Forays Into Reality

UN Treaty Bodies Confront Xenophobia But Leave Its Legal Boundaries Unclear

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For decades, xenophobia – which can be defined as the civic exclusion of those presumed alien to a nation – has been relegated to the margins of the UN treaty body system: it was routinely invoked alongside racism as a formulaic pairing ("racism and xenophobia") but rarely treated as a legal problem in its own right. On February 3, the Committee on the Elimination of Racial Discrimination (CERD) and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) broke this pattern by issuing two joint interpretative comments – a general guideline and a thematic one – on eradicating xenophobia against migrants and others perceived as such.

Ingmar Bergman once remarked, "I am living permanently in my dream, from which I make brief forays into reality". The Committees make an overdue incursion into the uncomfortable global reality of anti-immigrant politics – but the foray remains momentary. For all their effort and ambition to provide a comprehensive response to xenophobia, the extensive joint guidelines dodge the all-important structural tension arising from migration governance: xenophobia is embedded in an international system that recognises the sovereign impulse to police migration not only as a (much critiqued) prerogative but, crucially, as a legitimate objective. Even under a "demystified" conception of sovereignty that rejects unfettered state power, posing the question of xenophobia forces a reckoning with its boundaries.

Xenophobia's history as a legal afterthought

The joint comments by the CERD and the CMW represent the most detailed attempt yet to clarify the meaning of xenophobia within international human rights law. That this effort is made only now underscores how limited prior engagement has been. Not a single core human rights treaty mentions xenophobia. In fact, xenophobia entered the legal vocabulary only indirectly via the 1993 Vienna Declaration and Programme of Action, which, among others, called for the appointment of a Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (para 21).

From the outset, however, recognition came with limitations. The 2001 Durban Declaration offered the first quasi-operational treatment but immediately framed xenophobia through its relationship to racism. Its preamble suggests that "xenophobia and related intolerance" constitute serious violations of human rights only insofar as they amount to racism and racial discrimination (p. 9). Subsequent practice largely followed this approach, subsuming xenophobia under the doctrinal umbrella of racism and racial discrimination without any bearing upon its scope. As Shreya Atrey has shown, the CERD has played a key part in consolidating this perspective, filtering individual communications by migrants and those perceived as such through narrowly defined racial grounds related to race, ethnicity, colour or descent.

Prior to the issuance of the joint guidelines, the most authoritative UN treatment of xenophobia was the 2016 thematic report by the Special Rapporteur on racism and xenophobia, Mutuma Ruteere. Surveying global and regional manifestations and proposing a working definition centred on the denial of equal rights to those perceived as outsiders based on their origins, values, beliefs, or practices (p. 1), the report sounded the alarm on the worldwide rise of xenophobic exclusion. It emphasised preventative, bottom-up responses aimed at countering anti-migrant discourses and promoting social solidarity. In legal terms, the

Special Rapporteur largely mapped existing international and regional frameworks without developing a distinct doctrinal approach. Still, he problematised the equation of xenophobia with racism by outlining the diverse and intersectional forms through which perceived foreigners are marginalised.

The Venn diagram of xenophobia and racism

Building on this, one major contribution of the joint comments lies in connecting xenophobia and racism without collapsing the two. Rather than describing xenophobia in strictly racial terms, the Committees define it as the phenomenon in which "migrants and persons belonging to various social groups or minorities are portrayed and perceived as others, outsiders or enemies" based on the belief that they "threaten the predominant culture, heritage and wealth" (General Guidelines, para. 2). They offer a rare general definition of the term "migrant" not contingent on a specific legal status or purpose of stay (at para. 8), as including "all persons who move away from their country of origin across an international border with the purpose of living temporarily or permanently in another country." At the same time, they acknowledge that xenophobia can impact non-migrants as well. The key category of xenophobia therefore becomes "migrants and others perceived as such" – institutionalising, and arguably refining, the concept of the actual or perceived foreigner introduced by E. Tendayi Achiume.

The Committees are equally clear that xenophobia "is both a systemic driver of racial discrimination and a consequence of structural forms of racism and discrimination against migrants and others perceived as such" (para. 14). They further frame this relationship as one of "intrinsic intersection" grounded in processes of racialisation and in the enduring legacies of colonialism and slavery that shape global inequalities and patterns of human mobility (para. 16). The General Guidelines accordingly call for anti-racist frameworks to be mainstreamed into migration policies and for the active involvement of relevant public institutions and civil society actors (para. 18). The resulting doctrinal map resembles a Venn diagram: xenophobia and racism emerge as distinct yet partially overlapping phenomena whose shared terrain demands explicitly intersectional responses.

Intersectionality and the risk of diffusion

Intersectionality appropriately appears as a "crucial and indispensable" theme in the comments (General Guidelines, para. 21). The General Guidelines detail the particular challenges faced by migrants whose experiences are shaped by gender, age (including children, youth and older persons), disability, race, indigeneity, statelessness, religion or belief, socio-economic status, and health. While this account echoes analyses and case law on the specific vulnerabilities of migrants and refugees, the systematic integration of their intersectional experiences into human rights practice remains a work in progress, including within the UN treaty bodies. Against this background, the Guidelines offer a forward-looking human rights agenda that – despite its shortcomings – brings a fresh perspective to the discussion especially when it highlights the narratives that sustain xenophobia and the legislative responses required to counter them.

The strong emphasis on intersectionality is not without risks, however. Precisely because xenophobia rarely fits neatly within a single ground of discrimination and often intersects with several, it has long fallen between the cracks of human rights law as "discrimination against nobody". Simply reasserting intersectionality does not resolve this problem. On the contrary, it may contribute to the diffusion of a concept that has just begun to consolidate. The Committees themselves show that xenophobia *has* a defined core: it involves the exclusion or marginalisation of migrants and others perceived as such through narratives that cast them as threats to the dominant culture, heritage, or economic order. This social process cannot be fully explained by reference to intersecting grounds alone. Xenophobia is more than the sum of its parts.

How to fight xenophobic narratives?

One of the most intriguing contributions made by the Committees can be found in the Thematic Guidelines, which discuss at length the detrimental impact of

xenophobic narratives and ways to counter them. The focus on narratives is clearly warranted, capturing an essential ingredient of xenophobia. It also makes the vital connection to the proliferation of xenophobic hate speech. The CERD can draw on its previous work in this regard, specifically General Recommendation 35 on combatting racist hate speech and General Recommendation 30 on discrimination against non-citizens, calling on states to protect against hate speech and racial violence.

To be sure, many of the recommendations calling for "rights-based narratives on migrants and migration" (p. 2) contained in the Thematic Guidelines are well taken. It is here, however, that the Committees start retreating from reality. One might still argue about the legal and political feasibility of extensive media regulation, such as the recommendation that "all media actors, both public and private, adopt codes of conduct and self-regulatory principles and guidelines aimed at ensuring a responsible approach to migration and ethical reporting and advertising", para. 12). By contrast, it seems more far-fetched to expect "political parties, authorities and candidates" to "[f]ormally commit to putting an end to the instrumentalization of migration, asylum and related matters for political and electoral gain" (para. 101). More troubling still is the assertion that narratives "have wrongfully proposed that nationals should enjoy privileged protection of human rights" (para. 71) when status-based differentiations are, in fact, firmly embedded in the human rights framework. The juxtaposition of rights-based narratives and "narrow and unfair representations" (para. 3) seems to suggests that sorting machines will be undone through the sudden enlightenment of a deeply divisive discourse – a prospect that may appeal to human rights audiences but downplays the normative intricacy of debates concerning borders and belonging.

Xenophobia and the stubborn problem of boundary-drawing

So, when does migration governance become xenophobic discrimination? Here, the Committees offer little guidance. Instead, the Thematic Guidelines highlight the "reciprocal connection between xenophobic narratives and migration policies" (para. 48) to survey a wide range of state practices. Next to clearly illegal acts (such as pushbacks, collective expulsions, and racial profiling), they also list measures that the Committees cannot dismiss categorically: visa regulations, entry controls, asylum procedures, residence permits and discretionary regularisation programmes, detention, as well as migration law enforcement more broadly. Beyond general calls for greater transparency, effective remedies and stronger due process guarantees, the guidelines do not consider when these restrictive policies cross the threshold into xenophobic action. There are a few notable exceptions here; for instance, the discussions on detention and expulsion describe these as last resort measures (at paras. 49 and 52). These relatively clear signposts could inform future legal assessments.

Admittedly, it would have been asking much of the CERD and the CMW to resolve the difficult question of xenophobic boundary-drawing by themselves. The problem, however, is that the guidelines do not even pose it. Answering this question will be necessary to restore the authority of human rights law in a field where violations are "entrenched and pervasive". Getting there requires not only an awareness of the limits of the human rights framework but also more than a quick foray into a reality that may appear unbearable when seen through a "decolonial, anti-racist, and intersectional lens" (General Guidelines, para. 19). Having recognised the persistent force of hostile narratives that target migrants and others perceived as such, the next step must be to establish convincing red lines for state actions. One obvious example would be policies aptly described as xenophobic on their face, such as the much-discussed Danish Housing Law, which explicitly targets "immigrants and their descendants from non-Western countries". While drawing such lines will be more difficult in other cases, xenophobia will have to be confronted as a sui generis form of exclusion that challenges the very premises of the human rights framework.

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