on account of foreignness. See *infra* Parts III.B, IV.A.

response? To date, scholars have done little to parse these questions, even though, as I will argue, this lack of clarity weakens the emerging international regime.

In this Article, I argue that UNHCR's emerging international anti-xenophobic discrimination policy is inadequate because it fails to account for the full scope of xenophobic discrimination. To make this argument, I begin by distinguishing two forms of xenophobic discrimination: (1) *explicit prejudice-based xenophobic discrimination* and (2) *structural xenophobic discrimination*. As the name suggests, explicit prejudice-based xenophobic discrimination refers to harm that refugees and other categories of foreigners experience on account of explicit anti-foreigner prejudice. Structural xenophobic discrimination, on the other hand, refers to harm to refugees and other foreigners that results from the disparate effects of various measures on these groups even in the absence of explicit prejudice. Crucially, these effects are the product of interactions among these measures with each other and with the typical circumstances confronting these groups. To tease out the implications of this distinction, consider the following example.

International human rights law provides a right to basic education,⁹ and many countries extend this right to refugees.¹⁰ Nonetheless, refugee children still face great difficulties in accessing basic education.¹¹ In some cases, it may be on account of explicit prejudice-based xenophobic discrimination. This would be the case where a refugee is barred from enrolling in a public elementary school by an administrator who explicitly states the basis for the denial as anti-foreigner prejudice. Alternatively, a refugee may be barred from enrollment because she cannot produce a recent academic transcript and birth certificate. All her documentation was destroyed during her flight from her country of nationality. Furthermore, she cannot seek copies of this documentation from her country of nationality because to do so would jeopardize her asylum claim.¹²

Although the effect is the same as under the first example, the latter

9. International Covenant on Economic, Social and Cultural Rights art. 13, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

10. South Africa is one example. *See* Refugees Act 130 of 1998 § 27(g) (S. Afr.).

11. *See, e.g.,* Paloma Bourgonje, *Education for Refugee and Asylum Seeking Children in OECD Countries: Case Studies from Australia, Spain, Sweden and the United Kingdom*, in EDUCATION INTERNATIONAL 7 (2010) (describing the challenges that refugees and asylum seekers in Australia, Spain, Sweden, and the United Kingdom face in accessing education).

12. In some jurisdictions, even if contacting one's government is feasible and not threatening to a refugee's safety, doing so may be a basis for the country of asylum to deny or revoke refugee status.

scenario does not present a case of explicit prejudice-based xenophobic discrimination. The birth certificate and transcript requirements serve the independent and legitimate purposes of identity verification and academic placement assessment, respectively. It is instead a case of what I have called structural xenophobic discrimination. It involves a violation of the right to basic education on account of an admissions policy that disproportionately harms refugees as foreigners, despite the absence of explicit anti-foreigner prejudice. My theory of structural xenophobic discrimination captures discriminatory effects of single laws or policies such as this admission policy. It also encompasses more complex cases where multiple laws, policies, or practices interact with each other cumulatively to cause structural human rights violations against refugees.¹³

Applying this distinction to contemporary international anti-xenophobic discrimination policy, I argue that UNHCR has implicitly but overwhelmingly taken a prejudice approach to determining unlawful discrimination against refugees. In other words, it has focused almost exclusively on ensuring that states regulate explicit prejudice-based xenophobic discrimination against refugees. This is a problem for at least two reasons. The first is that in much of the world, a significant portion of the harm that refugees experience on account of their status as foreigners involves no explicit prejudice.¹⁴ It instead takes the form of structural xenophobic discrimination. This means that UNHCR's influential global policy fails to account for a category of harms that I will argue substantially compromises the very livelihood of refugees. The second is that research suggests that structural xenophobic discrimination makes refugees more vulnerable to episodes of explicit prejudice-based xenophobic discrimination.¹⁵ Thus, even where the concern is primarily to regulate harm from explicit prejudice, it is a mistake to ignore structural xenophobic discrimination.

In addition to identifying the shortcomings of UNHCR's anti-xenophobic discrimination policy, I argue that international human rights law offers a legal basis for expanding this policy to address structural xenophobic discrimination. UNHCR's existing policy is anchored in an international human rights law treaty—the International Convention for the Elimination of all forms of Racial Discrimination

13. *See infra* Part II.C.

14. *Id.*

15. *See infra* Part II.D.

(the Discrimination Convention).¹⁶ Significantly, the Discrimination Convention prohibits conduct or measures as discriminatory that have the purpose *or* effect of violating international human rights law on the basis of a prohibited classification.¹⁷ The Discrimination Convention does not prohibit *all* disparate effects. But by recognizing certain disparate effects as prohibited, the Discrimination Convention serves as firm legal basis for requiring states to regulate structural xenophobic discrimination.¹⁸ As a result, I argue that UNHCR's global policy can and should adopt an inclusive approach that requires states to regulate harm to refugees resulting from explicit anti-foreigner prejudice *and* harm resulting from structural xenophobic discrimination.

Why does any of this matter? There are serious questions regarding whether the existing international legal framework for refugee protection can address the dramatically changed circumstances to which it now applies.¹⁹ In the view of many, international human rights law does

16. UNHCR has rightfully conceptualized xenophobic discrimination as occurring at the intersection of multiple categories, even if national origin and nationality are most salient. It has noted that targets of xenophobic harm may be subject to it “on the grounds of race, colour, descent, or national or ethnic origin, including in combination with other grounds, such as religion, gender and disability.” Combating Racism, Racial Discrimination, Xenophobia and Related Intolerance Through a Strategic Approach, UNHCR ¶ 11 (2009) [hereinafter 2009 UNHCR Guidance Note]. UNHCR has also included nationality in this list. *Id.* ¶ 12. The Discrimination Convention prohibits precisely this kind of discrimination. See *infra* Section III.B.

17. The International Convention on the Elimination of All Forms of Racial Discrimination (the Discrimination Convention) prohibits racial discrimination, which it broadly defines as: any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. The International Convention on the Elimination of All Forms of Racial Discrimination art. 1, Jan. 4, 1965.

(emphasis added). See *infra* Part III.B. for a discussion of foreignness as a prohibited classification.

18. See *infra* Part IV.A.

19. Erika Feller, as Director of UNHCR's Department of International Protection, recalled that “[w]hen UNHCR was established, the problem presented was essentially one of dealing with the approximately one million individuals who had first fled Nazism, and later communism, in Europe.” Erika Feller, *The Evolution of the International Refugee Protection Regime*, 5 WASH. U. J.L. & POL'Y 129, 131 (2001). As scholars have pointed out, the UN Refugee Convention, which is the cornerstone of international refugee law, was designed “for the purpose of addressing the status of mainly Europeans who had crossed an international border during [World War II].” Margaret G. Wachenfeld & Hanne Christensen, Note, *An Introduction to Refugees and Human Rights*, 59 NORDIC J. INT'L L. 178, 179 (1990); see also James C. Hathaway, *Reconceiving Refugee Law as Human Rights Protection*, 4 J. REFUGEE STUD. 113, 114 (1991) (describing the UN Refugee Convention as “premised on a Eurocentric notion of burden-sharing, and defines need in terms which exclude most refugees from the less developed world”).

and will play an important role in the tailoring of refugee protection to contemporary reality.²⁰ The validity of this belief remains to be seen. But as various legal actors, particularly in countries that do not rely on the international human rights framework for refugee protection—such as the United States—consider increased reliance on international human rights in domestic settings, my evaluation in the Article is useful.²¹ And while I focus here on refugees and asylum seekers, my arguments are relevant to those concerned with the rights of other categories of immigrants under international human rights law.

In Section II, I elaborate the distinction between explicit prejudice-based xenophobic discrimination and structural xenophobic discrimination, and the relationship between the two. In Section III, I review global refugee protection policy to reveal the dominance of what I have termed the prejudice approach to fighting xenophobic discrimination. I also note the shortcomings of this narrow approach. In Section IV, I argue that the Discrimination Convention requires regulation of structural xenophobic discrimination against refugees. Given the conditions that refugees face and the fact that the Discrimination Convention provides a basis for addressing these conditions, I argue that UNHCR should shift from its narrow focus on explicit prejudice to an inclusive approach that also regulates structural xenophobic discrimination. In this Section, I also address briefly the biggest challenges to realizing this inclusive approach.

II. CONCEPTUALIZING XENOPHOBIC DISCRIMINATION

In this section, I examine the challenges that refugees and asylum seekers²² face on account of foreignness, introducing an important

20. See *infra* note 138.

21. Scott Cummings has written on the “new interest in human rights among public interest lawyers” in the U.S. domestic context, whom he describes as “now turning to human rights as a master frame for social change.” Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 970 (2008); see also Caroline Bettinger-Lopez et al., *Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice*, 18 GEO. J. ON POVERTY L. & POL’Y 337, 347 (2011) (describing the use of international human rights by domestic human rights activists). Bettinger-Lopez et al. note that “these advocates are incorporating with more frequency international human rights norms, language and strategies in their work within U.S. borders.” See Bettinger-Lopez et al., *supra*, at 345. Scott Cummings notes in particular that lawyers within the U.S. domestic immigrants rights field are among those that have “more readily embraced the human rights framework.” See Cummings, *supra*, at 996-98.

22. An asylum seeker is a person who claims refugee status, but whose claim has not been formally recognized by a host government or by UNHCR. U.N.H.C.R., U.N.H.C.R. GLOBAL TRENDS 37 (2011).

distinction between explicit prejudice-based discrimination and structural xenophobic discrimination. I use South Africa as my primary case study, and there are several compelling reasons to do so. Over eighty percent of the total global refugee population is in the so-called developing world.²³ Of the 845,800 people that applied for refugee status in 2010, a solid *twenty* percent of these did so in South Africa.²⁴ The United States received the next largest number of asylum applications—a distant second, with six percent of total applications.²⁵ Nonetheless, what little scholarship exists on xenophobic discrimination against refugees and other forced migrants focuses on this phenomenon in the developed world.²⁶ In light of contemporary patterns of forced displacement, South Africa—an asylum seeker “hotspot” of the global south and, indeed, the world—is an apt starting point.²⁷

Furthermore, South Africa has shown notable openness to human rights-based refugee protection. It has an impressive refugee protection regime buttressed by international human rights law and principles enshrined in its domestic constitution and legislation.²⁸ Finally,

23. U.N.H.C.R., U.N.H.C.R. GLOBAL TRENDS 13 (2012).

24. South Africa received eleven percent of global applications in 2011, again remaining firmly in the lead.

25. U.N.H.C.R., U.N.H.C.R. GLOBAL TRENDS 3 (2010).

26. INT’L LABOUR ORG. ET AL., INTERNATIONAL MIGRATION, RACISM, DISCRIMINATION AND XENOPHOBIA (2003), *available at* <http://www.unesco.org/most/migration/imrdx.pdf> (“Research on concrete manifestations of xenophobia and discrimination against migrants, refugees and other non-nationals is still very limited, especially outside Europe and North America. There is very little data that allows for effective comparisons among countries, let alone across regional contexts.”).

27. The experiences of refugees in South Africa can by no means be conflated with those of all others in the global south. South Africa is but one of the many refugee-receiving countries in Africa. Furthermore, although Africa (excluding North Africa) hosted 2.4 million refugees in 2011, the Asia Pacific region hosted 3.6 million and the Middle East 1.7 million. U.N.H.C.R. GLOBAL TRENDS (2011), *supra* note 22, at 13. I supplement my case study with UNHCR findings based on experiences of xenophobic discrimination across the world. I do this to show that there is strong reason to believe that my conceptual intervention in this Article (a theory of structural xenophobic discrimination) is applicable beyond the South African context. That said, on the basis of South Africa’s context alone, it is possible to reach conclusions of consequence regarding the suitability of UNHCR’s approach to xenophobic discrimination. A global policy that fails to meet the needs of the significant proportion of the global refugee and asylum seeker population in South Africa warrants serious concern, even in the unlikely event that these needs are categorically different from those of refugees in any other countries.

28. *See* JEFF HANDMAKER, LEE ANNE DE LA HUNT & JONATHAN KLAAREN, ADVANCING REFUGEE PROTECTION IN SOUTH AFRICA 278 (Handmaker et al. eds., 2008) (discussing the basis of South Africa’s refugee protection in international human rights law). For a detailed account of how human rights advocates played a crucial role in the development of this regime, see JEFFREY

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South Africa is among the few countries in the global south with a relative wealth of accessible data on xenophobic discrimination against refugees.²⁹

A. *Foreignness As a Basis for Discrimination*

I define foreignness as the status of being an actual or perceived outsider to a given political community (typically a nation state). What it means concretely to be “foreign” will thus shift depending on context. The particular operational classifications will vary according to how the history, politics, and socio-economics of a given country have shaped its understanding of the appropriate beneficiaries of political membership. A universal feature of foreignness, however, is that its construction rests on multiple, intersecting classifications. As UNHCR has stated, xenophobic harm maybe based “on the grounds of race, colour, descent, or national or ethnic origin, including in combination with other grounds, such as religion, gender and disability.”³⁰ It has also added nationality to this list.³¹

To start with, when refugees and other forced migrants are targeted as foreigners, it is evident that national origin is deeply implicated.³² National origin may refer to country of origin, but it may also refer to ancestry, or the birthplace of those from whom one is descended.³³ In addition to national origin, nationality as a distinct classification may also be at stake. By nationality, I mean the legal status of bearing the

HANDMAKER, *ADVOCATING FOR ACCOUNTABILITY: CIVIC-STATE INTERACTIONS TO PROTECT REFUGEES IN SOUTH AFRICA* (2009).

29. The challenge that access to empirical data on this issue outside of the West presents cannot be overstated. See INT’L LABOUR ORG. ET AL., *INTERNATIONAL MIGRATION, RACISM, DISCRIMINATION AND XENOPHOBIA* 9 (2001).

30. 2009 UNHCR Guidance Note, *supra* note 16, ¶ 12.

31. *Id.*

32. The threats of a group that attacked and severely wounded an Afghan refugee in Athens, Greece, illustrate this: “Where are you from? Go back to your country immediately! Leave! Out of here! Go to hell! You are not wanted.” Press Release, UNHCR, *Three Face Justice in Athens for Attacks on Foreigners* (Sept. 27, 2011) (discussing almost daily attacks on foreign nationals, including asylum seekers, in Athens).

33. Writing on discrimination on the basis of national origin in the U.S. domestic context, Professor Natsu Taylor Saito has similarly noted that here, too, national origin as a basis of discrimination incorporates both birth country and ancestry. Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 308 (1997). On the meaning of ancestry and its possible relationship to national origin, see Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 832-33 (1994).

entitlements and responsibilities of full membership in a nation state, and I use this term synonymously with alienage and citizenship. In some cases, xenophobic discrimination against refugees and asylum seekers may be perpetrated on the basis of nationality, to the seeming exclusion of national origin.

Consider an example relating to access to health care. In South Africa, refugees are entitled under law to the same public health benefits as South African citizens.³⁴ Yet the difficulties that refugees face in realizing these entitlements are myriad. They report that “in many cases when they seek health care, clinics and hospitals either refuse to treat them, terminate their care prematurely, charge them excessive fees, or verbally harass and mistreat them for being foreign.”³⁵ Even where health care providers are aware of what the law requires, they may refuse to treat refugees because they are foreign.³⁶ In some cases, foreignness is determined on the basis of national origin, which a health care administrator may attempt to determine using ethnic, linguistic or other traits. But in other cases, nationality may be treated as what is characteristic of foreignness. This is the case, for example, when health care practitioners deny treatment to an un-naturalized refugee but will administer it to a naturalized refugee on presentation of proof of citizenship.³⁷

In the case of xenophobic discrimination against refugees, race is a fundamental determinant of who among those of foreign national origin or nationality are deemed deserving of xenophobic harm. In

34. Jo Vearey & Lorena Nunez, *Towards Improving Forced Migrant Access to Health and Psychosocial Rights in Urban South Africa—A Focus on Johannesburg*, African Centre for Migration & Soc’y Migration Issue Brief, 5 (2011).

35. HUMAN RIGHTS WATCH, *NO HEALING HERE: VIOLENCE, DISCRIMINATION AND BARRIERS TO HEALTH FOR MIGRANTS IN SOUTH AFRICA 2* (2009). In fact, “[a]llegations of discrimination and xenophobic attitudes by health care staff ranked as one of the leading barriers to health care” for migrants, including refugees. *Id.* at 55.

36. Human Rights Watch quotes a refugee healthcare provider who says:

In general, before May 2008 access to treatment was improving, but xenophobia has created a lot of problems. It’s worse now than before the attacks. It’s not the policy that is the problem by now. It is individual discrimination by nurses and others at the hospital. We have lost the ground we won over the last ten years and have to start gain from square one.

Id. at 55.

37. At the same time, even where the ostensible grounds of discrimination is nationality, this may be a pretext or a proxy for national origin in light of the overwhelming instances for refugees, and the totality of instances for asylum seekers, where nationality and national origin overlap. Thus, while I highlight the distinction between national origin and nationality in the operation of xenophobic discrimination, I do not mean to overstate it.

other words, not all people of foreign national origin or nationality are equally vulnerable to harm on account of foreignness—vulnerability is a partial but significant function of race.³⁸ This is evident in South Africa, where a white Zimbabwean refugee is unlikely to face the same risk of xenophobic discrimination as a black Zimbabwean refugee, who is an almost certain target, even at the hands of South Africa's majority black citizens.³⁹ Here, “the differential experience of discrimination is a function of the intersection of identities.”⁴⁰ Israel offers another example. There, black African asylum-seekers are victims of racialized

38. Here I use the term race to capture both biological conceptions of race that focus on phenotypical differences, as well as social conceptions that describe relations of power among different groups constructed as racially distinct. On the social construction of race, see Ian F. Haney-López, *Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994); Jayne Chong-Soon Lee, Book Review, *Navigating the Topology of Race*, 46 STAN. L. REV. 747, 758 (1994). Being black, where black refers broadly to individuals of sub-Saharan African descent, may on its own mark you as of foreign national origin if you are a refugee in Sweden, but not necessarily so in a sub-Saharan African country such as South Africa. In the latter context, however, subtle differences in phenotype are used crudely to distinguish foreign from native. Skin tone or complexion serves as an example—one's “shade of black” may be one of several traits used to single a person out as foreign. Some South African scholars have described this as part of xenophobic discrimination's negrophobic qualities in that country: “[d]arker skin betrays foreign African origins and invites persecution by fellow ‘blacks’ who see their lighter skin as the most telling signifier of South African belonging.” SHIREEN HASSIM, ERIC WORBY & TAWANA KUPE, *GO HOME OR DIE HERE: VIOLENCE, XENOPHOBIA AND THE REINVENTION OF DIFFERENCE IN SOUTH AFRICA* 16 (Shireen Hassim et al. eds., 2008). Similarly, Somalis, whose typically light complexion sufficiently differs from the shades of black considered native to South Africa, are regularly singled out as targets of xenophobic violence. See, e.g., Press Release, Office of the High Commissioner for Human Rights, Human Rights Commissioner Pillay Highlights Brutal Killing of Somali Family in South Africa, U.N. Press Release (Oct. 7, 2008).

39. Sociologist Alan Morris, for example, reports the findings of his study to show that “being a black foreigner is no protection from racism, especially if you are from a country north of South Africa's neighbouring states. Instead, black foreigners from these countries can expect to experience the same levels of abuse, discrimination and stereotyping endured by black immigrants in other parts of the world.” Alan Morris, “*Our Fellow Africans Make Our Lives Hell*”: *The Lives of Congolese and Nigerians Living in Johannesburg*, 21 ETHNIC & RACIAL STUD. 1116, 1133 (1998).

40. Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 707 (2001). It also reflects another face of “negrophobic” xenophobic discrimination. Pumla Dineo Gqola describes xenophobic violence against Caucasian non-nationals in South Africa as “unthinkable.” She explains that “what makes it unthinkable is the clear value *and* whiteness of the safe European versus the disposability of *and* Blackness of the brutalized African ‘foreigner’” that occurs in part via the racialization of immigrant communities.” Pumla Dineo Gqola, *Brutal Inheritances: Echoes, Negrophobia and Masculinist Violence*, in *GO HOME OR DIE HERE: VIOLENCE, XENOPHOBIA AND THE REINVENTION OF DIFFERENCE IN SOUTH AFRICA* 213 (Tawana Kupe et al. eds., 2008).

xenophobic discrimination.⁴¹ This discrimination includes violence as extreme as the firebombing of homes and kindergartens known to be attended by black Africans.⁴²

Ecuador, which is home to the largest refugee population in Latin America, provides an example that also illustrates the gendered nature of xenophobic discrimination.⁴³ Refugees in this country, ninety-eight percent of whom are Colombian, face widespread xenophobic discrimination from their host population.⁴⁴ A 2010 study found that 97.3 percent of refugees interviewed had experienced discriminatory incidents on the basis of being Colombian.⁴⁵ But Afro-Colombians and Colombian women who were single heads of households were found to be particularly vulnerable to xenophobic discrimination,⁴⁶ reflecting the race and gender dimensions of this discrimination.⁴⁷

Beyond national origin, nationality, race, and gender, there are other classifications that operate in the marking of refugees and other foreigners as targets of xenophobic discrimination. UNHCR has identified religion as one such classification.⁴⁸ Class is another. South African sociologist Ashwin Desai has contrasted the differential impact of xenophobic discrimination on “denizens”—a more privileged group of non-citizens such as expatriates whose class, among other things, permits them to transcend the limits of the nation state—and “helots”—vulnerable groups such as asylum seekers and other forced migrants whose class, among other things, exposes them to xenophobic exclusion.⁴⁹

41. *Israel and Its Black Immigrants: Keep Out*, *ECONOMIST* (June 2, 2012); see also Eleanor Acer, *Combating Xenophobic Violence in Israel and Around the World*, *HUM. RTS. FIRST* (June 4, 2012), <http://www.humanrightsfirst.org/2012/06/04/combating-xenophobic-violence-in-israel-and-around-the-world/>.

42. *Israel and Its Black Immigrants*, *supra* note 41.

43. Gorka Ortega, *Ecuador: Thousands of Colombian Refugees at Risk*, *JESUIT REFUGEE SERV. USA* (Mar. 23, 2011), https://www.jrsusa.org/campaign_detail?PTN=PROMO-20100910013207&TN=PROJECT-20130408084358.

44. Gorka Ortega, *Columbian Refugees in Panama and Ecuador*, *JESUIT REFUGEE SERV. USA* (Mar. 23, 2011), http://jrsusa.org/Spotlight_Detail_Continue?TN=DTN-20110321033950&PTN=DTN-20110321031249.

45. *Id.*

46. *Id.*

47. See also Gqola, *supra* note 40, at 218-21 (discussing the gendered nature of certain forms of xenophobic discrimination in South Africa).

48. 2009 UNHCR Guidance Note, *supra* note 16, ¶ 11.

49. Ashwin Desai, *Xenophobia and the Place of the Refugee in the Rainbow Nation of Human Rights*, 12 *AFR. SOC. REV.* 49, 61 (2008).

In sum, foreignness is a composite category at the intersection of multiple classifications.⁵⁰ Functionally, the classification “foreign” marks the group constructed as such not only as distinct from an in-group designated native, but in the case of refugees, as an out-group deserving of exclusion⁵¹ and of a broad spectrum of harm.

I argue that it is important to distinguish two forms of harm that refugees and other migrants experience on account of foreignness: explicit prejudice-based xenophobic discrimination and structural xenophobic discrimination.

B. *Explicit Prejudice-Based Xenophobic Discrimination*

References to “xenophobic discrimination” by refugee protection advocates such as the UN Refugee Agency, and even in popular media and public discourse in different parts of the world, typically refer to harm that results from explicit, anti-foreigner prejudice.⁵² In its most extreme forms, explicit prejudice-based xenophobic discrimination is violent. A remarkable example that made international headlines was a two-week long spate of xenophobic violence that shook South Africa in

50. For example, U.S. critical race scholars have done insightful work to unpack the intersecting classifications that have been mobilized to mark Asian-Americans and Native Americans as foreign, citizenship notwithstanding. *See, e.g.*, Saito, *supra* note 33, at 322 (“To understand discrimination against those perceived as a foreign, we must consider the ways in which race intersects with other classifications, such as ethnicity, ancestry, and citizenship status.”).

51. This is true beyond the refugee protection context. Writing on the construct of foreignness in the United States, Professor Saito offers the example of Native Americans, whom she notes “have consistently been cast as outsiders, labeled foreign in the name of sovereignty, and excluded.” *Id.* at 289.

52. Accounts focus on the concept of “xenophobia.” In a discussion paper, the International Labour Office (ILO), the International Organization for Migration (IOM), and the Office of the United Nations High Commissioner for Human Rights (OHCHR) consider the definition of xenophobia as “attitudes, prejudices and behavior that reject, exclude and often vilify persons, based on the perception that they are outsiders or foreigners to the community, society or national identity.” INT’L LABOUR ORG. ET AL., INT’L MIGRATION, RACISM, DISCRIMINATION, AND XENOPHOBIA 2 (2001). The content of this discussion paper, even understood as no more than “a preliminary inter-agency exploration of the subject matter,” indicates current thinking on xenophobia within important international migrant and refugee protection agencies. The South African Human Rights Commission (SAHRC)—an independent national institution mandated by the South African Constitution to promote respect for and protection of human rights—has defined xenophobia as “the deep dislike of non-nationals by nationals of a recipient state.” S. African Human Rights Comm’n, *Braamfontein Statement on Xenophobia* (Oct. 15, 1998), available at <http://www.queensu.ca/samp/migrationresources/xenophobia/responses/sahrc2.htm>. Under this formulation, xenophobia is “an irrational prejudice and hostility towards non-nationals” whose “manifestation is a violation of human rights.” *Id.*

May 2008. This violence began in Alexandra,⁵³ one of Johannesburg's oldest townships. During this period, "[v]ictims and witnesses describe[d] chilling attacks: hundreds of people armed with axes, clubs and metal bars going from shack to shack, purging districts of foreigners; victims being clubbed insensible with concrete slabs and then burned, or being locked into their shacks, which were then set alight."⁵⁴

Attacks during this period left sixty-two dead and over 600 injured. These attacks also displaced over 100,000 people, many of whose homes and property were destroyed in the process.⁵⁵ Without a doubt, the targets of the violence were foreign nationals or people perceived to be foreign nationals.⁵⁶ At the same time, not all categories of foreign nationals were equally at risk of attack. The race and class dimensions of the violence were stark—violence was targeted at poor, black foreigners.⁵⁷ Refugees and asylum seekers, the vast majority of whom in South Africa are black and poor, were among the most vulnerable to the violence.

As earlier examples above have shown, however, explicit prejudice-based xenophobic discrimination need not be violent.⁵⁸ Globally, refugees and asylum seekers experience a wide range of harm on account of non-violent explicit prejudice-based xenophobic discrimination.⁵⁹ For example, explicit prejudice severely compromises the ef-

53. Noor Nieftagodien, *Xenophobia's Local Genesis: Historical Constructions of Insiders and the Politics of Exclusion in Alexandra Township*, in EXORCISING THE DEMONS WITHIN: XENOPHOBIA, VIOLENCE, AND STATECRAFT IN CONTEMPORARY SOUTH AFRICA 109, 109 (Loren B. Landau ed., 2012) [hereinafter *Xenophobia's Local Genesis*].

54. Robyn Dixon, *Migrants Burned Alive in S. Africa*, L.A. TIMES, May 20, 2008, <http://articles.latimes.com/2008/may/20/world/fg-rampage20>.

55. JEAN PIERRE MISAGO ET AL., TOWARDS TOLERANCE, LAW, AND DIGNITY: ADDRESSING VIOLENCE AGAINST FOREIGN NATIONALS IN SOUTH AFRICA 2 (2009).

56. In fact, of those who died during this period of violence, a third were South African nationals deemed "foreign" by their murderers. HASSIM, WORBY & KUPE, *supra* note 38, at 1.

57. Notably, these dimensions mirror a sufficiently global trend with respect to the victims of xenophobic violence, such that United Nations High Commissioner for Refugees has spoken out against the particular vulnerabilities of refugees and asylum seekers of African descent across the world. UNHCR CERD *Thematic Discussion*, *supra* note 4, at 2.

58. See examples of xenophobic discrimination in Part II(A) above discussing foreignness as a basis for discrimination.

59. On the account of the director of the UNHCR's international protection division: "Xenophobia and racism are often at the root of discrimination and intolerance against asylum seekers and refugees . . . Many UNHCR offices have identified negative public attitudes towards persons of concern as a significant obstacle to the provision of international protection." UNHCR *Issues Guidelines to Counter Discrimination, Intolerance*, *supra* note 4.

forts of refugees in South Africa to access a range of social services to which they are entitled under law, such as health care,⁶⁰ basic education, and social grants.⁶¹

C. *Structural Xenophobic Discrimination*

In South Africa, and arguably across the world, acts of explicit prejudice-based xenophobic discrimination occur within the context of pervasive structural xenophobic discrimination. By this I mean harm that results from the disparate impact of measures on refugees and other groups on account of foreignness, when these measures interact with each other and with context. Explicit prejudice is not a necessary condition for this form of xenophobic discrimination. And in fact, typically the policies and practices at the heart of structural xenophobic discrimination are not motivated by explicit prejudice. Instead, they are intended to serve an independent, legitimate purpose. A central goal of this Article is to show that despite the absence of any explicit prejudice, structural xenophobic discrimination is fundamental to understanding and remedying the severe hardships refugees face on account of foreignness.

The access to education example in the Introduction was an example of a simple case of structural xenophobic discrimination. I now provide an example of a complex case, where the cumulative effect of a wide range of measures is serious harm to refugees. When considered individually and in isolation from the context within which they operate, the disparate effects of these measures on refugees may seem trivial. But crucially, when they interact and have effect in concrete social contexts, these policies and practices can inflict significant harm on refugees and other foreigners. Specifically, I offer the example of how structural xenophobic discrimination facilitates the severe socio-economic marginalization of refugees, essentially turning this group into a vulnerable underclass.

Like urban refugees and asylum seekers in much of the world, those in South Africa cannot rely on relief aid from host governments or UNHCR for their survival.⁶² Such relief, where available, is limited. A

60. See HUMAN RIGHTS WATCH, *supra* note 35, at 54-55.

61. CONSORTIUM FOR REFUGEES & MIGRANTS IN S. AFR., PROTECTING REFUGEES, ASYLUM SEEKERS AND IMMIGRANTS IN SOUTH AFRICA 22 (Loren B. Landau et al. eds., 2008) [hereinafter CORMSA 2008].

62. An urban refugee protection policy requires refugees to integrate within a host society, as opposed to a camp policy that requires refugees to remain in a camp managed by the host government or by UNHCR.

primary source of livelihood is thus income they must generate alongside other members of society.⁶³ South Africa grants refugees the right to work,⁶⁴ and the same is true of asylum seekers, who are granted this right from the moment they are issued an asylum seeker permit.⁶⁵ Despite work authorization, professional qualifications, and work experience, however, these groups face great difficulty in securing formal employment.⁶⁶ This is the case notwithstanding a skills shortage in South Africa's labor market.⁶⁷

The causes of refugees' and asylum seekers' exclusion from formal employment are myriad and include explicitly communicated prejudice on the part of employers who, on the basis of this prejudice, refuse to employ members of these groups.⁶⁸ What I wish to highlight here, however, are the structural forces that play an important role in barring refugees and asylum seekers from formal employment but that do not take the form of explicit prejudice-based discrimination.

I propose that structural xenophobic discrimination originates in laws, policies, and practices that fall into two categories. The first contains laws and policies that I term "de jure alienage exclusive." These laws and policies, for independent and ostensibly legitimate reasons, explicitly exclude refugees and asylum seekers from entire sectors of industry on the basis of citizenship or immigration status.

63. UN HIGH COMM'R FOR REFUGEES (UNHCR), UNHCR POLICY ON REFUGEE PROTECTION AND SOLUTIONS IN URBAN AREAS ¶ 100 (Sept. 2009), <http://www.refworld.org/docid/4ab8e7f72.html> [hereinafter UNHCR POLICY ON REFUGEE PROTECTION AND SOLUTIONS IN URBAN AREAS].

64. Refugees Act 130 of 1998 § 27(f) (S. Afr.).

65. Incidentally, this is a right that refugee advocates secured using human rights-based litigation. *Minister of Home Affairs and Others v. Watchenuka and Another* 2003 (4) SA 326 (SCA) ¶ 10 (S. Afr.); [2004] 1 All SA 21 (SCA) (Nov. 28, 2003).

66. Loren B. Landau et al., *Xenophobia in South Africa and Problems Related to It*, 13 Forced Migration Working Paper Series 1, 22 (2004). Karen Jacobsen writes, for example, that in Cairo, Johannesburg and Tokyo studies find that "[w]hile recognized refugees have the right to work, even skilled workers or professionals usually can find only low paid, unskilled jobs, often without work contracts or social benefits." Karen Jacobsen, *Refugees and Asylum Seekers in Urban Areas: A Livelihoods Perspective*, 19 J. REFUGEE STUD. 273, 282 (2006).

67. See CONSORTIUM FOR REFUGEES & MIGRANTS IN S. AFR. (CoRMSA), PROTECTING REFUGEES AND ASYLUM SEEKERS, 46 (2007) [hereinafter CoRMSA 2007]; Tara Polzer, *Migrant Employment in South Africa: New Data from the Migrant Rights Monitoring Project*, U. OF THE WITWATERSRAND FORCED MIGRATION STUD. PROGRAMME 5 (2008).

68. See, e.g., Roni Amit, *Winning Isn't Everything: Courts, Context, and the Barriers to Effecting Change Through Public Interest Litigation*, 27 S. AFR. J. HUM. RTS. 8, 30 (2011) (discussing how as a result of prejudice, "asylum seekers are pushed to the margins—they are forced into the informal economy, cannot access health care or social services, and are viewed as illegal and suspect by both the police and society at large").

The second category contains laws, policies, and practices that I term “de facto alienage exclusive.” These do not explicitly or on their face exclude refugees and asylum seekers from formal economic opportunities. They are, in principle, alienage neutral, but nonetheless subject these groups to requirements or conditions that in effect exclude them on the basis of their nationality or immigration status. Below, I highlight how interaction between these categories results in structural xenophobic discrimination that excludes refugees and asylum seekers from formal employment.

1. Industry Gate-Keeping Law and Policy

Among the greatest contributors to structural xenophobic discrimination are industry laws and regulatory policies that serve a gate-keeping or quality-control function. Whether they are de facto or de jure alienage exclusive, typically their existence is justified on the basis of an interest in ensuring a certain standard of service within a particular industry. South Africa’s Private Security Industry Regulation Act (PSIRA) is a prototypical example of a de jure alienage exclusive law that serves such a gate-keeping function. This Act restricts employment in the private security industry—which employs more people than the national army and police force combined⁶⁹—to citizens and permanent residents.⁷⁰ Although the law permits a regulatory body to exempt applicants not meeting these criteria, exemptions are discretionary, and refugees and asylum seekers face great difficulties securing such exemptions.⁷¹ Furthermore, refugees face great barriers to acquiring legal permanent resident status.⁷² As a result of PSIRA, refugees and asylum seekers are all but foreclosed from taking employment that provides a “security service” broadly defined as “protecting or safeguarding a person or property in any manner.”⁷³ It bars these groups from

69. *Bertie Van Zyl (Pty) Ltd. and Another v. Minister for Safety and Security and Others* 2010 (2) SA 181 (CC), 19 ¶ 34 (S. Afr.).

70. Private Security Industry Regulation Act 56 of 2001, § 2(2)(c) (S. Afr.).

71. Applicant’s Head of Argument, ¶ 5.6.13, *Union of Refugee Women and Others v. Director, Private Security Industry Regulatory Authority and Others* 2007 (4) BCLR 339 (CC) (S. Afr.).

72. *Id.* ¶ 6.3.18.

73. The scope of PSIRA is expansive, and South Africa’s Constitutional Court noted this in *Bertie Van Zyl (Pty) Ltd. and Another*, ¶ 26, where it stated:

According to the definition in section 1 of the Act—“‘security service’ means one or more of the following services or activities: 1. protecting or safeguarding a person or property in any manner; 2. giving advice on the protection or safeguarding of a person or property, on any other type of security service as defined in this section, or on the use of

what was, for a period, the second most sought after form of employment among all employed refugees and asylum seekers.⁷⁴

When PSIRA is considered in isolation from the broader regulatory policies and customary practices that structure the formal employment sector, it is difficult to comprehend the severity of its impact on refugees' right to work.⁷⁵ But when PSIRA's exclusion is mapped onto other *de jure* and *de facto* alienage exclusive policies and practices, many of which similarly serve a gate-keeping function, it is necessary to re-evaluate the severity of PSIRA's disparate impact on refugees and asylum seekers. In broader context, PSIRA is in fact an important building block of a structural barrier to arguably any formal employment at all for refugees and asylum seekers.⁷⁶

security equipment; 3. providing a reactive or response service in connection with the safeguarding of a person or property in any manner; 4. providing a service aimed at ensuring order and safety on the premises used for sporting, recreational, entertainment or similar purposes; 5. manufacturing, importing, distributing or advertising of monitoring devices contemplated in section 1 of the Interception and Monitoring Prohibition Act, 1992 (Act No. 127 of 1992); 6. performing the functions of a private investigator; 7. providing security training or instruction to a security service provider or prospective security service provider; 8. installing, servicing or repairing security equipment; 9. monitoring signals or transmissions from electronic security equipment; 10. performing the functions of a locksmith; 11. making a person or the services of a person available, whether directly or indirectly, for the rendering of any service referred to in paragraphs (a) to (j) and (l), to another person; 12. managing, controlling or supervising the rendering of any of the services referred to in paragraphs (a) to (j); 13. creating the impression, in any manner, that one or more of the services in paragraphs (a) to (l) are rendered[.]”

Each service or activity enumerated in the list above on its own qualifies as a security service. On the text of this definition, a person need only engage in one of these services or activities to be required by the Act to register as a security service provider.

74. *Union of Refugee Women and Others*, ¶ 122 n.41 (S. Afr.) (O'Regan and Mkgoro, JJ., dissenting) (Langa, CJ and Van der Westhuizen, J concurring).

75. An organization representing the interests of refugees challenged the constitutionality of this law on the basis that the exclusion of refugees was discriminatory on the grounds of alienage and immigration status. *Id.* ¶ 20. The Constitutional Court of South Africa upheld the law on the basis that, although there is a fundamental human right to work, there is no fundamental human right to choose one's employment. *Id.* ¶¶ 46-54. It found that PSIRA did not violate the right to work, as it merely limited this right to the extent that refugees and asylum seekers could not seek employment in the private security industry. The Court found this limitation to be permissible for gate-keeping purposes and deemed PSIRA's framework to be sufficiently proportionate or narrowly tailored to achieve this purpose. *Id.* ¶ 67.

76. *Id.* ¶ 122 (“[T]here is evidence to suggest that the relatively low-skilled work available in the private security industry is a significant source of employment for many refugees. Their exclusion from this form of employment is therefore not negligible and may well have a severe impact on the ability of refugees to earn a livelihood in South Africa.”).

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An example of a suite of de facto alienage exclusive gate-keeping policies that detrimentally interact with PSIRA is the rules governing admission to various professions within South Africa. The healthcare profession, despite crippling need in South Africa for skilled, experienced, healthcare professionals, provides an illuminating example.⁷⁷ Nurses, who are required by law to register with the South African Nursing Council prior to being permitted to practice their profession, are among the most affected. Year after year, refugee protection advocates report that most refugees “are unable to fulfill registration requirements that require documentary proof of professional qualifications and certificates of good standing from the professional nursing bodies in their home countries.”⁷⁸

Even beyond the field of nursing, the professional qualifications of refugees and asylum seekers are often not readily recognized by professional regulatory bodies, which then typically require prohibitively expensive recertification or training within South Africa that is unaffordable for refugees and asylum seekers.⁷⁹ The extenuating circumstances of their flight often mean these refugees arrive in South Africa without proof of their professional qualifications.⁸⁰ This is compounded by the fact that refugees and asylum seekers are by definition foreclosed from the assistance of their countries of nationality to verify their qualifications.⁸¹ As a result, many must abandon their professions for unskilled jobs, if they can find formal employment at all.⁸² These professional admission policies do not de jure exclude refugees and asylum seekers, but their ultimate effect does so. Further-

77. The Consortium for Refugees and Migrants in South Africa (CORMSA), an umbrella network of refugee protection civil society organizations, notes: “While South Africa faces an extreme skills shortage in employment sectors such as health care, education, engineering, and IT, and there are national programmes to recruit skilled people from abroad (for example doctors from Tunisia), refugees and asylum seekers who are already in the country and possess the needed skills face almost insurmountable obstacles to contributing to their host country.” CORMSA 2007, *supra* note 67, at 46 (footnote omitted).

78. *Id.* at 48; CORMSA 2008, *supra* note 61, at 53 (noting that “there has been no progress over the past year in facilitating registration for asylum seeker and refugee nurses with the Nursing Council, in spite of repeated advocacy attempts”).

79. Landau et al., *supra* note 66, at 22; *see* Polzer, *supra* note 67, at 5.

80. CORMSA 2007, *supra* note 67, at 48.

81. *Id.* If an asylum seeker has fled persecution from her government, contacting public authorities is typically too dangerous. Furthermore, any such attempts to establish contact may be used by a host government as a basis for denying or revoking refugee status. This is because a grant of refugee status is contingent on an individual’s inability or unwillingness to seek assistance from her country of nationality.

82. Landau et al., *supra* note 66, at 22.

more, these policies, which create often-insurmountable barriers for these groups, are not motivated by explicit xenophobic prejudice. Instead, they are based on valid concerns for ensuring that only persons actually qualified to administer medical care are permitted to do so.

2. Laws and Policies Unrelated to Industry Gate Keeping

Although gate-keeping regulation contributes significantly to structural xenophobic discrimination, it is by no means the sole avenue through which the latter operates. Even law and policy that have no seeming connection to employment within a particular industry can be instrumental in forming the structural web that compromises refugees' rights to work. An example of this is a former regulatory policy by South Africa's Financial Intelligence Centre (FIC), the authority that regulates South Africa's anti-money laundering regime under the Financial Intelligence Centre Act (FICA). FIC interpreted FICA regulations to prohibit banks from accepting government-issued asylum seeker permits as proof of identification for opening bank accounts.⁸³ This measure, which is de jure alienage exclusive, was undertaken for security purposes related to preventing money laundering. As a result, even the few asylum seekers who might otherwise have received services from the odd bank could no longer do so.⁸⁴

Taken in isolation, this regulatory policy might be considered a mere inconvenience. Yet in the context of other prevalent business practices that are de facto alienage exclusive, the exclusionary effect of this banking policy change on an asylum seeker's livelihood is magnified significantly. For example, many employers in the formal sector require employees to have a bank account in which wages can be directly deposited.⁸⁵ As a result, they will not employ individuals who do not have bank accounts. Refugee protection advocates have repeatedly pointed to inability to open a bank account as a major barrier to their clients' ability to secure formal employment.⁸⁶ Furthermore, those refugees and asylum seekers wishing to transition from informal entrepreneurial activities to small businesses such as small corner shops

83. See CONSORTIUM FOR REFUGEES & MIGRANTS IN S. AFR. (CoRMSA), PROTECTING REFUGEES, ASYLUM SEEKERS AND IMMIGRANTS IN SOUTH AFRICA DURING 2010 45 (2011).

84. Loren B. Landau, *Protection and Dignity in Johannesburg: Shortcomings of South Africa's Urban Refugee Policy*, 19 J. REFUGEE STUD. 308, 320 (2006).

85. S. AFR. HUMAN RIGHTS COMM'N (SAHRC), REPORT: OPEN HEARINGS ON XENOPHOBIA AND THE PROBLEMS RELATED TO IT 30 (2006).

86. Landau et al., *supra* note 66, at 22.

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have difficulties doing so in part due to their exclusion from banking services.⁸⁷ Worse still, this particular banking policy had direct subordinating effects beyond employment opportunities. For example, the inability to open a bank account effectively excludes refugees and asylum seekers from accommodation in neighborhoods where landlords require a financial record prior to leasing, which is the case in almost all but the poorest residential areas of South Africa.

The cumulative effect of policies such as those described above is the exclusion of most refugees and asylum seekers from the formal employment sector. Those who can enter it are largely confined to unskilled labor regardless of their qualifications.⁸⁸ And although structural xenophobic discrimination is not the only factor that pushes refugees and asylum seekers out of the formal employment sector, its effect is significant. With no opportunities in the formal sector, refugees and asylum seekers are forced into the informal employment sector.

I use the term “informal employment” to signal the absence of an employment contract or any written commitment on the part of an employer to guarantee safe, equitable employment conditions. Informal employment is often synonymous with unlawful employment conditions and unchecked exploitation of employees.⁸⁹ Unable to secure employment in the formal economy, many refugees and asylum seekers in South Africa work as informal traders, for example, selling small food items, second hand clothing, and other cheap items on inner city streets and in medium and high-density suburbs.⁹⁰ Income within the informal sector is both limited and unreliable, resulting in economic marginality that threatens the livelihood of refugees and asylum seekers. Although my examples are drawn from South Africa, UNHCR has found the structural confinement of urban refugees and asylum seekers to the informal sector to be a global phenomenon.⁹¹ It is likely,

87. SAHRC, *supra* note 85, at 30; Polzer, *supra* note 67, at 5.

88. Landau et al., *supra* note 66, at 22.

89. UNHCR POLICY ON REFUGEE PROTECTION AND SOLUTIONS IN URBAN AREAS, *supra* note 63, ¶ 100.

90. One estimate is that “approximately a quarter of asylum seekers and refugees in South Africa earn their livelihoods through informal street trading.” CORMSA 2007, *supra* note 67, at 47 (citing F. BELVEDERE, Z. KIMMIE & E. MOGODI, COMMUNITY AGENCY FOR SOCIAL ENQUIRY, NATIONAL REFUGEE BASELINE SURVEY 51 (2003)).

91. UNHCR notes:

Urban refugees are often confronted with a wide range of legal, financial, cultural and linguistic barriers in their efforts to establish sustainable livelihoods. In many cases, they have little alternative but to join the informal economy, where they find themselves competing with large numbers of poor local people for jobs that are hazardous and

or at the very least conceivable, that many of these contexts of structural confinement are cases of structural xenophobic discrimination in operation.

The economic marginalization of refugees has profound social effects for this group.⁹² In South Africa, it means they are confined to overcrowded neighborhoods,⁹³ often with no electricity, limited access to safe drinking water, and no functioning sanitation systems.⁹⁴ Even though they share these living conditions with South African citizens, the factors that confine refugees to these conditions are unique to their status as foreigners.

D. *Connecting Explicit Prejudice-Based Discrimination and Structural Xenophobic Discrimination*

Structural xenophobic discrimination is a concern in its own right, but it brings about the social marginalization of refugees in ways that increase their vulnerability (as a class) to explicit-prejudice based xenophobic discrimination. For example, refugees working as informal street traders are regular targets of explicitly bias-motivated violence and property vandalism from private citizens who view them as a competitive threat to be eliminated.⁹⁵ Worse still, even the very police force responsible for the equal protection of persons resident in South Africa—foreign and native alike—notoriously prey on foreign informal traders. Police officers have been known to extort money

poorly paid. In some cases, employers may actually choose to engage refugees rather than nationals, but only because they are less likely to complain or seek redress if they are treated unfairly.

UNHCR POLICY ON REFUGEE PROTECTION AND SOLUTIONS IN URBAN AREAS, *supra* note 63, ¶ 100.

92. This is consistent with research from Europe that demonstrates how discrimination in the employment sector can subsequently lead to much broader social marginalization manifest in poor living conditions, health services, and educational opportunities. TIMO MAKKONEN, EQUAL IN LAW, UNEQUAL IN FACT: RACIAL AND ETHNIC DISCRIMINATION AND THE LEGAL RESPONSE THERETO IN EUROPE 128-49 (2012).

93. WOMEN'S REFUGEE COMM'N, NO PLACE TO GO BUT UP: URBAN REFUGEES IN JOHANNESBURG, SOUTH AFRICA 14 (2011) ("Regardless of wealth group, many forced migrants [in South Africa] live in crowded multifamily dwellings, usually single rooms separated by curtains. Some 40.7 percent of Congolese share a room with four to six people and 38.5 percent share with 7 to 30 people. Similarly, 44.1 percent of Somalis share a room with four to six people and 38.7 percent share with 7 to 30 people. The very poor Congolese are twice as likely and very poor Somalis are three times as likely to live with 7 to 30 people.").

94. *See infra* Part II.D.

95. *See* HUMAN RIGHTS WATCH, "PROHIBITED PERSONS": ABUSE OF UNDOCUMENTED MIGRANTS, ASYLUM SEEKERS, AND REFUGEES IN SOUTH AFRICA (1998).

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from refugees and asylum seekers working as informal traders, to forcefully and unlawfully remove these traders from their places of work to appease South African informal traders, and to ignore refugee and asylum seeker pleas for protection against violent and non-violent explicit prejudice-based xenophobic discrimination.⁹⁶

Another striking example of how socio-economic marginalization or underclass status of refugees makes them more vulnerable to explicit prejudice-based discrimination relates to the May 2008 xenophobic violence I mention above. This violence began in the township of Alexandra and was confined to places like it—high-density urban settlements and inner cities.⁹⁷ These areas are home to South Africa's poor and predominantly black working classes, and they are the primary and often permanent destination of forced migrants, including refugees and asylum seekers settling in South Africa's urban areas.⁹⁸ Material conditions in much of these areas border on inhumane.⁹⁹ Alexandra, for example, has a population of approximately 350,000 inhabitants, eighty-one percent of whom occupy the shockingly small area of two square kilometers.¹⁰⁰

Most of these inhabitants live in 74,000 informal structures, 34,000 of which are shacks. Others live in grossly over-crowded hostels built during apartheid to house migrant laborers.¹⁰¹ Some of these hostels have such poor sanitation that raw sewage flows through their corridors.¹⁰² In Alexandra, as in townships across the nation, unemployment is high at twenty-nine percent. Of those that are employed, seventy-one percent works in unskilled or semi-skilled jobs. This results in low levels of income such that twenty percent of households in

96. Landau, *supra* note 84, at 317.

97. SALLY PEBERDY, ATLANTIC PHILANTHROPIES, SETTING THE SCENE: MIGRATION AND URBANISATION IN SOUTH AFRICA 2 (2010).

98. See Melinda Silverman & Tanya Zack, *Housing Delivery, The Urban Crisis and Xenophobia, in GO HOME OR DIE HERE: VIOLENCE, XENOPHOBIA AND THE REINVENTION OF DIFFERENCE IN SOUTH AFRICA* 153 (Tawana Kupe et al. eds., 2008); WOMEN'S REFUGEE COMM'N, *supra* note 93, at 9.

99. Silverman & Zack, *supra* note 98, at 147 (describing these areas as "characterized by severe overcrowding, deteriorating services, high levels of poverty, rampant unemployment, ongoing racial segregation and the daily struggles of poor people forced to compete with one another for increasingly scarce resources").

100. Noor Nieftagodien, *Xenophobia in Alexandra, in GO HOME OR DIE HERE: VIOLENCE, XENOPHOBIA AND THE REINVENTION OF DIFFERENCE IN SOUTH AFRICA* 65, 68 (Tawana Kupe et al. eds., 2008) [hereinafter *Xenophobia in Alexandra*].

101. *Xenophobia's Local Genesis, supra* note 53, at 125-26 (describing the degrading conditions of these hostels).

102. *Xenophobia in Alexandra, supra* note 100, at 68-69.

Alexandra earn the equivalent of about \$140 a month.¹⁰³ Refugees and other forced migrants living in areas such as Alexandra are thus on the front lines of a battle for subsistence and they must engage in it alongside and in competition with South Africa's predominantly black, poor, and working class citizens. Studies from other parts of the world demonstrate that these conditions are by no means unique to South Africa.¹⁰⁴ Although citizens and non-citizens alike must contend with the hardships of life in Alexandra and places like it, the hardships that confront non-citizens, including refugees, are typically harsher.¹⁰⁵ In so far as structural xenophobic discrimination keeps refugees and asylum seekers confined to areas such as Alexandra, they face the continuing risk of violent and non-violent forms of explicit prejudice-based xenophobic discrimination.

There exists quantitative and qualitative empirical basis for a statistically significant connection between explicit prejudice-motivated acts of xenophobic discrimination, and the structural material conditions within which these acts are embedded. Although much empirical work remains to be done on the precise nature of this relationship, among those scholars who study xenophobia in South Africa, there is consensus that structural material conditions of actual and perceived scarcity are important determinants of explicit prejudice-motivated acts of xenophobic discrimination.¹⁰⁶ A current research focus has been on qualitative and quantitative accounts of the structural triggers

103. *Id.* at 68.

104. In an editorial introduction to a volume on the livelihood of refugees and asylum seekers in urban areas of Kenya, Egypt, Kampala, Japan, the United Kingdom, and Canada, Karen Jacobsen notes: "In shantytowns and inner cities, host country nationals and refugees alike confront the structural problems associated with urban poverty. Everyone struggles to meet physical necessities (housing, food, clean water) and to access education and health care." She further notes that the experiences of refugees are exacerbated by their particularized protection needs, including protection from discrimination. Jacobsen, *supra* note 66, at 276.

105. *Id.*

106. See, e.g., Devan Pillay, *Relative Deprivation, Social Instability and Cultures of Entitlement*, in GO HOME OR DIE HERE: VIOLENCE, XENOPHOBIA AND THE REINVENTION OF DIFFERENCE IN SOUTH AFRICA 93 (Shireen Hassim et al. eds., 2008) (arguing that "class inequality is a systemic problem of uneven development (abundance/scarcity, wealth/poverty, stuffed/starved. Insider/outsider, power/powerlessness, empowerment/disempowerment)"); Christine Fauvelle-Aymar & Aurelia Segatti, *People, Space and Politics: An Exploration of Factors Explaining the 2008 Anti-Foreigner Violence in South Africa*, in EXORCISING THE DEMONS WITHIN 74, 77 (Loren B. Landau ed., 2011) ("[T]ownships and squatter settlements have remained marginalised spaces where poverty and deprivation are experienced most sharply, and consequently where the struggle over limited resources tends to generate politics of exclusion and fear that undergird xenophobia."); MISAGO, LANDAU & MONSON, *supra* note 55.

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of xenophobic violence. A recent econometric study conducted by researchers at the African Center for Migration and Society offers empirical evidence of a statistically significant correlation between acts of xenophobic violence and structural material scarcity.¹⁰⁷ According to ACMS, “empirical analysis shows that violence is more likely when the ratio of the intermediary income relative to the proportion of low income (the inter-poor variable) increases.”¹⁰⁸ Put differently, an increase in the ratio of people earning between ZAR 12,800 and ZAR 800 (USD 564 – USD 98) to those earning less than ZAR 800 (USD 98) makes violent xenophobic discrimination more likely, providing support for a more nuanced version of the relative deprivation theory.¹⁰⁹ Importantly, housing type is also a significant explanatory variable: “incidents of violence are more frequent in sites characterised by informal dwellings and shacks.”¹¹⁰

In addition to quantitative studies, qualitative studies provide further support for a structural account of important determinants of explicit prejudice-based xenophobic discrimination. For example, two years after the May 2008 violence, the Centre for Civil Society (CCS) at the University of KwaZulu-Natal published the results of a qualitative study based on interviews with 187 people residing in various sites in the South African city of Durban.¹¹¹ A central thrust of these findings was that civil society’s response to the May 2008 xenophobic violence—including humanitarian assistance following the violence¹¹² and public awareness campaigns to promote tolerance¹¹³—failed to tackle the root of this violence, which CCS located in structural variables.¹¹⁴ Among these were “extremely high unemployment[;] a tight housing market with residential stratification, and service delivery shortfalls[;]

107. Fauvelle-Aymar & Segatti, *supra* note 106.

108. *Id.* at 74.

109. *Id.* at 77.

110. *Id.* at 74.

111. Amisi et. al, *Xenophobia and Civil Society: Durban’s Structured Social Divisions*, in 38 POLITIKON 53 (2011) [hereinafter *CCS Report*].

112. *Id.* at 66.

113. *Id.*

114. *Id.* at 60-61. According to the CCS Report,

[t]he combination of immigrant rightlessness and structural exclusion, amidst a perceived invasion of ‘foreigners’, resulted in organised social activism against individuals perceived as dangerous to the socio-cultural and moral fabric, and as threatening the economic opportunities of poor South Africans, within a system set up by wealthy South Africans to superexploit migrant labour from both South Africa and the wider region.

Id.

extreme retail business competition[; and] world leading crime rates.”¹¹⁵ Following a baseline study commissioned by the International Organization for Migration (IOM), the African Center for Migration and Society at Witwatersrand University also reported that structural factors were among the determinants of the May 2008 attacks and preceding episodes of violence.¹¹⁶ The study found high unemployment rates and poor service delivery with respect to housing, water and sanitation to be contributing, though insufficient, explanators of the xenophobic violence.¹¹⁷

My point here is not to reduce all the complex factors that result in hardship for refugees to structural xenophobic discrimination. It is instead to illustrate that, despite the visibility of explicit prejudice-based xenophobic discrimination, refugees are also routinely subjected to structural xenophobic discrimination, which substantially contributes to this hardship. Structural xenophobic discrimination itself harms refugees, including by bringing about their socio-economic marginalization. As a socio-economic underclass, refugees are then also more vulnerable to explicit prejudice-based xenophobic discrimination.

It is in response to circumstances such as these that UNHCR and other refugee protection advocates have developed a global anti-xenophobic discrimination policy framework.

III. THE PREJUDICE APPROACH

A. *UNHCR and Global Refugee Protection: An Overview*

Some context is necessary to highlight the importance of UNHCR’s international anti-xenophobic discrimination policy. Under international law, the primary responsibility for the protection of refugees lies with states. In reality, however, particularly in the global south, this

115. *Id.* at 63. For further discussion and context regarding the structural determinants identified by this study, see *id.*

116. Among these were “institutionalised attitudes and practices that dehumanise foreign nationals and/or minority groups and exclude them from access to social protection and rights.” MISAGO, LANDAU & MONSON, *supra* note 55, at 8. To be clear, this report found structural factors to be necessary, though insufficient, explanators of the xenophobic attacks. The African Centre for Migration and Society (ACMS) was known as the Forced Migration Studies Programme (FMSP) at the time it published this report.

117. *Id.* at 33. With respect to factors determining the timing and location of the violence, FMSP found that “in almost all cases where violence occurred, it was organised and led by local groups and individuals in an effort to claim and consolidate the authority and power needed to further their political and economic interests.” *Id.* at 2.

responsibility falls to non-state actors because governments are unable or unwilling to provide this protection.¹¹⁸ Among these non-state actors, UNHCR is the most important international body, created “(1) to ensure the international protection of refugees; and (2) to find solutions to their plight.”¹¹⁹ Together, the United Nations Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees (UN Refugee Convention and its Protocol) form the cornerstone of the international refugee protection framework, and they establish UNHCR as their monitoring body.¹²⁰ Under Article 35 of the UN Refugee Convention, states parties are required to cooperate with UNHCR “in the exercise of its functions,” and to “facilitate [UNHCR’s] duty of supervising the application of this Convention.”¹²¹

UNHCR operates in more than 125 countries with a staff of about 7,685 people.¹²² Its 2012 budget was USD 3.59 billion. It uses these resources to provide remarkable humanitarian assistance to displaced persons by administering camps for refugees and internally displaced persons and providing emergency relief outside of the camp con-

118. In many parts of the world, private citizens, too, play a large role in providing assistance to refugees. This has been the case in the ongoing Syrian refugee crisis, where communities in neighboring countries have been instrumental in assisting Syrian refugees. *See, e.g.*, Joelle Tanguy, Under Sec’y Gen., Int’l Fed’n of Red Cross & Red Crescent Soc’ys, Solidarity with Countries Hosting Refugees, Address Before the 64th Session of the Executive Committee of the UNHCR High-Level Segment on Solidarity and Burden-Sharing with Countries Hosting Syrian Refugees (Oct. 1, 2013), *available at* <http://reliefweb.int/report/lebanon/solidarity-countries-hosting-syrian-refugees> (noting the crucial role of host communities in Lebanon, Jordan, Iraq, Turkey, Egypt, Bulgaria and Italy in providing assistance to refugees).

119. ALEXANDER BETTS, GIL LOESCHER & JAMES MILNER, *UNHCR: THE POLITICS AND PRACTICE OF REFUGEE PROTECTION* 82 (2d ed. 2012). For a detailed account of UNHCR and its role in refugee protection see CORRINE LEWIS, *UNHCR AND INTERNATIONAL REFUGEE LAW: FROM TREATIES TO INNOVATION* (2012).

120. This is the case even though UNHCR predates these instruments. G.A. Res. 428(V) (Dec. 14, 1949).

121. U.N. Refugee Convention, *supra* note 1, art. 35. The preamble to the 1951 Refugee Convention recognizes that UNHCR “is charged with the task of supervising international conventions providing for the protection of the refugees.” Unlike the supervisory mechanisms established under various UN human rights conventions, UNHCR does not have a complaints procedure or engage in periodic reviews of states parties to the UN Refugee Convention. Yet its pivotal role as the global leader in refugee protection cannot be overstated. *See* LEWIS, *supra* note 119, at 23-49 (documenting the UNHCR’s work).

122. *What We Do*, UN REFUGEE AGENCY, <http://www.unhcr.org/pages/49c3646cbf.html> (last visited Dec. 18, 2013).

text.¹²³ In cases where states fail to conduct refugee status determination procedures, UNHCR may step in to perform this task and may also take on the task of “monitoring states’ borders to ensure that refugees are not wrongly sent back to their country of origin against their will.”¹²⁴ UNHCR’s international protection mandate requires that it ensure individuals are able to access asylum, and that states respect the rights that attach to refugee status.¹²⁵

Although UNHCR has limited ability to coerce state compliance with international refugee law, “for much of its history, UNHCR has been a ‘teacher’ of international norms, promoting and disseminating international refugee law, and socializing states into ratifying key conventions and incorporating the main tenets of international refugee law within domestic legislation and policy frameworks.”¹²⁶ For example, UNHCR has in the last three decades adopted a practice of producing authoritative guidance on international refugee protection pursuant to its mandate under the UNHCR Statute, Article 35 of the UN Refugee Convention, and Article II of the Protocol to the UN Refugee Convention.¹²⁷ Among these are the UNHCR Handbook, Guidelines on International Protection, Guidance Notes, Eligibility Guidelines, and even *amicus curiae* briefs for court interventions.¹²⁸ Some of this guidance is interpretive—providing clarity on international refugee law—and some of it applies international refugee law to particular facts in a country or region.¹²⁹

These documents are not a source of international law,¹³⁰ but are instead best considered “non-binding ‘soft law,’” deriving their persuasiveness from UNHCR’s unique expertise in refugee protection, and

123. INGO VENZKE, *HOW INTERPRETATION MAKES INTERNATIONAL LAW: ON SEMANTIC CHANGE AND NORMATIVE TWISTS* 87-88 (2012). Its current work assisting the multitude of refugees fleeing the Syrian crisis is an important case in point. For an overview of UNHCR’s immense protection and humanitarian effort in Syria’s neighboring countries, see Syrian Refugee Response Plan Inter-agency Information Sharing Portal, UNHCR, <http://data.unhcr.org/syrianrefugees/regional.php> (last visited Jan. 10, 2014).

124. BETTS, LOESCHER & MILNER, *supra* note 119, at 86.

125. *Id.* at 85; *see, e.g.*, UNHCR POLICY ON REFUGEE PROTECTION AND SOLUTIONS IN URBAN AREAS, *supra* note 63, at 8-24 (describing many of UNHCR’s protection strategies).

126. BETTS, LOESCHER & MILNER, *supra* note 119, at 94.

127. UNHCR’s Department of International Protection produces this guidance. CECILIE SCHJAVET, NORWEGIAN DIRECTORATE OF IMMIGR., *THE MAKING OF UNHCR’S GUIDANCE AND ITS IMPLEMENTATION IN THE NATIONAL JURISDICTION OF THE UNITED KINGDOM, NORWAY AND SWEDEN* 20 (2010).

128. For discussion of these different document types, *see id.* at 16-49.

129. *See id.* at 20.

130. *Id.* at 19.

more importantly from the duty that states parties to the UN Refugee Convention have to cooperate with UNHCR.¹³¹ Even as soft law, however, the global influence of UNHCR guidance is far-reaching.¹³² Domestic, regional, and international courts regularly rely on UNHCR's guidance to interpret states' obligations towards refugees.¹³³ This guidance is further intended for law and policy-makers, as well as non-governmental advocates engaged in domestic refugee protection.¹³⁴

B. *UNHCR's Anti-Xenophobic Discrimination Policy: International Human Rights Law Foundations*

It is only in the last decade or so that UNHCR has officially undertaken a range of global policy and advocacy initiatives to combat xenophobic discrimination.¹³⁵ It has chosen to ground these initiatives in international human rights law, and not in the international refugee law regime.¹³⁶ For much of its existence, UNHCR maintained what it

131. *Id.*

132. Professor Ingo Venzke, who has studied UNHCR's role in the elaboration of refugee law notes: "It is beyond doubt that [UNHCR's publications] are not binding on states. But this does not exhaust the issue of their standing in the practice of interpretation and their influence in the process of communicative lawmaking. UNHCR claims semantic authority and enjoys such authority in the eyes of others." VENZKE, *supra* note 123, at 117. Semantic authority refers to an organization or institution's ability to serve as an independent source of guidance on the meaning of law, because of the influence it has on important legal actors such as courts.

133. *Id.* at 109-34.

134. LEWIS, *supra* note 119, at 78-80. In addition, UNHCR guidance informs the work of its large field staff, which implements international law for the protection of refugees. *Id.*

135. On its own account, the key initiatives of UNHCR's global policy and advocacy to combat xenophobic discrimination have been: its contribution to developing the provisions of the 2001 Durban Declaration and Programme of Action that relate to discrimination against refugees and asylum seekers; the 2009 UNHCR Guidelines; an annual consultation with NGOs on strategies for protecting refugees and asylum seekers from xenophobic discrimination; continuous coordination with the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance; and promotion of the strategic use of the international human rights framework, particularly the Discrimination Convention, for refugee protection. *UNHCR CERD Thematic Discussion*, *supra* note 4, at 3-4. At the domestic level, UNHCR points to partnerships with national NGOs to promote tolerance via public awareness campaigns.

136. Combating Racism, Racial Discrimination, Xenophobia and Related Intolerance Through a Strategic Approach, UNHCR ¶ 11 (2009) (identifying the Discrimination Convention as the cornerstone for fighting xenophobic discrimination); *see also* INT'L LABOUR ORG. ET AL., *supra* note 26, at 3 ("Human rights must be at the centre of any analysis of migration and xenophobia."). This turn remains noteworthy in the refugee protection context, which at the international level has traditionally been regulated by a separate regime from that of international human rights law: the UN Refugee Convention and its Protocol. These instruments set the

subsequently described as “a deliberate distance” from the international human rights framework.¹³⁷ Thus, although today UNHCR firmly embraces this framework as an important source of complementary protection for refugees, it is necessary to underscore that this shift is both relatively recent and decidedly strategic. It is strategic in the sense that it marks a deliberate choice calculated to enhance refugee protection by aligning two previously discrete international legal frameworks.¹³⁸

prevailing international legal standard for who qualifies for refugee protection, and enumerate the rights to which such individuals are entitled under international law. For an analysis of these instruments, see JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 91-112 (2005). International protection is supplemented by regional refugee protection frameworks in Africa by the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, and in the Americas by the 1984 Cartagena Declaration on Refugees. For most of its existence, this international refugee law framework evolved separately from that of international human rights, notwithstanding the recent, seeming normative convergence between the two. Vincent Chetail, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations Between Refugee Law and Human Rights Law*, in *MIGRATIONS AND HUMAN RIGHTS, COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW* (R. Rubio Marin ed., forthcoming 2013), available at <http://ssrn.com/abstract=2147763> (noting that “from the angle of the content of their respective norms, the border between the two regimes has been steadily blurred,” and pointing to the role of human rights treaty bodies in this process).

137. *UNHCR and Human Rights*, UNHCR 1 (1997), available at <http://www.refworld.org/docid/3ae6b332c.html>. It was not until 1997 that UNHCR for the first time comprehensively addressed the connection between refugee protection and human rights. See Brian Gorlick, *Human Rights and Refugees: Enhancing Protection Through International Human Rights Law*, 69 *NORDIC J. INT'L L.* 117, 125 (2000).

138. *UNHCR CERD Thematic Discussion*, *supra* note 4, at 3-4 (acknowledging “the strategic use of the international human rights framework, particularly [the Discrimination Convention], for refugee protection”). A comparison of the relative advantages and disadvantages of using international human rights law over international refugee law for refugee protection generally is a task beyond the scope of this Article. Generally speaking, as global refugee protection has in practice made a broad move towards international human rights law, scholars, too, have for the most part endorsed this shift. See, e.g., Tom Clark, *Rights Based Refugee, the Potential of the 1951 Convention and the Need for Authoritative Interpretation*, 16 *INT'L J. REFUGEE L.* 584 (2004) (calling for authoritative interpretation of human rights treaties as they apply to refugees); Guy S. Goodwin-Gill, *Refugees and their Human Rights*, 17 *REFUGEE STUD. CTR. WORKING PAPER SERIES* 6-7 (2004) (characterizing the UN Refugee Convention as essentially a human rights instrument, and calling for greater use of human rights to protect asylum seekers, and in the interpretation of the refugee criteria); Jacqueline Bhabha, *Internationalist Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights*, 15 *HARV. HUM. RTS. J.* 155, 168 (2002) (noting the role of human rights in grounding the definition of “persecution”); Brian Gorlick, *Human Rights and Refugees: Enhancing Protection Through International Human Rights Law*, 69 *NORDIC J. INT'L L.* 117, 119 (2000) (arguing that “UNHCR and other actors should continue to actively develop and promote the practical and analytical links between human rights and refugee protection”); Tom Clark & François Crépeau, *Mainstreaming Refugee Rights: The 1951 Refugee Convention and International Human Rights Law*,

The international human rights law at the center of UNHCR's policy is the International Convention for the Elimination of Racial Discrimination (the Discrimination Convention). The Discrimination Convention provides a legally binding framework for the elimination¹³⁹ of racial discrimination, which it defines broadly, as

[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.¹⁴⁰

The Discrimination Convention prohibits discrimination on the basis of the primary classifications that intersect in the construction of

17 NETH. Q. HUM. RTS. 389, 408 (1999) (arguing that the UN Refugee Convention “be considered alongside and in the current juridical context of the UN human rights treaties and the current doctrine of non-discrimination,” and that it be “subjected to more attention by various international treaty bodies”); Guy S. Goodwin-Gill, *International Law and Human Rights: Trends Concerning International Migrants and Refugees*, 23 INT’L MIGRATION REV. 526 (1989); see also Louis Henkin, *Refugees and Their Human Rights*, 18 FORDHAM INT’L L.J. 1079 (1994); James C. Hathaway, *Reconceiving Refugee Law as Human Rights Protection*, 4 J. REFUGEE STUD. 113, 122 (1991) (arguing that the “conceptualization of persecution as the failure of basic state protection demonstrated through the denial of core, internationally recognized human rights is a helpful means of breathing new life into refugee law”); Margaret G. Wachenfeld & Hanne Christensen, Note, *An Introduction to Refugees and Human Rights*, 59 NORDIC J. INT’L L. 178, 179 (1990) (arguing in support of the application of human rights standards to refugees). But see HATHAWAY, *supra* note 136, at 120-23 (expressing concern that human rights may not be able to account for the specific circumstances of refugeehood); Daniel Warner, *Refugees, UNHCR and Human Rights: Current Dilemmas of Conflicting Mandates*, 17 REFUGEE 12, 14 (1998) (arguing that a human rights approach in fact weakens refugee protection by failing to address the specificity of the condition of being a refugee).

139. The Discrimination Convention scholar and former commissioner of the Committee on the Elimination of Racial Discrimination, Michael Banton, is skeptical of the utility of thinking in terms of the elimination rather than the prohibition, holding the view that discrimination is not a phenomenon that can ever be eliminated from human society. MICHAEL BANTON, *INTERNATIONAL ACTION AGAINST RACIAL DISCRIMINATION* 50 (1996). While one may question the feasibility of total elimination, I embrace the notion of elimination in so far as it signals a commitment not only to prohibiting discriminatory behavior, but also to addressing its causes and effects.

140. International Convention on the Elimination of All Forms of Racial Discrimination art. 1, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter *The Discrimination Convention*]. For a succinct but comprehensive examination of the Discrimination Convention’s general antidiscrimination framework, see MAKKONEN, *supra* note 92, at 128-49.

foreignness.¹⁴¹ And the Discrimination Convention's monitoring body, the Committee on the Elimination of Racial Discrimination (the Discrimination Committee)¹⁴² has recognized discrimination that occurs at the intersection of multiple classifications.¹⁴³ Thus, although

141. 2009 UNHCR Guidance Note, *supra* note 16, ¶¶ 10-11 (stating that refugees may suffer xenophobic discrimination on account of “race, colour, descent, or national or ethnic origin, including in combination with other grounds, such as religion, gender[,] disability” and nationality). The Discrimination Convention does not define the term “national origin,” but it does make clear the distinction between national origin and nationality. Scholarship on the Discrimination Convention’s drafting history reports that, among certain drafters, the term national origin captured linguistic and cultural differences, while among others it connoted a connection to a different country via past citizenship, but it was not intended to mean nationality. MAKKONEN, *supra* note 92, at 136. Article 1(2) states that the Discrimination Convention “shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.” However, the Discrimination Committee has explained that in the first place, Article 1(2) should not be construed as undermining or detracting from protections afforded to non-citizens under the three instruments that comprise the international bill of rights: the Universal Declaration of Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPR), and the International Convention on Economic Social and Cultural Rights (ICESCR). More importantly the Discrimination Committee has called attention to Article 5 of the Discrimination Convention, which “incorporates the obligation on states parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights.” UN COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (CERD), CERD GENERAL RECOMMENDATION 30 ON DISCRIMINATION AGAINST NON CITIZENS ¶ 3 (Oct. 1, 2002). On the basis of this provision, it stated that political rights such as the right to vote or to stand for election may permissibly be limited to citizens, but that states parties “are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of [human rights] to the extent recognized under international law.” *Id.* ¶ 3. In sum, the Discrimination Committee has determined that under the Discrimination Convention, “differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.” *Id.* ¶ 4. In other words, discrimination on the basis of nationality may in fact constitute discrimination under the Discrimination Convention. Kevin Boyle & Anneliese Baldaccini, *A Critical Evaluation of International Human Rights Approaches to Racism*, in DISCRIMINATION AND THE CASE OF RACISM 154-55 (Sandra Fredman ed., 2001) (“The inclusion of non-citizens within the reach of Article 4 has never been disputed nor that equality before the law must be guaranteed to everyone.”); WOUTER VANDENHOLE, NON-DISCRIMINATION AND EQUALITY IN THE VIEW OF THE UN HUMAN RIGHTS TREATY BODIES 91 (2005) (surmising that the Discrimination Committee’s interpretation of Article 1 paragraph 2 implies that “apart from the right to participate in elections, to vote and to stand for elections . . . differentiation between citizens and non citizens with regard to human rights is no longer permissible”).

142. The Discrimination Convention, *supra* note 140, art. 8.

143. Comm. on the Elimination of Racial Discrimination Gen. Recommendation No. 25, *Gender Related Dimensions of Racial Discrimination*, 56th Sess., Mar. 20, 2007, U.N. Doc. A/55/18, annex V ¶ 1 (Mar. 20, 2007). This is important as it avoids the problem identified by Professor Saito, who points out that reliance on separate laws or provisions that individually prohibit

“foreignness” is not a category listed in Article 1, this provision nonetheless prohibits conduct and measures that meet the definition of xenophobic discrimination.¹⁴⁴ As a result, UNHCR has used the Discrimination Convention as the legal basis for its global anti-xenophobic discrimination policy.

C. *The Prejudice Approach*

UNHCR has fashioned an anti-xenophobic discrimination policy framework that relies on the Discrimination Convention. Review of UNHCR policy and advocacy reveals the predominance of what I call a “prejudice approach,” which focuses almost exclusively on regulating explicit anti-foreigner prejudice and the bad actors who are motivated by this prejudice to violate the rights of refugees.¹⁴⁵ Two categories of

discrimination on the basis of race or national origin can be dangerous in the context of discrimination on account of foreignness, because these laws may be interpreted restrictively to exclude foreignness discrimination. Saito, *supra* note 50, at 316; *see also* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1251 (1991) (showing how the failure to account for oppression at the intersection of social categories, when combined with institutions premised on non-intersectional contexts, can shape and subsequently compromise interventions on behalf of persons located at these intersections).

144. Notably, however, the Discrimination Committee has stated that “a general reference to ‘foreigners’ is not at present considered to single out a group of persons on the basis of a specific race, ethnicity, colour, descent or national origin within the meaning of Article 1.” MAKKONEN, *supra* note 92, at 137 (referencing *Kamal Quereshi v. Denmark*, Communication No. 33/2003). Instead, it is necessary to specify the categories of foreignness prohibited by article 1 of the Discrimination Convention.

145. *See, e.g.*, 2009 UNHCR Guidance Note, *supra* note 16, ¶ 1 (“Xenophobia and racism are often at the root of discrimination and intolerance against asylum seekers and refugees Many UNHCR offices have identified negative public attitudes towards persons of concern as a significant obstacle to the provision of international protection.”); Press Release, UNHCR, UNHCR Issues Guidelines to Counter Discrimination, Intolerance, UNHCR Press Release (Dec. 22, 2009). The core of UNHCR’s recommended strategic approach to fighting xenophobic discrimination is premised on the belief that it can be defeated “if the psychological elements behind [xenophobic discrimination] are understood” and society takes up the challenge of combating them. 2009 UNCHR Guidance Note, *supra* note 16, ¶ 7. On this basis, the guidance note identifies seven elements of a strategic approach fighting xenophobia, all of which focus on combating the “psychological elements” at the core of xenophobia. These seven elements of the strategic approach are:

- (i) monitoring signs of racial discrimination, xenophobia and related intolerance, and tracking and reporting hate crimes; (ii) analysing the underlying reasons; (iii) assessing the manifestations of these phenomena and their impact on protection; (iv) understanding legal obligations to protect all individuals from racial discrimination and multiple forms of discrimination; (v) engaging a network of diverse organizations and actors that

strategies, both central to UNHCR's anti-xenophobic discrimination policy, bear this out.

The first category focuses on the imposition and enforcement of criminal or civil penalties for rights violations perpetrated by individuals motivated by explicit anti-foreigner prejudice. A central feature is thus advocacy to promote and enforce hate crimes legislation, which occupies a prominent place within UNHCR's strategic approach to fighting xenophobic discrimination.¹⁴⁶

UNHCR has noted that there is no international law definition of a hate crime, but Article 4 of the Discrimination Convention and Article 20 of the International Covenant on Civil and Political Rights provide a legal basis for prohibiting hate crimes. In its Guidance Note for combating xenophobic discrimination, UNHCR offers the following description of hate crimes:

Hate crimes—or bias-motivated crimes—are generally defined as any criminal offence directed at a person(s) or property due to the real or perceived connection, attachment, affiliation, support, or membership of a group associated with that person or property Criminal offenses motivated by the offender's bias against an individual based on his/her race, religion, disability, sexual orientation, ethnic or national origin are generally recognized as falling within the category of hate crimes.¹⁴⁷

implement complementary activities targeting different groups in society; (vi) including affected communities in the strategic approach; and (vii) providing individual support to victims.

Id.

146. See, e.g., 2009 UNHCR Guidance Note, *supra* note 16, ¶ 7 (listing “monitoring signs of racial discrimination [as broadly defined by the Discrimination Convention], xenophobia and related intolerance, and tracking and reporting hate crimes” as the first element of a strategic approach to fighting xenophobic discrimination). UNHCR offers the example of Human Rights First’s “Ten-Point Plan for Combating Hate Crimes” as a commendable anti-xenophobic discrimination strategy. *Id.* ¶ 16. UNHCR singles out for commendation human rights bodies such as CERD for calling for punishment of hate crimes. *Id.* ¶ 17.

147. Combating Racism, Racial Discrimination, Xenophobia and Related Intolerance Through a Strategic Approach, *supra* note 136, at n.1. For hate crimes emphasis, see *id.* ¶¶ 1, 13, 16, 17.

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From South Africa¹⁴⁸ to the Ukraine,¹⁴⁹ efforts are underway to pursue hate crimes legislation and enforcement for the protection of refugees from explicit prejudice-based xenophobic discrimination.¹⁵⁰ UNHCR has also underscored the work of international human rights treaty monitoring bodies calling for punishment of perpetrators of prejudice-motivated acts against refugees.¹⁵¹ In keeping with UNHCR, other highly influential global refugee protection actors have embraced a similar focus on punishing hate crimes against refugees and asylum seekers.¹⁵²

148. *Combating Xenophobic Violence*, *supra* note 5, at 11-12 (describing pursuit of hate crimes legislation and enforcement in South Africa).

149. Ukraine's "Diversity Initiative," launched by UNHCR, IOM, and Amnesty International, among others, had hate crimes prosecution as a central strategy for fighting xenophobic discrimination. 2009 UNHCR Guidance Note, *supra* note 16, ¶ 14.

150. UNHCR has even entered into a memorandum of understanding with the Organization for Security Co-operation in Europe's Office for Democratic Institutions and Human Rights (ODIHR) to facilitate coordination by the two bodies to combat hate crimes. Memorandum of Understanding Between the OSCE Office for Democratic Insts. and Human Rights and the Office of the United Nations High Comm'r for Refugees (June 22, 2011).

151. *See* 2009 UNHCR Guidance Note, *supra* note 16, ¶ 17 (highlighting calls by the Discrimination Convention for the prosecution and punishment of prejudice-motivated acts against refugees and asylum seekers).

152. These include the International Labor Organization (ILO), the International Organization for Migration (IOM), and the Office of the High Commissioner for Human Rights (OHCHR). ILO, IOM & OHCHR, *supra* note 52, at III. Human Rights First (HRF), which has worked closely with UNHCR on the issue of xenophobic violence, is among the foremost international NGOs currently advocating on behalf of refugees and asylum seekers facing this form of discrimination. For example, HRF and UNHCR jointly convened a thematic session on xenophobic discrimination at UNHCR's 2010 Annual Consultation with Non-Governmental Organizations. U.N. High Comm'r for Refugees (UNHCR), *UNHCR's Contribution to the Secretary-General's Report with Recommendations on Global Trends in the Fight Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance to the General Assembly for its 66th Session Pursuant to A/RES/64/148*, 4 (June 2011) [hereinafter *UNHCR's Contribution*]. HRF's strategic approach prioritizes the enforcement of hate crimes legislation, which requires prosecutions of alleged perpetrators, as well as monitoring and reports of attacks. *Combating Xenophobic Violence*, *supra* note 5, at 2-3, 30 (Human Rights First's Ten-Point Plan for Combating Hate Crimes). Another example is the response of international and domestic human rights advocates following the May 2008 violence. Adopting the prejudice approach, these advocates focused on prosecution of perpetrators of xenophobic violence, and failed to consider measures to address human rights violations as a result of structural forms of xenophobic discrimination. For example, South Africa's premier human rights academic institute published a report detailing South Africa's international and domestic human rights obligations towards non-nationals affected by the violence. CTR. FOR HUMAN RIGHTS, UNIV. OF PRETORIA, *THE NATURE OF SOUTH AFRICA'S LEGAL OBLIGATIONS TO COMBAT XENOPHOBIA* (2009). This report found that by failing to protect the victims of violence from non-state actors the South African government had violated their right to liberty and security of person. *Id.* at 4.

The second set of strategies comprising the prejudice approach involves the use of human rights education initiatives to promote tolerance of refugees and asylum seekers.¹⁵³ These strategies are also firmly rooted in international human rights law, including Article 7 of the Discrimination Convention.¹⁵⁴ The Discrimination Convention singles out public education to promote respect for and tolerance of groups that face discrimination, and to disseminate the normative vision of the international human rights framework as crucial for eliminating prejudice.¹⁵⁵ It prohibits the dissemination of ideas based on racial, national, or ethnic superiority, and it outlaws organizations and propaganda activities inciting racial discrimination.¹⁵⁶ The Discrimination Convention also requires states parties to adopt tolerance-promoting measures to combat “prejudices which lead to racial discrimination,” especially “in the fields of teaching, education, culture and information.”¹⁵⁷

To promote tolerance, UNHCR has advocated public awareness campaigns regarding the human rights of refugees and their reasons for fleeing their countries of nationality, as well as sporting events bringing together foreign nationals and citizens with the goal of forming positive social bonds.¹⁵⁸ Sensitization of media outlets as to their role in the promotion of diversity and tolerance has also been

153. Neil Gotanda offers a useful definition of tolerance and diversity, where tolerance is acceptance of multiculturalism and multiracialism as necessary evils in a given society. Neil Gotanda, *A Critique of “Our Constitution is Color-Blind”*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 268 (Kimberle Crenshaw et al. eds., 1995). Diversity, on the other hand, holds racial and cultural pluralism as a positive good in society. *Id.*

154. The Discrimination Convention, *supra* note 140, art. 7 (“States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.”).

155. Boyle and Baldaccini note: “Priority has been given under the Convention to legislation intended to suppress propaganda, the dissemination of racist ideas, and the prohibition of organizations that advocate racist violence and hatred . . . This approach was and remains an essential foundation.” Boyle & Baldaccini, *supra* note 141, at 164.

156. The Discrimination Convention, *supra* note 140, art. 4.

157. *Id.* art. 7.

158. Examples include South Africa’s UNHCR-sponsored “Roll Back Xenophobia” campaign, designed to promote tolerance and diversity through human rights education and sensitization to the plight of refugees and other forced migrants, S. Afr. Human Rights Comm’n, Fourth Annual Report 12 (1998-99); a UNHCR co-sponsored soccer tournament in Ireland—the “Fair Play Football Cup”—intended to promote cultural awareness, and a soccer tournament in

important.¹⁵⁹ Noting the scourge of xenophobic violence in South Africa, for example, UNHCR states that in order to prevent these attacks, it will “continue to commission the services of radio production companies to create messages promoting tolerance and coexistence.”¹⁶⁰ UNHCR has used similar and other awareness raising or sensitization campaigns in the Americas¹⁶¹ and Europe.¹⁶²

D. *The Limitations of the Prejudice Approach*

Punishing individuals motivated by explicit prejudice to violate the rights of refugees and using human rights education to promote tolerance for refugees are both important for protecting refugees against certain forms of xenophobic discrimination. In so far as the prejudice approach (1) holds responsible individuals to account, (2) deters future acts of xenophobic discrimination, (3) affords some material compensation to victims, and (4) fosters more tolerant societies, it has great value. However, it is conceptually inadequate to protect refugees from the full spectrum of discriminatory harm they experience on account of their status as foreigners. Specifically, the prejudice approach’s exclusive focus on xenophobic discrimination involving explicit antirefugee prejudice completely ignores structural xenophobic discrimination. Given the substantial harmful effects of structural xenophobic discrimination—including turning refugees into a de facto

Ecuador, co-sponsored by UNHCR for the same purposes, *UNHCR’s Contribution*, *supra* note 152, at 7-8.

159. See, e.g., *UNHCR’s Contribution*, *supra* note 152, at 8-9 (stating the importance of media outreach and training, and citing examples of initiatives in Ireland and Italy in this regard).

160. UNHCR, 2012 UNHCR Country Operations Profile—South Africa.

161. *UNHCR’s Contribution*, *supra* note 152, at 4-5. Examples include Costa Rica’s UNHCR-sponsored “La Red de Jóvenes sin Fronteras” (Youth Network Without Borders) devoted to promoting tolerance and diversity among youth in the face of xenophobic discrimination, Erin Kastelz, *Costa Rican Youth Strives to Combat Xenophobia*, UNHCR (Oct. 14, 2011), www.unhcr.org/4e9856c79.html; Ecuador’s 2012 UNHCR sponsored anti-xenophobic discrimination awareness campaign, “Convivir en Solidaridad,” *UNHCR’s Contribution*, *supra* note 152, at 5-6; and Mexico, where UNHCR has jointly launched a literature contest to “create awareness about refugees and to promote local integration and non-discrimination,” *UNHCR’s Contribution*, *supra* note 152, at 6-7.

162. Examples include: Ukraine’s “Diversity Initiative,” launched by UNHCR, IOM, and Amnesty International, among others, which included tolerance sensitization in addition to perpetrator model strategies, 2009 UNHCR Guidance Note, *supra* note 16, ¶ 14; Italy’s “Don’t be Afraid, Be Open to Others, Be Open to Rights” Campaign, launched in 2009 by UNHCR and twenty-seven partners, *id.* ¶ 24; and in Greece where UNHCR has jointly launched an education toolkit to mitigate xenophobic prejudice, *UNHCR’s Contribution*, *supra* note 152, at 7.

underclass—an anti-xenophobic discrimination policy that ignores this problem is inadequate.¹⁶³

Even for those concerned purely with explicit prejudice-motivated xenophobic discrimination, there is good reason to believe that an approach that addresses structural xenophobic discrimination is necessary to achieve their goals. As I argue in Section II.D., empirical evidence suggests that the socio-economic marginalization of refugees that results in part from structural xenophobic discrimination makes refugees more vulnerable to explicit prejudice-based xenophobic discrimination. UNHCR itself has acknowledged structural determinants of xenophobic discrimination in South Africa, stating that: “Competition between refugees and South African nationals for jobs, housing, business opportunities and social services has raised tensions, and aggravated xenophobic attitudes among some in the local community. It is noticeable that poor socio-economic conditions among host communities provide a breeding ground for xenophobia.”¹⁶⁴ But this acknowledgement is not reflected in UNHCR’s prejudice approach.¹⁶⁵

163. I should be clear that, in calling for an account of xenophobic discrimination that incorporates its structural operation, I do not mean to erase the role of individual and group agency in the perpetration of discriminatory acts. Individual murderers, rapists, looters, and other actors should be held to account for their acts, and indeed there is reason to believe that a reliable individual accountability mechanism is an important part of any regime for eliminating discrimination. MISAGO, LANDAU & MONSON, *supra* note 55, at 8. However, the acts of these individuals and comprehensive culpability for xenophobic discrimination, even as a legal matter, can only properly be understood and addressed within the broader structural context within which they are embedded.

164. U.N. HIGH COMM’R FOR REFUGEES, SUBMISSION BY THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES FOR THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS’ COMPILATION REPORT—UNIVERSAL PERIODIC REVIEW: SOUTH AFRICA (2012), available at <http://www.unhcr.org/refworld/docid/4ed724952.html>.

165. Its strategies for fighting xenophobic discrimination completely fail to engage the structural determinants of xenophobic discrimination. An example that underscores this is a 2010 evaluation of UNHCR’s protection efforts in South Africa. Although this evaluation acknowledged structural determinants of violent xenophobic discrimination (perceived government failure to deliver essential public services, unemployment, income inequality, and increased presence of foreign nationals), it nonetheless revealed that UNHCR’s approach to fighting xenophobic discrimination in South Africa has been to focus on an awareness campaign to promote tolerance and diversity in the country. Jeff Crisp & Esther Kiragu, United Nations High Comm’r for Refugees Policy and Evaluation Serv., *Refugee Protection and International Migration: A Review of UNHCR’s Role in Malawi, Mozambique and South Africa*, PDES/2010/10, ¶¶ 157-58 (Aug. 2010).

IV. TOWARD AN INCLUSIVE APPROACH

To provide refugees comprehensive protection from xenophobic discrimination, it is vital that the UN Refugee Agency shift from a narrow prejudice approach to an inclusive approach that accounts for structural xenophobic discrimination. This shift would facilitate international human rights law interventions on behalf of refugees to tackle their vulnerable underclass status, and the hardship this status entails.

A. *Structural Xenophobic Discrimination as a Violation of Existing International Human Rights Law*

Examination of the Discrimination Convention makes clear that the structural blindness of the prejudice approach does *not* lie with the tools of international human rights law, where we understand “tools” to refer to the legal provisions that articulate the binding obligations on states with respect to refugees and asylum seekers. Instead, I argue that this shortcoming of the prejudice approach is a product of the way that legal actors, such as UNHCR, have chosen to animate the concept of discrimination, quite separately from anything in the text of international human rights instruments. Put differently, this is a case where the fault lies with the workmen and not their tools.

Article 1 of the Discrimination Convention prohibits “direct discrimination,” which is intentional disparate treatment of similar individuals on a prohibited ground.¹⁶⁶ This prohibition requires regulation of explicit prejudice-based xenophobic discrimination, which is in essence intentionally disparate treatment of individuals on account of foreignness. Importantly, Article 1 also prohibits indirect discrimination,¹⁶⁷ which results from facially neutral measures that disproportion-

166. See Sandra Fredman, *Combating Racism with Human Rights: The Right to Equality*, in *DISCRIMINATION AND HUMAN RIGHTS: THE CASE OF RACISM* 23 (Sandra Fredman ed., 2001).

167. Under international human rights law, “[i]ndirect discrimination occurs when a neutral measure is having a disparate and discriminatory effect on different *groups* of people Indirect discrimination deals with institutional and structural biases.” VANDENHOLE, *supra* note 141, at 84-85 (emphasis and internal citations omitted). In his comprehensive analysis of the principle of non-discrimination under international human rights law, Professor Wouter Vandenhole finds that jurisprudence from all the international human rights treaty regimes that address discrimination employs the concept of indirect discrimination, even if this concept is not explicitly mentioned in the text of the respective treaties. These regimes are the ICCPR, the Discrimination Convention, ICESCR, CEDAW, and the Convention on the Rights of the Child (CRC). *Id.* at 36.

ately impact individuals on the basis of a prohibited ground.¹⁶⁸ It requires the regulation of discriminatory effects even in the absence of explicit prejudice.¹⁶⁹ The Discrimination Convention thus provides firm legal basis for prohibiting certain instances of structural xenophobic discrimination.

Recall that Article 1 of the Discrimination Convention prohibits

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

I thus propose the following definition of *unlawful* structural xenophobic discrimination: conduct and measures that have the individual or cumulative effect of “nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life,”¹⁷⁰ on the basis of foreignness. In other words, states are required to protect refugees from simple and complex cases of structural xenophobic discrimination when its impact is the violation of the rights of refugees under international human rights law.

My definition accounts for the fact that under the Discrimination

168. According to the Discrimination Committee, the Discrimination Convention “expressly extends beyond measures which are explicitly discriminatory, to encompass measures which are not discriminatory at face value but are discriminatory in fact and effect, that is, if they amount to indirect discrimination.” *L.R. v. Slovakia*, UN Doc. CERD/C/66/D/31/2003, Communication No. 31/2003 ¶ 10.4 (2005). For a discussion of direct and indirect discrimination in human rights law, see Fredman, *supra* note 166, at 23-26. For definitions of direct and indirect discrimination in the context of economic, social, and cultural rights, see Comm. on Economic, Social and Cultural Rights, General Comment No. 20 on its 42d Sess., May 4-22, 2009, U.N. Doc. E/C.12/GC/20, 4 (Jul. 2, 2009).

169. The Discrimination Convention, *supra* note 140, art. 1; Boyle & Baldaccini, *supra* note 141, at 157.

170. Timo Makkonen notes that the general term “structural discrimination,” much like the term institutional discrimination has been variously defined among scholars. For example, Makkonen himself defines structural discrimination as “obstacles that prevent or impair the enjoyment of equal rights and opportunities by immigrants and persons belonging to ethnic minorities because of the way some part of the societal make up (rules, policies, practices, criteria, and informal conventions) functions. MAKKONEN, *supra* note 92, at 38. In this Article, I seek a legally binding definition and thus propose one that draws directly on the language of the Discrimination Convention.

Convention, the non-discrimination principle is not absolute.¹⁷¹ Specifically, it does not require states to protect *all* categories of foreigners from *all* forms of disparate treatment or disparate effects. The Discrimination Committee has stated that disparate treatment of or impact on non-citizens is permissible if it results from measures that, when considered in light of the purpose and goals of the Discrimination Convention, are proportionately tailored to achieve a legitimate aim.¹⁷² This means that determining what instances of structural xenophobic discrimination are unlawful will require an examination of (1) the legitimacy of the aims pursued by the measures that result in structural xenophobic discrimination, and (2) the narrow tailoring of these measures to achieve a legitimate aim. Finally, this determination must be meaningfully informed by the purpose and objectives of the Discrimination Convention. Broadly speaking, *unlawful* structural xenophobic discrimination will only be measures whose disparate harmful effects undermine the goals of the Discrimination Convention.

A fundamental objective of the Discrimination Convention is substantive equality or equality of outcomes.¹⁷³ An important aspect of this is ensuring that vulnerable social groups, such as racial, ethnic, and other minority groups, do not become social under-classes, such that members of these groups are systemically denied human rights under international law.¹⁷⁴ Refugees are a category of foreigners that are particularly vulnerable to the social underclass status the Discrimina-

171. In fact, some scholars have warned that the balancing of interests permitted under international human rights law's non-discrimination principle are a serious threat to their usefulness for protecting non-citizens from discrimination. *See, e.g.*, Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1383-84 (1999).

172. U.N. Comm. on the Elimination of Racial Discrimination, General Recommendation 30, Discrimination Against Non Citizens (2004), ¶ 4, U.N. Doc. CERD/C/64/Misc.11/rev.3 (Oct. 1, 2004), *available at* <http://www.refworld.org/publisher,CERD,GENERAL,,45139e084,0.html> [hereinafter *Discrimination Against Non Citizens*] (“[D]ifferential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.”).

173. Boyle and Baldaccini note that the Discrimination Convention “advocates a notion of equality of outcome, which is sensitive to the starting point of people, to past disadvantages which have created systematic patterns of discrimination in many societies, the effects of which may be continued or even exacerbated by facially neutral policies.” Boyle & Baldaccini, *supra* note 141, at 157. For detailed accounts of the basis of this understanding of the Discrimination Convention, see Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT’L L. 283, 286-89 (1985).

174. Boyle & Baldaccini, *supra* note 141, at 156-58.

tion Convention seeks to regulate.¹⁷⁵ By definition, members of this group are not full members of any political community and typically are a minority group in their host country. As non-citizens in their host countries, refugees cannot attempt to protect their interests through the political process. This makes them more vulnerable than even racial, ethnic, religious, or other minorities who are citizens of the host nation. And relative to other migrants, even forced migrants, refugees are per se cut off from the protection of their countries of nationality.¹⁷⁶ Any determination of whether structural xenophobic discrimination against refugees is unlawful must be made in light of these circumstances.

Many of the policies and practices that result in structural xenophobic discrimination are individually justifiable on the basis of reasonable and even important societal goals.¹⁷⁷ As the examples I offer in Section II illustrate, these policies and practices typically serve a legitimate aim. They are, however, not always proportionately tailored to achieve this end.¹⁷⁸ The example I provide in the Introduction of a

175. In recognition of this fact, the Discrimination Committee has taken active steps to inform states of their obligations to refugees, asylum seekers and other categories of non-citizens under the Discrimination Convention. *Discrimination Against Non Citizens*, *supra* note 172.

176. I do not mean to suggest here that other categories of forced migrants are never cut off from the protection of their countries of nationality. Unauthorized forced migrants fleeing economic collapse may, for example, find themselves essentially unable to rely on their countries of nationality to guarantee their fundamental rights. In this Article, I limit my account of unlawful structural xenophobic discrimination to the case of refugees because the vulnerability of this category of forced migrants enjoys international legal consensus. Their legal status includes formal acknowledgment of the unique predicament of being foreclosed from seeking any benefits of political membership from one's country of nationality. However, it is just as important, if not more so, to achieve clarity on what constitutes unlawful structural xenophobic discrimination against other categories of forced migrants, even if this task is beyond the scope of this Article.

177. Two examples are bank account restrictions to prevent money laundering and medical professional certification requirements to ensure the quality of healthcare services available.

178. I advocate a strict proportionality requirement in the inevitable balancing of state interests and the wellbeing of refugees. This is in keeping with a view UNHCR has expressed on distinguishing between unlawful discrimination against non-nationals, and permissible differentiation: "Guiding parameters should include a predetermined legitimate objective for differentiation, if any, a preference for the softest and least intrusive measures and respect for the principle of proportionality." Convention on the Elimination of all Forms of Racial Discrimination, Comm. on the Elimination of Racial Discrimination, *Summary Records of the 124th Meeting*, U.N. Doc. CERD/C/SR.1624 (Mar. 5, 2004). This would not be unprecedented. Under the jurisprudence of the European Court of Human Rights, only "very weighty reasons" can justify discrimination on the basis of nationality even in the context of socio-economic rights. *Gaygusuz v. Austria*, App. No. 17371/90, 39 Eur. Comm'n H.R. Dec. & Rep./545/632 (1996). For a detailed discussion of the case, see Frans Pennings, *Non-Discrimination on the Ground of Nationality in Social Security: What*

primary school admissions policy that requires a birth certificate and transcript as unwaivable requirements of enrollment illustrates the case of an overly broad measure¹⁷⁹ with a legitimate aim. It is not that nation states should not be able to protect legitimate interests, but rather that the means by which they do so must not violate the rights of refugees under international human rights law. This is consistent with the general approach the Discrimination Committee has taken with respect to determining unlawful disparate effects under the Discrimination Convention: “In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.”¹⁸⁰ Where structural xenophobic discrimination results in the violation of the rights of refugees under international law, it is unjustifiable.

The Discrimination Convention does not itself grant the substantive socio-economic and civil rights it seeks to guarantee equally to all. Rather, it requires non-discriminatory access to these rights once they have been granted in either domestic or international law.¹⁸¹ Thus, although the Discrimination Convention offers a firm basis for the

Are the Consequences of the Accession of the EU to the ECHR?, 9 UTRECHT L. REV. 118, 119-21 (2013). It is important to note, however, that the ECHR has yet to develop a theory of indirect discrimination in its jurisprudence. Under the jurisprudence of the European Court of Justice, in cases involving Racial and Employment Equality Directives, Professor Christa Tobler describes the proportionality requirement as “very strict.” CHRISTA TOBLER, *THE LIMITS AND THE POTENTIAL OF THE CONCEPT OF INDIRECT DISCRIMINATION* 6 (2008). She writes: “Proportionality requires that the concrete measure taken in the interest of the legitimate aim be both appropriate (i.e. suitable for achieving the aim in question) and necessary (i.e. another measure with a lesser effect, or even no disparate effect would not be effective).” *Id.* For a more detailed discussion of exemplary jurisprudence, see *id.* at 35. This applies both to direct and indirect discrimination on account of race and gender. Although this principle under ECJ jurisprudence has not developed in the context of discrimination based on nationality, I argue that it is the appropriate standard for protecting groups as vulnerable as refugees.

179. This policy is overbroad in its effect because it unnecessarily excludes all refugees unable to produce these documents, regardless of other means they may have to prove their identity and academic aptitude. An admissions policy that included an exemption for refugees, permitting them to use a refugee ID and to sit a placement examination, would be one way to solve this problem.

180. UN Committee on the Elimination of Racial Discrimination (CERD), *CERD General Recommendation XIV on The Definition of Racial Discrimination*, ¶ 2, U.N. Doc. A/48/18 at 114 (1994).

181. Comm. on the Elimination of Racial Discrimination, *General Recommendation 20*, ¶ 1 (1996) (“Article 5 of [the Discrimination Convention], apart from requiring the guarantee that the exercise of human rights shall be free from racial discrimination, does not itself create civil, political, economic, social or cultural rights, but assumes the existence and recognition of these rights.”).

prohibition of structural xenophobic discrimination, this protection is limited to rights that the host nation is obligated to provide by its own domestic law, or by an international treaty that it has ratified.¹⁸² The rights most at stake for refugees and asylum seekers in solidifying their underclass status are socio-economic rights, although it is possible to provide examples that implicate civil rights.¹⁸³ Of particular relevance to this Article, the Discrimination Convention requires states to eliminate discrimination that violates the rights to work, housing, health care, and education.¹⁸⁴ The Discrimination Committee has in fact explicitly affirmed the responsibility of states under the Discrimination Convention to “[r]emove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health.”¹⁸⁵

At the international level, the most comprehensive source of legally binding socio-economic rights obligations is the International Covenant on Economic, Social and Cultural Rights (ICESCR). This treaty is broadly, though not universally, ratified; thus, it is an important anchor for socio-economic legal obligations in much of the world.¹⁸⁶

The ICESCR provides the right to work,¹⁸⁷ the right to favorable conditions of work,¹⁸⁸ the right to social security,¹⁸⁹ the right to an adequate standard of living—which includes the right to adequate food, clothing, and housing¹⁹⁰—and the right to health.¹⁹¹ The monitoring body of the ICESCR has made clear that “[t]he ground of

182. The Discrimination Committee has explained that:

All States Parties are . . . obliged to acknowledge and protect the enjoyment of human rights, but the manner in which these obligations are translated into the legal orders of States Parties may differ. Article 5 of the Convention, apart from requiring a guarantee that the exercise of human rights shall be free from racial discrimination, does not of itself create civil, political, economic, social or cultural rights, but assumes the existence and recognition of these rights. The Convention obliges States to prohibit and eliminate racial discrimination in the enjoyment of such human rights.

183. For example, protection advocates have identified violations of refugees’ rights to due process of law or to be free from arbitrary detention originating in structural forces as opposed to explicit prejudice.

184. The Discrimination Convention, *supra* note 140, art. 5.

185. Discrimination Against Non Citizens, *supra* note 172, ¶ 29.

186. 160 of the 193 countries that are members of the United Nations are states party to the ICESCR. ICESCR, *supra* note 9.

187. *Id.* art. 6.

188. *Id.* art. 7.

189. *Id.* art. 9.

190. *Id.* art. 11.

191. *Id.* art. 12.

nationality should not bar access to Covenant rights The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.”¹⁹² However, the ICESCR permits certain states differential treatment of citizens and non-citizens under qualified circumstances. Article 2(3) of the ICESCR states that: “*Developing countries*, with due regard to human rights and their national economy, may determine to what extent they would guarantee the *economic* rights recognized in the [ICESCR] to non-nationals.”¹⁹³ This would mean that, in developing countries that have explicitly limited economic rights such as the right to work to citizens in their implementation of ICESCR, refugees would be unable to rely on this treaty to pursue a structural xenophobic discrimination claim under the Discrimination Convention.

Further below, I evaluate the challenge this limitation poses for the inclusive approach I advance. However, the practical relevance of Article 2(3) has been called into question, as it has never been invoked by a state.¹⁹⁴ And in contexts where provision of economic rights to non-nationals is rooted in domestic constitutions or legislation distinct from legislation implementing the ICESCR, these potential limitations are irrelevant. South Africa, which has not ratified the ICESCR, is a case in point. The South African Constitution and certain domestic statutes grant refugees and asylum seekers a range of socio-economic rights.¹⁹⁵

The Discrimination Convention not only recognizes structural forms of discrimination, it also provides the basis for robust structural remedies. Under Article 2 of the Discrimination Convention, states parties are required “to pursue by *all* appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races.”¹⁹⁶ Article 2 also requires states parties to “take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the *effect* of creating or perpetuating . . . discrimination wherever it exists.”¹⁹⁷ This is a broad provision that requires states to take active steps to address unlawful structural xenophobic

192. General Comment No. 20, *supra* note 168, at 30.

193. (emphasis added).

194. VANDENHOLE, *supra* note 141, at 143.

195. See JEFF HANDMAKER, LEE ANNE DE LA HUNT & JONATHAN KLAAREN, *ADVANCING REFUGEE PROTECTION IN SOUTH AFRICA* 304 (Handmaker et al. eds., 2008).

196. (emphasis added).

197. The Discrimination Convention, *supra* note 140, art. 2.1.

discrimination. Significantly the Discrimination Committee has stated that the Discrimination Convention requires states to: “Take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects.”¹⁹⁸

The Discrimination Convention applies both to public conduct (by the State and civil servants acting in their official capacity) and to conduct by private parties.¹⁹⁹ Thus, regardless of whether public or private actors trigger structural xenophobic discrimination, the Discrimination Convention would require states to provide redress.²⁰⁰ Importantly, Article 2 of the Discrimination Convention mandates affirmative action “in the social, economic, cultural and other fields” to bring an end to discrimination where such action is required. It thus places an explicit burden on governments to take positive steps to protect vulnerable groups from discrimination,²⁰¹ even if these measures single out affected groups for special treatment that under other legal frameworks might be prohibited as reverse discrimination.²⁰²

B. *Resetting the Global Anti-Xenophobic Discrimination Agenda: Using the Discrimination Convention to Chart an Inclusive Approach*

My goal in this Article has been to make the case for resetting the normative and legal underpinnings of global anti-xenophobic discrimi-

198. U.N. COMM. ON THE ELIMINATION OF RACIAL DISCRIMINATION (CERD), CERD GENERAL RECOMMENDATION 30 ON DISCRIMINATION AGAINST NON CITIZENS ¶ 33 (2002).

199. For an explication of this point, see MAKKONEN, *supra* note 92, at 139-42.

200. Convention on the Elimination of all Forms of Racial Discrimination, Comm. on the Elimination of Racial Discrimination, General Recommendation No. 32, ¶ 9, CERD/C/GC/32 (Sept. 24, 2009) [hereinafter CERD General Recommendation 32] (“The reference to public life in article 1 of the Discrimination Convention does not limit the scope of the non-discrimination principle to acts of the public administration but should be read in light of provisions in the Convention mandating measures by States parties to address racial discrimination ‘by any persons, group or organization.’” (citations omitted)).

201. The Discrimination Convention, *supra* note 140, art. 1.4 (“Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”); see CERD General Recommendation 32, *supra* note 200 (elaborating on this point).

202. On the concept of “reverse discrimination” in U.S. domestic antidiscrimination law, see David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 WIS. L. REV. 657 (2000).

nation policy. Here, I propose some concrete ways in which this goal might be realized. I also offer some examples of the potential implications of this resetting in the domestic contexts where refugees need them the most.²⁰³

As a first step toward resetting global anti-xenophobic discrimination policy, I propose the re-articulation of the concept of xenophobic discrimination: the concept should include harm that results from explicit anti-foreigner prejudice, and harm that results from the disparate impact of facially neutral measures on account of foreignness. Concretely, this re-articulation could begin with the monitoring bodies of the international refugee law regime (UNHCR), and of the Discrimination Convention (the Discrimination Committee). UNHCR could issue a new Guidance Note (1) elevating structural xenophobic discrimination to the same priority level as acts of discrimination motivated by explicit anti-foreigner prejudice, and (2) recalling the obligation of states to remedy both forms of discrimination under the Discrimination Convention. The Discrimination Committee could adopt a General Recommendation similarly (1) calling attention to the phenomenon of structural xenophobic discrimination against refugees and asylum seekers, (2) delineating the circumstances under which the Discrimination Convention prohibits this form of discrimination, and (3) highlighting states parties' responsibilities under the Convention to eliminate it.²⁰⁴

These two proposals have international and domestic ramifications. At the international level, a UNHCR Guidance Note incorporating structural xenophobic discrimination would re-orient the manner in which UNHCR officers in the field engage host nation governments on the question of xenophobic discrimination. It would provide these officers with a framework for lobbying governments to take action to fight the conditions of structural xenophobic discrimination on the basis of binding international human rights law. In various existing publications, UNHCR already draws attention to the fact and implications of the economic and social marginalization of refugees and

203. It is nonetheless beyond the scope of this article to drill down into specific case studies to illustrate the detailed mechanics of implementing an inclusive approach. This is an important area for future research.

204. Pursuant to Article 9(2) of the Discrimination Convention, the Discrimination Committee may issue General Recommendations. These General Recommendations "enable it to both indicate to states [the Discrimination Committee's] view of the scope of [the Discrimination Convention's] provisions as a guide to [state] reporting and to offer guidance on the legal interpretation of the Convention." Boyle & Baldaccini, *supra* note 141, at 172.

asylum seekers.²⁰⁵ However, by explicitly conceptualizing this marginalization as structural xenophobic discrimination prohibited under international human rights law, UNHCR would provide its field officers with a vocabulary that has legal weight (the Discrimination Convention) and can be used to influence negotiations with host governments to protect refugees and asylum seekers.

This Guidance Note would also inform UNHCR's collaboration with other UN bodies whose mandates bring refugees and asylum seekers within their purview. These include the UN Office of the High Commissioner for Human Rights and the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance.²⁰⁶ A Guidance Note by UNHCR cannot and will not be a silver bullet for structural xenophobic discrimination. It would, however, serve the important function of setting a comprehensive agenda for the global fight against xenophobic discrimination. In light of the broad impact of UNHCR interpretation of the international law governing refugees in international, regional, and domestic courts, and in non-adjudicatory forums, a Guidance Note would make an important difference.²⁰⁷

A General Recommendation from the Discrimination Committee would, at the international level, provide states parties with clarification of their responsibilities under the Discrimination Convention. Although General Recommendations are not legally binding on states parties to the Discrimination Convention, they provide these states with a guide for the mandatory reports that the Discrimination Convention requires them to submit.²⁰⁸ They also provide states with guidance on the legal interpretation of the Discrimination Convention.²⁰⁹ Under Article 11(1), the Discrimination Committee has the authority to hear

205. See UNHCR POLICY ON REFUGEE PROTECTION AND SOLUTIONS IN URBAN AREAS, *supra* note 63, ¶ 100.

206. Both the UN High Commissioner for Human Rights and the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance engage in advocacy on behalf of refugees. See, e.g., Githu Muigai, U.N. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance, Human Rights and Migration: Realising a Human Rights Based Approach to the Protection of Migrants, Refugees and Asylum-Seekers (June 1, 2010), available at http://www2.ohchr.org/english/issues/racism/docs/Lisbon_speech.pdf (providing an example of the Special Rapporteur's advocacy regarding refugees and asylum seekers).

207. See *infra* Part II.

208. Boyle & Baldaccini, *supra* note 141, at 172.

209. *Id.*

complaints brought by individuals against states parties to the Discrimination Convention. A General Recommendation might serve as an important catalyst, mobilizing refugees to bring claims of structural xenophobic discrimination against host governments before the Discrimination Committee. It would also introduce structural xenophobic discrimination against refugees and asylum seekers as a problem for which states parties would be held accountable in their mandatory reports to the Discrimination Committee. A General Recommendation might also inform the work of influential inter-governmental organizations such as the International Organization for Migration (IOM), and international human rights groups such as Human Rights First, in their own advocacy to push states to protect refugees.

Arguably of more importance is the potential impact that a shift towards an inclusive approach at the international level could have on the work of domestic refugee protection advocates.²¹⁰ An authoritative Guidance Note from UNHCR would be a useful tool for domestic advocates adopting what Professor Scott Cummings terms a “polycentric” approach to social change. Polycentrism “invites lawyers to move into multiple arenas, where they are required to calculate strategic costs and benefits, weighing which avenues offer the greatest possibilities for politically meaningful intervention.”²¹¹ While a UNHCR Guidance Note and a Discrimination Committee General Recommendation are unlikely to result in spontaneous shifts in domestic refugee protection, there is reason to believe that both could provide normative and legal anchors for domestic advocates seeking an international foundation for approaches that address the conditions of structural xenophobic discrimination.²¹² In countries bound by the Discrimination Convention, these instruments could complement direct reliance on the Discrimination Convention itself to advance an inclusive conception of xenophobic discrimination. This is important given that the Discrimination Convention is legally binding on more

210. These include lawyers, activists, and non-governmental organizations that work domestically to advance the rights of refugees. They provide direct legal services to refugees, engaging in litigation and other forms of advocacy, such as consultations with policy-makers.

211. Cummings, *supra* note 21, at 1020.

212. For an example of a recent empirically-based project charting how lawyers and activists in different parts of Africa are successfully using human rights—socio-economic rights in particular—to challenge structural oppression, see *STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY* (Lucie White & Jeremy Perelman eds., 2011); Lesley Wexler, *The Non-Legal Role of International Human Rights Law in Addressing Immigration*, 2007 U. CHI. LEGAL F. 359 (2007).

states than is the UN Refugee Convention.²¹³ Through various transnational legal processes, the Guidance Note and General Recommendation could assist domestic advocates in holding governments and their officials accountable for unlawful structural xenophobic discrimination.²¹⁴

In the access to education example I provided in the Introduction, a UNHCR Guidance Note and a Discrimination Committee General Recommendation would assist refugee protection advocates in lobbying the executive authority responsible for regulating public education to create special exemptions for refugees unable to provide certain forms of documentation. The authority could permit the use of refugee documentation to prove identity, and offer aptitude tests at no cost to refugees in order to determine their academic placement in the absence of official transcripts.

The same principle applies to more complex forms of structural xenophobic discrimination. Professor Jeffrey Handmaker has expressed optimism for litigation partnered with other advocacy strategies to bring about structural changes for refugees in South Africa.²¹⁵ More importantly, he describes advocacy and litigation on behalf of refugees in South Africa as characterized by the use of international human rights law to challenge the “legal normative framework.”²¹⁶ South Africa is a context where the use of international law to interpret the Bill of Rights is constitutionally mandated.²¹⁷ It is therefore conceivable, for example, that in the context of the Guidance Note and CERD General Recommendation I propose, the South African Constitutional Court may have reached a different decision in *Union of Refugee Women*, a case in which the Court upheld the gate-keeping provisions

213. The Discrimination Convention has 175 states parties and the UN Refugee Convention has 145. *Multilateral Treaties Deposited with the Secretary-General*, UNITED NATIONS, <http://treaties.un.org/Pages/ParticipationStatus.aspx> (last visited Jan. 10, 2014).

214. For discussion of the transnational processes through which international human rights is enforced domestically, see Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1998-1999); Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT'L ORG. 633 (2000); THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE (Thomas Risse et al. eds., 1999).

215. Jeff Handmaker, *Public Interest Litigation for Refugees in South Africa and the Potential for Structural Change*, 27 S. AFR. J. HUM. RTS. 65 (2011).

216. *Id.* at 69.

217. S. AFR. CONST., 1996 (“When interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law.”) This includes the Discrimination Convention because this treaty binds South Africa.

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of PSIRA discussed above.²¹⁸ As mentioned above, the ruling in that case turned on the fact that legislation curtailed refugees' ability to choose their occupation, but did not violate their fundamental human right to work. Four Justices of the Constitutional Court issued a dissenting opinion in that case, in large part because there was:

evidence to suggest that the relatively low-skilled work available in the private security industry [was] a significant source of employment for many refugees. Their exclusion from this form of employment [was] therefore not negligible and may well have [had] a severe impact on the ability of refugees to earn a livelihood in South Africa.²¹⁹

Authoritative guidance from UNHCR and the Discrimination Committee mapping the structural effects of facially neutral laws such as PSIRA might have influenced the remaining six Justices who took a different view from those dissenting. It might also have guided the pleadings of the lawyers on behalf of the refugees challenging the law to include comprehensive data on the cumulative structural exclusion of refugees from the formal employment sector.

Even more so than litigation, the Guidance Note and General Recommendation might inform domestic policy-making. For example, in the South African context where refugee protection advocates are in dialogue with the government to develop policies to combat xenophobic discrimination, an international articulation of an inclusive approach could offer important leverage for the adoption of more comprehensive policy. These two interventions would undoubtedly be beneficial arsenal for legal actors advancing structural xenophobic discrimination arguments. Pursuant to an international declaration on the issue,²²⁰ the government of South Africa has been drafting a National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP).²²¹ The Note and Recommen-

218. *Union of Refugee Women and Others v. Director, Private Security Industry Regulatory Authority and Others* 2007 (4) BCLR 339 (CC) (S. Afr.). See *supra* note 75 for a description of the case and the court's determination.

219. *Union of Refugee Women and Others*, ¶ 122 (O'Regan and Mokgoro, JJ., dissenting) (Langa, CJ and Van der Westhuizen, J concurring).

220. World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Aug. 31-Sept. 8, 2001, *Durban Declaration*, ¶ 99 (Sept. 8, 2001).

221. S. AFR. HUMAN RIGHTS COMM'N, THE NATIONAL ACTION PLAN & STRATEGY TO COMBAT RACISM (2001), available at <http://www.sahrc.org.za/home/21/files/Reports/NAP%20to%20comat%20raciem.pdf>.

dation would offer refugee protection advocates who are a part of the drafting process a framework for pursuing legislation and policy that provides refugees with more comprehensive protections. NAP could be an important policy document for facilitating multi-sectoral coordination across industries. This coordination would ensure that *effect* as well as *intent* is part of the calculus for identifying and preventing wrongful discrimination at the lawmaking stage. NAP might, for example, require (1) professional boards to carve out exemptions for refugees, allowing them to take re-certification exams at discounted costs; and (2) banks to offer instruments and services that balance security concerns with the needs of refugees and asylum seekers to the extent that these needs deeply implicate their human rights.²²² This would be in keeping with the Discrimination Convention's existing guidance.²²³

C. *On the Biggest Challenge to Implementing an Inclusive Approach*

1. Unwillingness or Inability

Law is, at best, only a first step toward social change. And redressing structural oppression requires far more than the existence of laws and norms that prohibit it. The unwillingness or inability of states to adopt a structural approach to xenophobic discrimination is likely to pose the most significant obstacle to its implementation.

With respect to unwillingness, the general reluctance of states to address human rights violations is not uncommon. But the economic and political costs of remedying structural violations of socio-economics rights of refugees may mean that compelling states to act is particularly challenging. Despite growing evidence that forced migrants can be an economic boon for a host state,²²⁴ states are likely to view the economic implications of a structural approach as a disincentive, at least at first blush. Politically, refugees and asylum seekers have no

222. As the result of advocacy by South African human rights lawyers, South Africa's financial regulatory agency has done precisely this. Media Release, Fin. Intelligence Ctr., Republic of S. Afr., *Refugees and Asylum Seekers Now Able To Open Bank Accounts* (Nov. 11, 2010), available at <https://www.fic.gov.za/DownloadContent/NEWS/PRESSRELEASE/Refugee%20Asylum%20release%2011%20November%202010.pdf>.

223. Discrimination Against Non Citizens, *supra* note 172, ¶ 33, (affirming the responsibilities of states to “[t]ake measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects”).

224. See, e.g., Jacobsen, *supra* note 66, at 283-84.

electoral clout, and indeed special measures to assist them may have the perverse effect of fueling xenophobic sentiment among resentful nationals in ways that only further endanger these groups.²²⁵

Finding creative strategies to overcome political resistance to robust refugee protection is precisely the daily task of refugee and human rights lawyers and perhaps even scholars. I say this not to trivialize the complexity of the challenges that these advocates will have in securing remedies for structural xenophobic discrimination but to note that political resistance is not unique to the proposal I advance in this Article. It is thus a matter of advocates extending or adapting their existing toolkits to challenge political resistance to fighting structural xenophobic discrimination. The strategies they adopt will need to reflect the concrete socio-economic and political contexts within which they are embedded. And while the challenges they face will be significant, there is cause for some optimism. There exists literature on the successful if not guaranteed use of human rights to shift norms and law, even in the area of socio-economic rights in the global south.²²⁶ Notably, human rights advocates in South Africa have had remarkable successes in shifting the normative and legal framework governing the rights of refugees in South Africa. Professor Handmaker has recounted in detail the cooperative and confrontational strategies that civic actors adopted to bring about these changes, relying to a great extent on international human rights law.²²⁷ While recognizing the importance of historical and socio-legal context, he argues that his analysis of civic actors' strategies for bringing about change is globally relevant, and sheds light on refugee protection in other parts of the world.²²⁸

The unique challenge posed by xenophobic discrimination is that measures to address it may only serve to fuel it further. In South Africa,

225. UNHCR, REPORT OF THE AD HOC INQUIRY INTO UNHCR'S RESPONSE TO THE 2008 XENOPHOBIC CRISIS IN THE REPUBLIC OF SOUTH AFRICA TO THE HIGH COMMISSIONER FOR REFUGEES (2009) (expressing this very concern as a possible reason for government reluctance to meet minimum standards of protection for displaced non-nationals, including refugees). *But see* UNHCR POLICY ON REFUGEE PROTECTION AND SOLUTIONS IN URBAN AREAS, *supra* note 63, ¶ 40 ("UNHCR will endeavour to combat discrimination and xenophobia and will ensure that the services it provides to urban refugees bring benefits to other city-dwellers, especially the neediest sections of the population and those who live in closest proximity to refugees.").

226. For examples of the use of human rights to bring about structural socio-economic change beyond the refugee protection context, see STONES OF HOPE, *supra* note 212, at 7 ("The most salient lesson from this theory-practice project is that ESR activism, deployed in certain contexts and designed in certain ways, can sometimes open pathways leading to positive changes.").

227. HANDMAKER, *supra* note 28.

228. *Id.* at 209-11.

UNHCR has noted that: “Competition between refugees and South African nationals for jobs, housing, business opportunities and social services has raised tensions, and aggravated xenophobic attitudes among some in the local community. It is noticeable that poor socio-economic conditions among host communities provide a breeding ground for xenophobia.”²²⁹ It stands to reason that intervention to alleviate the suffering of refugees may only further exacerbate xenophobic attitudes and discrimination. This strongly suggests that attempts to combat structural xenophobic discrimination must be pursued in tandem with policies aimed at alleviating the suffering of the economically marginal in host nations.²³⁰ This is, of course, no easy feat and raises important questions regarding the resources necessary to provide the comprehensive protections that an inclusive approach entails.

In countries where host governments are irrevocably opposed to measures to alleviate the suffering of refugees and asylum seekers, a Guidance Note and General Recommendation may be of limited consequence. However, in those places where political context fluctuates in ways that even only occasionally result in interest convergence between governments and refugee protection advocates, the Guidance Note and General Recommendation have great potential. In the global south where dramatic shifts in political power regularly reset the institutional frameworks of government, the international human rights law framework can, and in fact does, play a fundamental role in shaping domestic struggles against oppression. South Africa’s own dramatic successes in moving from a country that once barred UNHCR presence to one that has adopted a human rights-based refugee protection framework is an important case in point.²³¹ Today, South Africa’s jurisprudence recognizes the unique vulnerability of refugees and asylum seekers.²³²

The normative and legal re-articulation I propose here is intended to provide domestic actors with a basis to ground advocacy for comprehensive protection against xenophobic discrimination. Perhaps in a post-conflict Syria, which has historically been host to among the

229. UN HIGH COMM’R FOR REFUGEES, SUBMISSION BY THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES FOR THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS’ COMPILATION REPORT—UNIVERSAL PERIODIC REVIEW: SOUTH AFRICA 3 (2011).

230. Existing UNHCR policy does precisely this. *See supra* note 226.

231. *See generally* HANDMAKER, *supra* note 28.

232. *Minister of Home Affairs and Others v. Watchenuka and Another* 2003 (4) SA 326 (SCA) ¶ 10 (S. Afr.); *Union of Refugee Women and Others v. Director, Private Security Industry Regulatory Authority and Others* 2007 (4) BCLR 339 (CC) (S. Afr.).

largest refugee populations in the world, advocates might find use in a statement by the Discrimination Committee interpreting the Discrimination Convention to require states to address structural xenophobic discrimination. Syria, while not a state party to the UN Refugee Convention or Protocol, acceded to the Discrimination Convention in 1969.²³³ Although the international human rights framework does not *determine* domestic outcomes, it can have a profound impact on the manner in which problems are conceptualized and on the tools international and domestic actors have at their disposal to effect change.²³⁴

With respect to economic challenges, in some circumstances it may not be that states are unwilling, but that they are unable to honor the requirements of an inclusive approach to xenophobic discrimination due to genuine resource constraints. UNHCR reports that in 2011, 4.7 million refugees resided in countries where the GDP per capita was below USD 3,000. In comparison, that same year, U.S. gross domestic product (GDP) per capita was USD 48,112, and U.K. GDP per capita was USD 39,038.²³⁵ During this time, Pakistan hosted 605 refugees per dollar of its GDP per capita, and the DRC hosted 399. Absence of the material means to redress human rights violations presents a different challenge from absence of political will to apply these means. It triggers one of the perennial and seemingly intractable problems of refugee protection: international burden- or responsibility-sharing as means of meeting the needs of refugees who are regionally concentrated in the poorest parts of the world.

Under international refugee law, wealthier states are under no explicit legal obligation to assist poorer states that host disproportionate numbers of the global refugee population on account of geographic proximity to conflict.²³⁶ This means there may be some contexts in which genuine economic constraints foreclose structural interventions on behalf of refugees. As an initial matter, it will be vital to distinguish between firm resource constraints and inefficient use of otherwise available resources. That said, the problem of limited resources (or the global unequal distribution of wealth) may be the Achilles heel to the successful implementation of an inclusive approach, but no more so than it is to refugee protection broadly

233. *Human Rights*, UNITED NATIONS TREATY COLLECTION, available at http://treaties.un.org/Pages/ViewDetails.aspx?mtmsg_no=IV-2&chapter=4&lang=en (last visited Jan. 6, 2014).

234. See STONES OF HOPE, *supra* note 212, at 149-53.

235. *GDP Per Capita*, WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD> (last visited Jan. 6, 2014).

236. JAMES C. HATHAWAY, *RECONCEIVING INTERNATIONAL REFUGEE LAW* xxi (1997).

speaking. The fact of scarce resources cannot overcome the need for comprehensive legal protections for refugees. It only makes meeting these needs a very difficult enterprise.

2. Feasibility

The theory of structural xenophobic discrimination that I advance holds that individual policies and practices that may not violate the rights of refugees may nevertheless have the cumulative effect of doing so. This is different from the more typical accounts of indirect discrimination that focus on the effect of a single policy. However, focusing on the cumulative discriminatory effects of policies and practices whose individual effect may not rise to the level of unlawfulness is not novel. For example, adjudicators consider cumulative discriminatory effects in refugee status determination procedures all over the world. In order to qualify for refugee status, a refugee is required to establish a well-founded fear of persecution in her country of nationality. In this context, refugees may offer acts of discrimination that they suffered in order to establish past persecution or to demonstrate a well-founded fear of future persecution.

The UN Refugee Convention provides no definition of persecution and across domestic contexts there is jurisprudential agreement—in accordance with UNHCR’s guidance²³⁷—that discrimination in and of itself is not sufficient to establish persecution for the purposes of refugee status. However, refugee status adjudicators do agree that the cumulative effects of discriminatory acts that would individually fail to meet the threshold of persecution, can together result in persecution for the purposes of establishing refugee status.²³⁸ In this context, Rebecca Dowd describes cumulative discrimination as “the situation in which a person faces a number of different discriminatory measures, such as in education, health care, employment and/or housing,” that cumulatively rise to the level of persecution that the UN Refugee Convention aims to protect against.²³⁹ In this regard, UNHCR’s all-important Handbook on Procedures and Criteria for Determining Refugee Status states the following:

237. U.N. High Comm’r on Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, ¶ 53, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1992) [hereinafter *UNHCR Handbook*].

238. For a discussion of the concept of cumulative effects discrimination in refugee status determination jurisprudence, see Rebecca Dowd, *Dissecting Discrimination in Refugee Law: An Analysis of Its Meaning and Its Cumulative Effect*, 23 INT’L J. REFUGEE L. 28-53 (2010).

239. *Id.* at 39.

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Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practice his religion, or his access to normally available educational facilities . . . Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances.²⁴⁰

Determining when measures cumulatively “lead to consequences of a substantially prejudicial nature” would be precisely the task involved in reaching a determination of structural xenophobic discrimination.²⁴¹ Rebecca Dowd’s work offers examples of adjudicators in Canada, the United States, the United Kingdom, Australia, and New Zealand who apply this principle in refugee status determination procedures.²⁴² The New Zealand Tribunal responsible for adjudicating appeals of those denied refugee status has stated, for example, that “[t]he need to recognize the cumulative effect of threats to human rights is particularly important in the context of refugee claims based on discrimination.”²⁴³ To be sure, in these proceedings, adjudicators typically consider discriminatory acts whose causal effects on asylum seekers are more easily established. The cumulative effect of multiple acts of discriminatory violence on an asylum seeker, for example, is more easily established than the cumulative effect of practices and policies that I argue are at the root of structural xenophobic discrimination. While conceding the complexity of establishing the cumulative effects that result in structural xenophobic discrimination, I nonetheless maintain that this is not an unreasonable task for adjudicators or other legal actors.

Environmental law is an example of an area where policy makers and

240. *UNHCR Handbook*, *supra* note 237, ¶¶ 54-55.

241. This is notwithstanding the fact that UNHCR’s Handbook advocates this approach in the context of establishing refugee status as opposed to the context of determining unlawful discrimination.

242. Dowd, *supra* note 238, at 42-43.

243. *Id.* at 42.

adjudicators are required to take into account cumulative effects of a broad and diverse set of factors. In the United States, the National Environmental Protection Act (NEPA) requires federal agencies to take into account cumulative effects in their environmental impact analyses.²⁴⁴ NEPA's regulations define the "cumulative effects" of an action as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions."²⁴⁵ As a result, federal agencies "routinely address the direct and (to a lesser extent) indirect effects" of proposed actions on the environment.²⁴⁶ This is no easy feat, as it requires "delineating the cause-and-effect relationships between the multiple actions and resources, ecosystems, and human communities of concern."²⁴⁷ Accounting for cumulative effects in the environmental law context is complex and imperfect, and is subject to continuing efforts to improve the process.²⁴⁸ Accounting for the impact of cumulative effects on the rights of refugees will be no different. This Article takes the important first step of identifying cumulative effects as discriminatory, paving the way for the development of increasingly sophisticated technologies to empirically map and measure the cumulative effects that violate the rights of refugees.

244. In addition to policy makers and administrative agencies, courts, too, have had to evaluate cumulative effects in environmental law claims. *See, e.g.*, Michael D. Smith, *Cumulative Impact Assessment under the National Environmental Policy Act: An Analysis of Recent Case Law*, 8 ENVTL L. PRAC. 228 (2006) (examining 25 decisions from the Ninth Circuit Court of Appeals in which cumulative impact analyses were the subject of litigation); Peter N. Duinker & Lorne A. Greig, *The Impotence of Cumulative Effects Assessment in Canada: Ailments and Ideas for Redeployment*, 37 ENVTL MGMT. 153, 153 (2006). Europe similarly requires accounting for cumulative effects. *See* Elizabeth A. Masden et al., *Cumulative Impact Assessments and Bird/Wind Farm Interactions: Developing a Conceptual Framework*, 30 ENVTL IMPACT ASSESSMENT REV. 1, 1-2 (2010).

245. For example, the Department of Defense might have to consider how its use of a particular piece of land as a training ground impacts nesting birds in this area, and this assessment would have to account for the cumulative effect of the training given the universe of all other actions that might impact the nesting birds. COUNCIL ON ENVTL. QUALITY, *CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT* (1997) (citing 40 CFR § 1508.7).

246. *Id.* at v.

247. *Id.* at vi.

248. *See, e.g.*, Wanda Baxta et al., *Improving the Practice of Cumulative Assessment in Canada*, 19 IMPACT ASSESSMENT AND PROJECT APPRAISAL 253 (2001) (critically evaluating cumulative effects assessments and recommending improvements to the process); Barry Smit & Harry Spaling, *Methods for Cumulative Effects Assessment*, 15 ENVTL IMPACT ASSESSMENT REV. 81 (1995) (reviewing and evaluating the spectrum of approaches to cumulative effects analyses).

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In framing structural xenophobic discrimination as a violation of international human rights law, I wish to emphasize that combating this violation cannot solely or even primarily be achieved through litigation before courts. Refugees typically have severely limited access to courts, and particularly where structural problems are concerned, remedial efforts on their behalf are best pursued at the law-making and policy-making levels. For lawmakers and policymakers, this will mean coordination among the various sectors to ensure that the measures they adopt account for the interactive and cumulative effects at the core of structural xenophobic discrimination.

V. CONCLUSION

The prejudice approach shields structural xenophobic discrimination from the full emancipatory potential of the international human rights framework. It prevents engagement with even those structural effects that result in human rights violations and are thus prohibited by international human rights law. I propose a conceptual shift from a prejudice approach to an inclusive approach that recognizes structural forms of xenophobic discrimination as unlawful. This better tailors the emerging anti-xenophobic discrimination regime to solve the problem it seeks to address. An inclusive approach resonates more fully with the normative vision of the non-discrimination principle under international human rights law and is readily available under the Discrimination Convention.