

# **Structural Xenophobic Discrimination Against Refugees**

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# Outline

- I. Revisiting the Refugee/Migrant Distinction and Reviewing the Racial Demographics of Refugees
- II. Structural Xenophobic Discrimination Against Refugees
- III. ICERD's Application to Structural Xenophobic Discrimination Against Refugees

# I. Revisiting the Refugee/Migrant Distinction and Reviewing the Racial Demographics of Refugees

## Refugee v. Migrant?

- Shared Empirical Reality:
  - Refugees and involuntary migrants share the same chaotic, dangerous migratory routes
  - Many perpetrators of xenophobic discrimination and violence do not distinguish between refugees and other migrants

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

# Refugee v. Migrant?

- **Distinct legal frameworks:**
  - **1951 Refugee Convention**
  - **1967 Protocol to the Refugee Convention**

# Reviewing the Racial Demographics of Refugees

- **Vast majority of refugees are racialized as non-white and come from Muslim-majority countries**
  - **76% of the global refugee population under UNHCR's mandate** (this doesn't include Palestinian refugees) come from the following 10 countries:
    - Syria
    - Afghanistan
    - Somalia
    - South Sudan
    - Democratic Republic of Congo
    - Central African Republic
    - Myanmar
    - Eritrea
    - Colombia(UNHCR Global Trends 2015)
- **Conflicts in these countries are not internal in the sense that they involve for the most part:** Displacement rooted in structures or conflicts involving foreign sovereigns, including foreign military intervention.

# Reviewing the Racial Demographics of Refugees

The vast majority of refugees are racialized as non-white, and one implication of this is that exclusion of refugees or discrimination against refugees is overwhelmingly exclusion or discrimination along racialized lines.

## II. Structural Xenophobic Discrimination Against Refugees

- Xenophobic discrimination = foreignness discrimination
- Typically, when xenophobic discrimination is discussed, this calls to mind **discrimination that is explicitly based in anti-foreigner hatred.**

# Structural Xenophobic Discrimination Against Refugees

- Scenario 1: a refugee is **denied admission** from a school **because a school administrator explicitly stated anti-foreigner sentiments as the basis for denying admission.**
  - E.g. “Go home, we don’t want foreigners here!”
- Scenario 2: a refugee is **denied admission** from a school **because she doesn’t have a transcript and a birth certificate.** Her family fled their home in the eastern **Democratic Republic of Congo in wartime**, and wasn’t able to bring any documents with them. **The family cannot contact the home country to obtain these documents because this would risk invalidating their asylum claim.**



# Structural Xenophobic Discrimination Against Refugees

Scenario 1: a refugee is denied admission from a school because a school administrator explicitly stated antiforeigner sentiments as the basis for denying admission.

- This is clearly a case of explicit prejudice-based XD, because the perpetrator's actions were motivated principally by explicit intentions to harm foreigners.

Scenario 2: a refugee is denied admission from a school because she doesn't have a transcript and a birth certificate. Her family fled their home in the eastern Democratic Republic of Congo in wartime, and wasn't able to bring any documents with them. The family cannot contact the home country to obtain these documents because this would risk invalidating their asylum claim.

- This is not a case of prejudice-based XD, because (let us assume) no individual or group explicitly intended to harm foreigners in the way described. These documentary requirements serve an independent, legitimate purpose: **identification and placement assessment**

– Structural XD

# Structural Xenophobic Discrimination Against Refugees

Refugees also experience “structural xenophobic discrimination”

- This describes situations in which there is **harm resulting from:**
  - the disproportionate effect of laws, policies, and practices, on refugees:
  - on account of their status as foreigners,
  - even in the absence of explicit anti-foreigner prejudice.

CONSIDER A BANKING POLICY THAT PROHIBITS  
REFUGEES AND ASYLUM SEEKERS FROM  
OPENING BANK ACCOUNTS AS A MEASURE FOR  
PROTECTING AGAINST UNTRACEABLE MONEY  
LAUNDERING.

Bank Regulation  
& Policy

Bank Regulation  
& Policy

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graph LR; A[Bank Regulation & Policy] --> B[Employment limitations]
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The diagram consists of two rectangular boxes connected by a white arrow. The box on the left is white with a white border and contains the text 'Bank Regulation & Policy'. The box on the right is dark grey with a white border and contains the text 'Employment limitations'. A white arrow points from the right side of the left box to the left side of the right box, indicating a directional relationship.

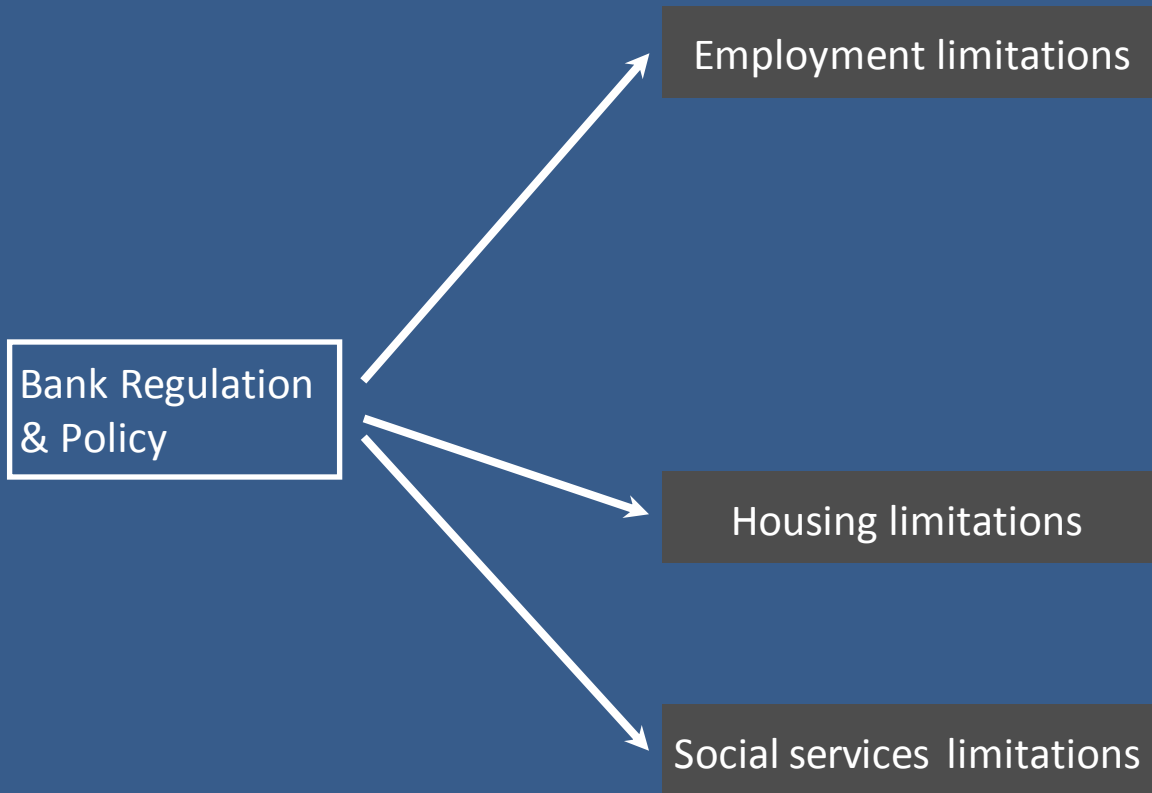
Employment limitations

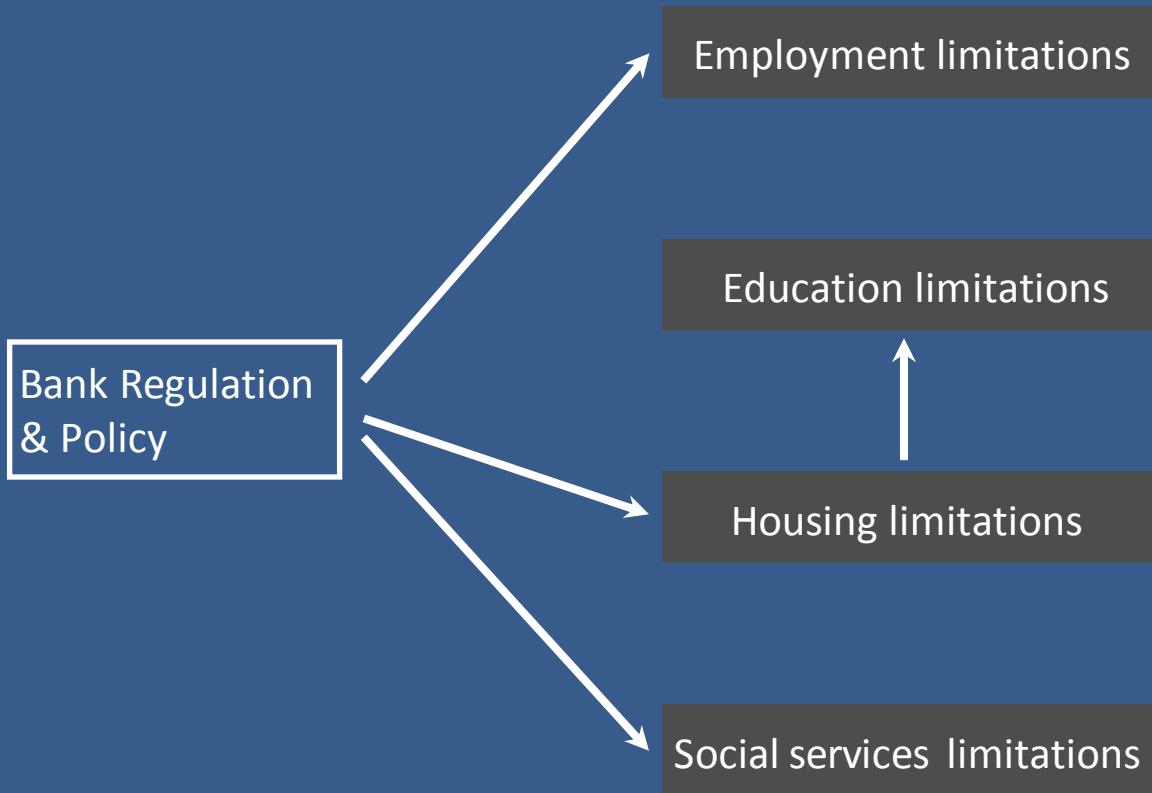
Bank Regulation  
& Policy

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graph LR; A[Bank Regulation & Policy] --> B[Employment limitations]; A --> C[Housing limitations];
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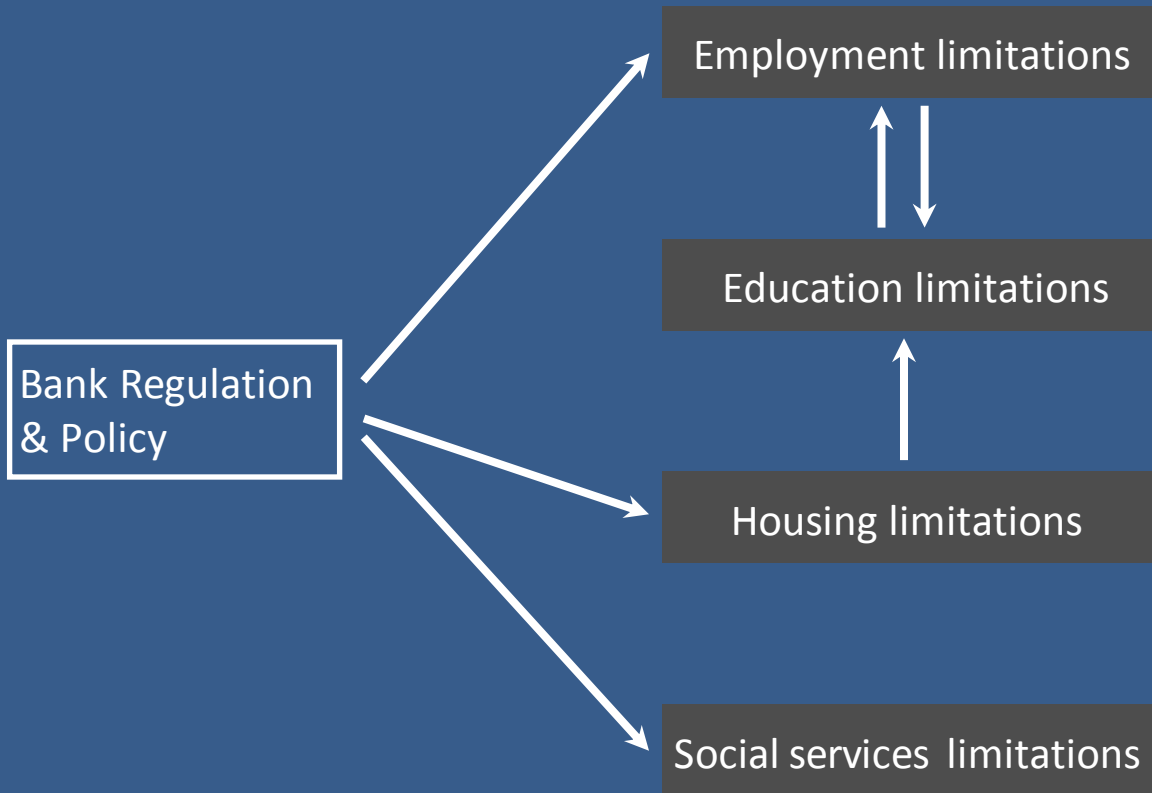
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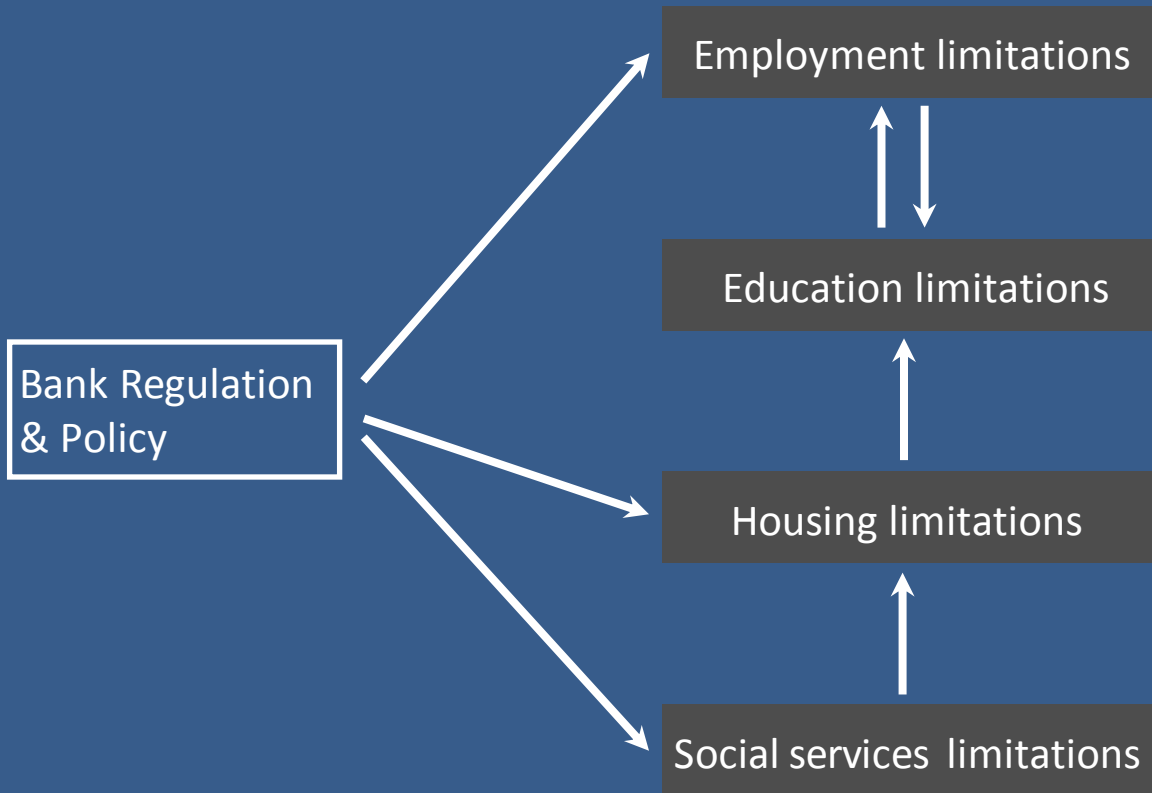
Housing limitations

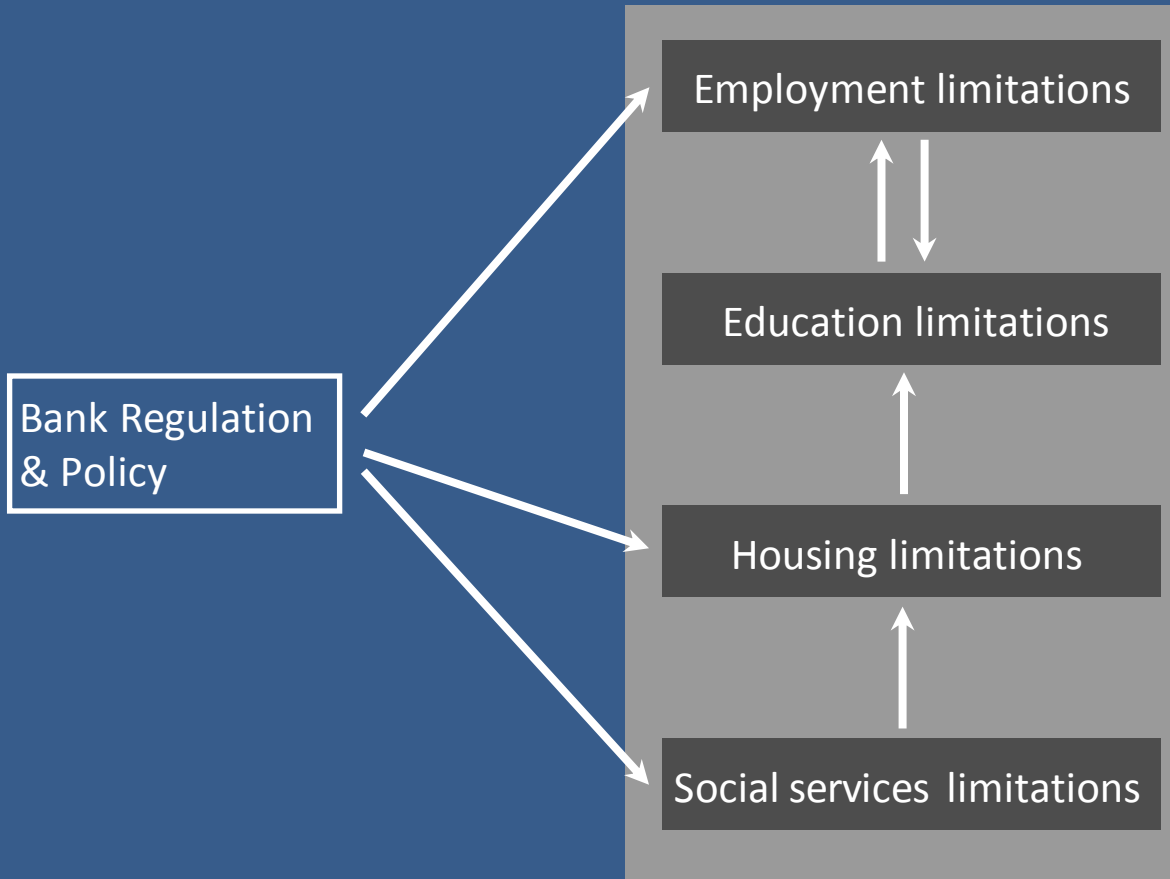


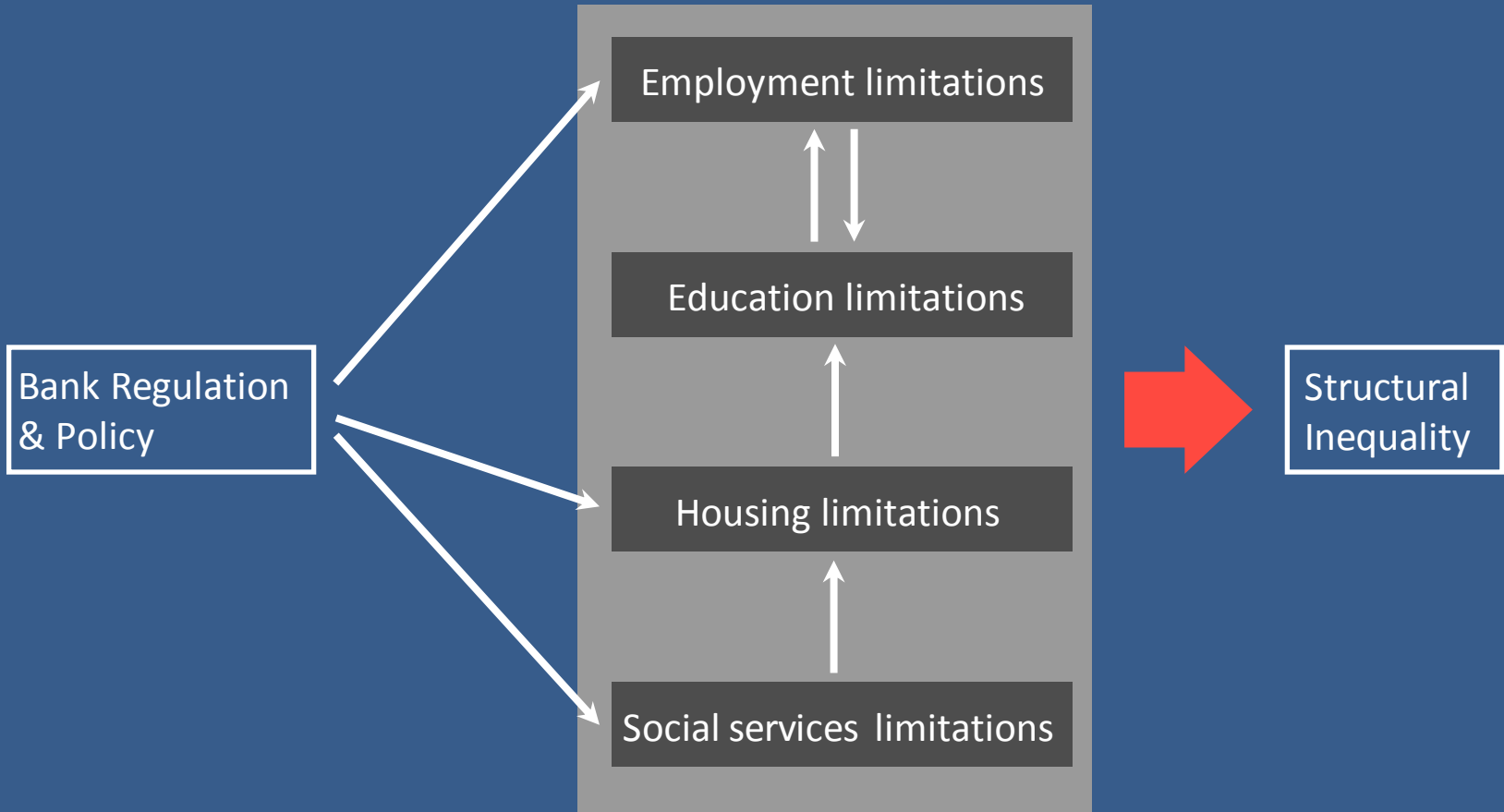












Structural xenophobic discrimination refers to simple and complex processes that result in varying degrees of harm (including human rights violations) to refugees even in the absence of explicit prejudice.

**Focusing only on prejudice fails to account for the fact that a significant proportion of the harm that refugees experience on account of foreignness may involve no explicit prejudice.**

# III. ICERD's Application to Structural Xenophobic Discrimination Against Refugees

## Article 1

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or **national or ethnic origin** which has the **purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.**
2. **This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.**

# Does Art.1 Cover Structural Xenophobic Discrimination?

On the one hand, the “purpose or effect clause” of Article 1 clearly requires the regulation of policies/measures whose effect is to nullify or impair the equal exercise of human rights on account of **differentiation on account of race, color, descent or national or ethnic origin.**

- Covers structural discrimination
- **Does not require intent**

[Recall that criminalization of acts of a xenophobic or racist nature would almost certainly not include this type of approach because criminal convictions typically require intent, at least in common law jurisdictions]



**But the question is: Is discrimination on the basis of non-citizenship status, such as refugee status, prohibited discrimination under Article 1?**

**Refugees are a group that are of a different national origin, but refugee status is also in important part about alienage or citizenship status. If a state maintains this is a distinction on the basis of citizenship status and not national origin, then Article 1.2 is relevant.**

# ICERD Art. 1

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

# Beneficial Guidance of the CERD

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

**BUT:**

Do ICERD member states uniformly defer to CERD's interpretive guidance?

Where CERD's General Recommendation 30 is viewed as authoritative (as it should be), what are the costs of leaving each state to engage in its own **legitimacy/proportionality** analysis?

**What are the implications for determining the global baseline for when structural exclusion of refugees that violates their human rights is prohibited xenophobic discrimination?**