

Refoulement as a Corollary of Hate: Private Actors and International Refugee Law

ISHITA CHAKRABARTY*

While researchers in the field of refugee studies have set out to influence the policy decisions of host states, the reverse situation, where a host state's policy decisions have shifted refugee movements, has been little discussed. With the increasing incidence of hate crimes, refugees now find themselves in situations similar to those which they were trying to escape. The issue of constructive refoulement—refoulement not by the outright return of refugees, but in the form of hostile practices such as detention practices, denial of employment, and inadequate reception conditions which compel a refugee's return—has gained prominence. This Essay seeks to build on this less-explored idea that refugees can be refouled through the actions of private actors where there is a real risk of degradation involved which jeopardizes the individual's rights to life and freedom from cruel, inhuman, and degrading treatment. In this Essay, I examine international treaties, and jurisprudence from international courts, and the existing international human rights framework, and argue that the rising incidences of hate crimes could amount to constructive refoulement under Article 33 of the Refugee Convention and implicate the host state's international responsibility. The scope of hate crimes within the Article is confined to acts that go beyond mere verbal abuse and include acts of arson, destruction of property, and bodily violence.

* Ishita Chakrabarty received her BA LL.B (Hons.) from Hidayatullah National Law University. She is currently engaged in the role of Research Officer at Quill Foundation, New Delhi, India. Her area of interests include refugee laws and international humanitarian law. The Author wishes to thank Ray Tang Hou and the entire editorial team at VJIL for their assistance which has helped in improving this Essay further. All errors are the Author's own. The Author can be contacted at: ishita.chakrabarty24@gmail.com.

I. INTRODUCTION 53
II. THE EXPANDING SCOPE OF REFOULEMENT 55
III. A QUESTION OF SEMANTICS 62
IV. A CASE FOR HATE-TRIGGERED REFOULEMENT..... 65
V. JUDICIAL RECOGNITION OF STATE OBLIGATIONS TOWARDS
ASYLUM SEEKERS AND REFUGEES..... 69
VI. CONCLUSION..... 74

I. INTRODUCTION

Recently, refugees have faced increased hostility within the countries in which they arrive. In a spate of incidents in America, Syrian refugees have been attacked by private actors.¹ To quote one victim, “We ran away from terrorism to find another kind of terrorism here . . . now I just wish I could go back.”² In South Africa, the new wave of anti-immigrant sentiments and resultant violence has led aliens, including migrants and refugee-seekers from the neighboring African states, to leave South Africa.³ More worryingly, states like South Africa fail to appropriately classify the crimes as acts motivated by bias or hate crimes.⁴ While the migrants have returned to the protection of their home states, the future of asylum seekers and refugees is less clear.

Refugees have long been considered aberrations within the international system. Studies have been dedicated to the question of whether refugee rights warrant the same level of protection as other human rights.⁵ According to one commentator, refugee inflows are but a natural result of gross human rights violations outside the nation state, and the consequence of agreeing to host refugees is a choice “between bolting the doors, thus increasing misery and violence outside, and opening them, at some cost to our own well-being.”⁶ Historically, mass expulsions were used to justify the act of “state-building.” More recently, emerging notions of “nationhood” have resulted in a wave of xenophobic acts and hate crimes, on the notion

1. Maria Rose, *Attacked in Pittsburgh-Area High School, Syrian Refugee Speaks for First Time in Wake of Viral Video*, POST-INDUS. (Dec. 9, 2019), <https://postindustrial.com/featuredstories/attacked-in-pittsburgh-area-high-school-syrian-refugee-speaks-for-first-time-in-wake-of-viral-video/#main>; Sam Levin, *Syrian Refugee, 17, Attacked on San Diego Trolley by Ban Shouting Slurs, Police Say*, GUARDIAN (Oct. 17, 2019), <https://www.theguardian.com/us-news/2019/oct/17/syria-refugee-san-diego-attack-report-hate-crimes>; see also Tyler Anbinder, *Trump has spread more hatred of immigrants than any American in history*, WASH. POST (Nov. 7, 2019), https://www.washingtonpost.com/outlook/trump-has-spread-more-hatred-of-immigrants-than-any-american-in-history/2019/11/07/7e253236-ff54-11e9-8bab-0fc209e065a8_story.html.

2. Maria Rose, *Attacked in Pittsburgh-Area High School*, POST-INDUS. (Dec. 9, 2019).

3. Eusebius McKaiser, *South Africans Are Used to Being the Targets of Racist Hatred. Now They've Become the Haters*, FOREIGN POL'Y (Sept. 19, 2019), <https://foreignpolicy.com/2019/09/19/south-africans-are-used-to-being-the-targets-of-racist-hatred-now-theyve-become-the-haters-xenophobia-afrophia/>.

4. See OXFORD PRO-BONO PUBLICO, COMPARATIVE HATE CRIME RESEARCH REPORT 28-29 (2014), <http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2014/05/Oxford-Pro-Bono-Publico-Comparative-Hate-Crime-Research-Report-April-2014.pdf>.

5. See VINCENT CHETAIL, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law*, in HUMAN RIGHTS AND IMMIGRATION (Ruth Rubio-Marin ed., OUP, 2014).

6. STANLEY HOFFMANN, DUTIES BEYOND BORDERS: ON THE LIMITS AND POSSIBILITIES OF ETHICAL INTERNATIONAL POLITICS 111 (New York, Syracuse University Press, 1981).

that refugees are “outsiders” and “invaders”.⁷ Although whether a person is a refugee or not is a matter of fact, the rights of refugees under 1951 Refugee Convention are contingent on the host state’s determination of their status. A common perception amongst states is that the refugee is an outsider to whom the state owes no obligations.⁸ Since a state believes that it remains legally accountable only to its own citizens, such bureaucratic decisions are undoubtedly political, involving economic, cultural, and national security concerns.

The cardinal principle of refugee law is the principle of non-refoulement under Article 33 of the Refugee Convention.⁹ Article 33 forbids states from transferring asylum-seekers under its jurisdiction to territories where there are grounds to believe that they stand a risk of persecution¹⁰ This is the position irrespective of whether the state has performed its declaratory function of assigning refugee status to an asylum seeker.¹¹ But deportation without following adequate procedural determinations is just one aspect of refoulement.

This Essay argues that refugees can be refouled through the actions of private actors when they create a real risk that a refugee’s rights to life and freedom from cruel, inhuman, and degrading treatment are violated. However, a state’s intention, as evidenced through its practice or policies, is evaluated when determining whether the host state bears responsibility under international law. This standard thus precludes individual instances where private actions do not hint at a larger state policy or where the state is unable to effectively control the acts of private actors.¹² To establish state

7. Aristide R. Zolberg, *The Formation of New States as a Refugee-Generating Process*, 467 ANNALS AM. ACAD. OF POL. & SOC. SCI. 34-36 (1983).

8. Stephen Mathis, *The Statist Approach to the Philosophy of Immigration and the Problem of Statelessness*, 11 GLOB. JUST.: THEORY PRACT. RHETORIC (2018), <https://www.theglobaljusticenetwork.org/index.php/gjn/article/view/139/148>.

9. Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13 INT’L J. REFUGEE L. 533, 538 (2001) (“[I]t is clear that the norm prohibiting refoulement is part of customary international law, thus binding on all States whether or not they are party to the 1951 Convention.”).

10. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137. *See generally* Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion, in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION (Erika Feller, Volker Türk & Frances Nicholson eds., Cambridge University Press, 2003).

11. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RTS., SCOPE OF THE PRINCIPLE OF NON-REFOULEMENT IN CONTEMPORARY BORDER MANAGEMENT: EVOLVING AREAS OF LAW 14 (2016), https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-scope-non-refoulement-0_en.pdf.

12. *See* Int’l Law Comm’n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc.A/56/10 (2001) [hereinafter *State Responsibility Draft Articles*] (although the Draft only deals with State responsibility in the context of “aliens” under Article 3(7)). Since the Regional treaties evaluate state responsibility on a “knew or ought to have known” basis, states could still be held legally accountable for failure to take prompt and appropriate measures. Also put as ‘a failure to take

responsibility in cases where the refugee rights are endangered as a matter of state policy or by private action within a state's effective control, this Essay relies on specific refugee conventions, international human rights, and the customary international law governing human rights.

The Essay is divided into the following sections. Part I deals with the scope of refoulement in courts that have embraced an effects-based approach to the principle. Part II addresses the distinction between voluntary returns and state-induced conditions that lead to refoulement, and Part III discusses the role hate crimes could play in refugee movements. Finally, Part IV deals with the judiciary's approach to state accountability on violations of refugee rights and options for prevention and redressal.

II. THE EXPANDING SCOPE OF REFOULEMENT

This section describes an "effects-based" approach to the principle of refoulement, which focuses on the nature of the right violated and not the means by which it is violated. The legal basis for this approach is grounded in the gradual expansion of the scope of the terms "refugee" and "refoulement" under treaty law and juridical interpretation. The primary analysis is whether the act has the effect of endangering the protected rights of the asylum seeker or the refugee.

The principle of non-refoulement prohibits states from transferring individuals under their control to another where they face a "credible fear" of persecution.¹³ Non-refoulement offers broader protection than Article 1F(a), which provides that any pre-admission exclusion is restricted only to certain categories of asylum seekers.¹⁴

Over the years, the scope of non-refoulement has expanded. Within the refugee regime itself, the 1969 Organization of African Unity (OAU) Convention and the 1984 Cartagena Declaration have further expanded protections. The OAU Convention and the Cartagena Declaration added armed conflict, foreign aggression, massive human rights violations, and

reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State', in *E. v. U.K.*, App. No. 33218/96, 590 Eur. Ct. H.R. 99 (Nov. 26, 2002); *Case of Gonzáles et al. ("Cotton Field") v. Mex.*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 282 (Nov. 16, 2009); *Case of the Pueblo Bello Massacre v. Colombia* Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 123 (Jan. 31, 2006).

13. *Defensive Asylum*, UNHCR, <https://www.unhcr.org/en-us/defensive-asylum.html>, discussing the interview procedure in asylum cases, where the asylum seeker has to show a 'credible fear' of persecution.

14. 'Reasonable grounds' offers a higher protection than 'serious reasons for considering'. See Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement Opinion for UNHCR's Global Consultations on International Protection* 47-49 (June 20, 2001), <https://www.refworld.org/docid/3b3702b15.html>.

serious disturbances of public order,¹⁵ giving rise to new legal protections such as the “exceptional leave to remain” and “subsidiary protection.”¹⁶ Protection from refoulement is not limited to refugees, and the Refugee Convention extends protections to asylees and asylum seekers, such as non-returns and non-expulsion.¹⁷ Moreover, non-refoulement has now transcended Article 33 of the Refugee Convention and finds expression within several human rights treaties and conventions, which an overwhelming number of states have ratified.¹⁸

Doctrinal constructions and judicial recognition of the customary law nature of non-refoulement have also expanded the principle to protect asylum-seekers on the high seas, borders and transit zones,¹⁹ and to protect them from the deprivation of certain fundamental rights by third states, such as rights to life and to be free from torture or other cruel, inhuman, degrading treatments in cases where the host state exercises effective control over the individual.²⁰ Similarly, under the American Convention on Human Rights (ACHR), Article 22(8) explicitly grants the right to seek and receive asylum.²¹ The 1984 Convention Against Torture (CAT) prohibits a state from expelling a person to another state where there are substantial grounds

15. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969), Article I(2); Section III (3) of the 1984 Cartagena Declaration on Refugees embodying the Conclusions of the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama.

16. Subsidiary and complementary forms of refugee protection fall under the UNHCR's extended mandate. They involve protection to those asylum seekers who do not fall under the Refugee Convention definition. See Executive Comm. of the High Comm'r's Programme, Standing Comm., *Providing International Protection Including Through Complementary Forms of Protection*, ¶ 26, UN Doc. EC/55/SC/CRP.16 (June 2, 2005), <https://www.refworld.org/docid/47fd49d.html>; UNHCR Statement on Subsidiary Protection Under the EC Qualification Directive for People Threatened by Indiscriminate Violence at 3, 22 (Jan. 2008), <https://www.refworld.org/pdfid/479df7472.pdf>.

17. GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 122-123 (3d ed., 2007).

18. See E. LAUTERPACHT & D. BETHLEHEM, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in *REFUGEE PROTECTION IN INTERNATIONAL LAW* 164-70 (E. Feller, V. Turk and F. Nicholson eds., Cambridge 2003).

19. See *Jamaa v. It.* App. No. 27765/09, Eur. Ct. H.R. ¶¶ 180-82 (Feb. 23, 2012); *Amuur v. Fr.*, App. No. 19776/92, Eur. Ct. H.R. ¶¶ 52-53 (June 25, 1996) (high seas); see also Guy S. Goodwin Gill, *R (ex Parte European Roma Rights Centre et al.) v. Immigration Officer at Prague Airport and another (UNHCR Intervening)*, 17 INT'L J. REFUGEE L. (2005). These cases involved an assessment into whether States engaging in interdictions, pushbacks at sea and pre-entry clearance which involves stopping asylum seekers from leaving their countries in the first place.

20. See Submission by the Office of the UN High Commissioner for Refugees in the Case of *Hirsi v. It.*, App. No. 27765/09, Eur. Ct. H.R. (Feb 23, 2012); *Jamaa v. It.* App. No. 27765/09, Eur. Ct. H.R. ¶¶ 76-82, 122-138 (Feb. 23, 2012) *Saadi v. It.*, App. No. 37201/06, Eur. Ct. H.R. ¶ 126 (Feb. 28, 2008); UN HRC, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (UN Doc. CCPR/C/21/Rev.1/Add.13)* ¶ 10 (May 26, 2004), <https://www.refworld.org/docid/478b26ae2.html>.

21. American Convention on Human Rights art. 22(7), *opened for signature* Nov. 22 1969, 1144 U.N.T.S. 123; Rights and Guarantees of Children in the Context of Migration, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶¶ 212-215 (Aug. 14, 2014).

for believing that he may be subjected to torture without any exceptions, including his past criminal records.²² This jurisprudence was long consolidated by the extradition case of *Soering* before the European Court of Human Rights (ECHR).²³

Recent expansions stretched the non-refoulement principle even further. The principle can now include the threat of “generalised violence” without any specific or individualized fear of persecution, the possibility of imposition of the death penalty, poverty, destitute living conditions, and lack of medical assistance in the absence of which the individual’s life would be at risk in the country of origin.²⁴ The individual can exercise his rights not merely in situations where the state directly engages in the transfer, but also where the state transfers the individual to a second, intermediate state that could potentially transfer him back to the country where his rights would stand violated. These situations are referred to as “indirect,” “secondary,” or “chain” refoulement.²⁵

Additionally, there have been arguments in favor of a third kind of refoulement, termed “constructive” or “disguised” refoulement, where the state creates circumstances that leave an individual with no other alternative but that of returning. The International Law Commission (ILC) Report, under Article 10 of the Draft Articles on the Expulsion of Aliens (Expulsion Draft Articles), notes that disguised expulsion arises not only from an action but also from any omission on the part of the state, including support or toleration of private acts if the support or toleration is attributable to the state. Nevertheless, states have not adopted the provisions of the Expulsion Draft Articles and have either refused to recognize “disguised expulsions”

22. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3(1), *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85; A. Duffy, *Expulsion to Face Torture? Non-refoulement in International Law*, 20 INT’L J. REFUGEE L. 380 (2008); B. Gorlick, *The Convention and Committee against Torture: A Complementary Protection Regime for Refugees*, 11 INT’L J. REFUGEE L. 481-82 (1999).

23. *Soering v. U.K.*, App. No. 14038/88, 11 Eur. Ct. H.R. ¶ 439 at ¶ 88 (July 7, 1989) (noting that it would not be compatible with Article 3 of the ECHR if a Member State knowingly surrendered a fugitive where there are substantial grounds for believing he would be subjected to torture and that similar provisions are also present under the ICCPR and the ACHR); see UNHCR, *Executive Committee Conclusion No 17 (XXXI) Problems of Extradition Affecting Refugees* (1980), ¶ (d)-(e), <https://www.unhcr.org/en-my/578371524.pdf> (calling upon the states to ensure that they act according to the principles of non-refoulement in their application of the extradition treaties).

24. *See Sufi v. U.K.*, App. No. 8319/07 and 11449/07, Eur. Ct. H.R. ¶¶ 278-282 (June 28, 2011); *M.S.S. v. Belg.*, App. No. 30696/09, Eur. Ct. H.R. ¶¶ 253-54, 264, 367 (Jan. 21, 2011); *D. v. U.K.*, App. No. 30240/96, Eur. Ct. H.R. ¶¶ 49-53 (May 2, 1997).

25. *Jamaa v. It.*, App. No. 27765/09, Eur. Ct. H.R. (Feb. 23, 2012); UNHRC, *General Comment No. 31, The Nature of the General Legal Obligation imposed on States Parties to the Covenant (UN Doc. CCPR/C/21/Rev.1/Add.13)* (May 26, 2004), ¶ 12, <https://www.refworld.org/docid/478b26ae2.html>.

as forbidden under international law, or have sought clarification of its scope.²⁶

The standard in the Expulsion Draft Articles is not new or unheard of. Previously, arbitral tribunals like the Eritrea-Ethiopia Claims Commission clarified the scope of “constructive expulsion” in a similar although restricted manner, building off of jurisprudence from the Iran-US Claims Tribunal. The Eritrea-Ethiopia tribunal held that where individuals left a country on account of “dire and threatening conditions so extreme” resulting from “actions or policies of the host government or clearly attributable to the government” coupled with a showing of government “intention”, they could constitute constructive expulsion.²⁷ The Iran-US and Eritrea-Ethiopia Claims Commissions were instrumental in the formulation of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (State Responsibility Draft Articles), adopted by the ILC in 2001.²⁸

The Commentaries to the Expulsion Draft Articles apply the attribution standard set out in the State Responsibility Draft Articles.²⁹ The State Responsibility Draft Articles attribute conduct to the State on account of (a) the acts and omissions of their own organs at any level where there exists an obligation, (b) or, of bodies acting in a de jure or de-facto state capacity or, (c) under certain circumstances, for the acts of private actors.

Generally, states are not held liable for the individual acts of private actors. However, Articles 8 and 11 of the Draft Articles on State Responsibility allow an act to be attributed to a state where the State instructs, directs or controls the acts of the private actors,³⁰ or in cases where

26. Int’l Law Comm’n, *Expulsion of Aliens: Comments and Observations Received from Governments*, UN Doc. A/CN.4/669 (2014), <https://undocs.org/A/CN.4/669>; Comm. Against Torture, *Written Submissions on the Draft Revised General Comment on the Implementation of Article 3 of the Convention in the Context of Article 22*, www.ohchr.org/EN/HRBodies/CAT/Pages/Submissions2017.aspx.

27. The ICRC also supports the prohibition of constructive refoulement. See ICRC, *Note on Migration and the Principle of Non-Refoulement*, 904 INT’L REV. OF THE RED CROSS 1, 10 (2018), <https://international-review.icrc.org/sites/default/files/irrc-904-19.pdf> (quoting Civilian Claims (Eth. v. Eri.), Partial Award, PCA Case Repository, ¶¶ 125-127 (Eritrea-Ethiopia Claims Comm’n 2004); and then citing Int’l Law Comm’n, *Draft Articles on the Expulsion of Aliens with Commentaries*, UN Doc A/69/10, at art. 10, ¶¶ 4-5 (2014) [hereinafter *Expulsion Draft Articles*]. But see Won Kidane, *Missed Opportunities in the International Law Commission’s Draft Articles on the Expulsion of Aliens*, 30 HARV. HUM. RTS. J. 77, 84 (2017) (noting that the standards in the Draft Articles were not as high as those in the Iran-US and Eritrea-Ethiopia Claims Tribunals since the Draft Articles did not contemplate the showing of intention in each individual case).

28. See Report of the International Law Commission, UN Doc. A/67/10 (2012), <https://undocs.org/A/67/10>.

29. *Expulsion Draft Articles*, *supra* note 26, at 17.

30. *State Responsibility Draft Articles*, *supra* note 12 at 47-48 (2001), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

the conduct of private actors is “acknowledged” and “adopted” by the State as its own,³¹ among other exceptions.

Under Article 8, while the question of whether a state “directs” or “instructs” is clear, the question of what the appropriate test for “control” over private actors is, has been of much debate, varying between an “effective control” test first proposed in *Nicaragua v. United States*,³² to the “overall control” proposed in *Prosecutor v. Tadić*.³³ The *Tadić* case also acknowledged, that “control” might have to be established on a case to case basis, so as to see that States do not simply act through individuals and then disassociate themselves from their conduct.³⁴ While later cases such as *Armed Activities on the Republic of Congo* and *Case Concerning Application of the Convention on the Prevention and Punishment of Genocide* re-adopted the “effective control” standard, it is significant to note that the test of control in all these circumstances discussed above has only been observed in the *jus ad bellem* context and not during a time of peace.³⁵

Commentators have criticized the jurisprudence of state attribution and favor a case-by-case approach. For example, Professor Kristin Boon suggests that the ILC failed to define an overarching standard of control and that the “effective control” may not apply outside the *jus ad bellem* context.³⁶ Professor Ian Brownlie further argues that the State has an exclusive control over its “internal events, information and communications,”³⁷ so the attribution of private acts might be easier to satisfy outside the *jus ad bellem* context. In a minority opinion for the *Genocide* case, ICJ Vice President Al-Khasawneh mentioned that there could be circumstances wherein the State facilitated or encouraged individuals and groups to commit unlawful acts.³⁸ The “case to case basis” in *Tadić* would thus seem to be more relevant to evaluate acts of expulsion in times of peace.

Furthermore, according to the Draft Articles on State Responsibility Commentary, “acknowledgement” and “adoption” under Article 11 can be inferred from endorsement and continuance of the wrongful action, either

31. *See id.* at 52-54.

32. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 115 (June 27).

33. Prosecutor v. Tadić, Case No. IT-94-1-I, Judgment, ¶¶ 145-146 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 19, 1999) (stating that the overall control test did not require “specific instructions”).

34. Sylwia Strykowska, *The International Legal Issue of Attribution of Conduct to a State - The Case Law of the International Courts and Tribunals*, ADAM MICKIEWICZ U. L. REV. 143, 149-51 (2018).

35. *See id.*

36. Kristen E. Boon, *Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrine*, 15 MELB. J. INT'L L. 330, 341, 348 (2014).

37. Gordon A. Christenson, *Attributing Acts of Omission to the State*, 12 MICH. J. INT'L L. 312, 315 (1990).

38. Strykowska, *supra* note 34, at 152.

express or implied through the State's conduct.³⁹ As an example of express endorsement, the commentary on the Draft Articles on State Responsibility cites the case of the *United States Diplomatic and Consular Staff in Tebran*. There, Iran's statements and policies maintaining the third-party seizure of the United States embassy adopted the seizure and established state responsibility.⁴⁰ One commentator proposes that in certain cases, the acts of private individuals could create a question of the government's "propriety" akin to the "fair and equitable treatment" standard in international investment law.⁴¹ Under that analysis, one would assess whether the government's actions "amount to an outrage, to bad faith, to willful neglect of duty or an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."⁴² Similarly, Professor Gordon Christenson proposes that a State could be held responsible in cases where its internal procedures do not meet the international standards of protection, and aliens who suffer injuries from non-state actors are additionally denied justice. The standard to be observed is not one of a mere failure to prevent, but one showing willful neglect.⁴³ That is, it does not refer to the secondary responsibility of the state for the primary acts of non-state actors, but refers to the state's independent conduct in response to a non-state action.⁴⁴ Christenson notes that state attribution is easier to satisfy in cases where "vital interests,"⁴⁵ such as the right to life, are at stake.

In certain cases, human rights treaties also recognize a positive obligation of states towards individuals when state or private actors violate their rights. For instance, under the International Convention on Elimination of Racial Discrimination (CERD), 1965, the state is obligated to seek positive measures to counter racial discrimination amongst public officials, institutions, and private individuals. Similarly, the International Covenant on Civil and Political Rights (ICCPR), 1966, guarantees certain rights, including the rights to life, security, equality, and equal application of law to all "without distinction of any kind," on the basis of factors such as "race . . . national or social origin . . . or other status" under Articles 2 and

39. *State Responsibility Draft Articles*, *supra* note 12, at 52-54, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

40. *See id.*

41. *See* Nirmalan Wigneswaran, *Judicial Leadership in International Human Rights: Developments in the Law of State Responsibility in Human Rights*, in THE SYLFF 2007 REGIONAL FORUM SELECTED PAPERS ON HUMAN RIGHTS AND CREATIVE LEADERSHIP 147, 157 n.42 (2009) (referring to *L.F.H. Neer v. Mex.*, 4 R.I.A.A. 60 (General Claims Commission 1926)).

42. *Id.*

43. Christenson, *supra* note 37, at 327.

44. *See id.* at 324.

45. *See id.* at 316-17 (discussing when State inaction amounts to "a conscious part of the prudent exercise of power").

26.⁴⁶ Previously, states had adopted an expanded understanding of the term “other status” to include discrimination on xenophobic grounds that may not be purely related to race, ethnicity, or nationality, such as gender identity and disability.⁴⁷ Apart from human rights treaties that usually interpret state obligations through a “teleological” extension,⁴⁸ refugee laws themselves contemplate a structure where rights are granted proportionally to the degree of association to the host state, as is the case for the rights to physical presence,⁴⁹ lawful stay,⁵⁰ and durable residence.⁵¹ Furthermore, the Refugee Convention ensures that, at the minimum, refugees receive the same treatment as meted out to non-citizens generally.⁵² Judicial interpretations have further ensured enhanced protection to those “settled,” illustrated, for example, through courts’ recognition of the “right to private life,” and the “retention of social ties.”⁵³ This implies that a refugee, whether settled or even those at the end of the continuum, seeking refuge, are entitled to the protection of their core rights.

46. International Covenant on Civil and Political Rights art. 2, 999 U.N.T.S. 171, S. Exec. Doc. No. E, 95-2 (Dec. 16, 1966).

47. See Shreya Atrey, *Fifty Years On: The Curious Case of Intersectional Discrimination in the ICCPR*, 35 NORDIC J. HUM. RTS. (2017), <https://doi.org/10.1080/18918131.2017.1350505>.

48. “Teleological” refers to a method of interpretation in accordance with the context and purpose of the treaty. For an analysis of “teleological interpretation” of treaties, see John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, 23 HARV. HUM. RTS. J. (2010).

49. GUNNEL STENBERG, NON-EXPULSION AND NON-REFOULEMENT: THE PROHIBITION AGAINST REMOVAL OF REFUGEES WITH SPECIAL REFERENCE TO ARTICLES 32 AND 33 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES 87 (Uppsala, Iustus Förlag, 1989).

50. See Statement of Mr. Juvigny of France in Ad Hoc Committee on Refugees and Stateless Persons, *Second Session Summary Record of the Forty-Second Meeting UN Doc. E/AC.32/SR.42* (Aug. 24, 1950), <https://www.unhcr.org/protection/statelessness/3ae68c190/ad-hoc-committee-refugees-stateless-persons-second-session-summary-record.html>. “Lawful stay” does not imply permanent residence or even domicile, and does not require a long stay. GRAHL MADSEN, 2 STATUS OF REFUGEES IN INTERNATIONAL LAW 353-354 (Leiden: A.W. Sijthoff, 1972) (noting that a three months’ time period is usually accepted as one of lawful stay after he has reported himself to the authorities or has filed the requisite application for status determination); Report of the Style Committee, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Draft Convention Relating to the Status of Refugees*, UN Doc. A/CONF.2/102 (July 24, 1951), <https://www.unhcr.org/protection/travaux/3ae68cd71c/conference-plenipotentiaries-status-refugees-stateless-persons-draft-convention.html> (stating that refugees lawfully present were entitled to social security, public assistance, and housing, and were also allowed access to pursue professions, freedom of association).

51. National treatment in relation to security before courts as costs during legal proceedings. After three years of residence, they are also exempted from any restrictions on employment.

52. In some contexts, the Convention calls for granting ‘most-favored-nation’ treatment (Articles 15, 17(1)), in others, it seeks to accord ‘national treatment’, that is, treatment no different from that of citizens (Articles 4, 14, 16, 20, 22(1), 23, 24(1), 29).

53. See Mario Savino, *The Right to Stay as a Fundamental Freedom? The Demise of Automatic Expulsion in Europe*, 7 TRANSNAT’L LEGAL THEORY (2016); *Slivenko v. Lat., App. No. 48321/99*, Eur. Ct. H.R. (Oct. 9, 2003).

III. A QUESTION OF SEMANTICS: VOLUNTARINESS OR REFOULEMENT?

The UNHCR considers voluntary repatriation, whenever possible, to be the most desirable solution to the refugee issue.⁵⁴ One commentator notes that although, the term ‘repatriation’ might indicate some degree of state involvement, the fact that it is preceded by the term ‘voluntary’ implies that refugees have an autonomy in this regard, such that on their return their rights under international human rights regime is not jeopardized.⁵⁵ He notes that respect for voluntary return emerges from respect for the principle of non-refoulement, and thus at the minimum presumes that conditions which gave rise to the refugee’s flight in the first place, have now ceased to exist.⁵⁶ This section shows that refugee repatriations have not always been “voluntary” but often occur under duress, owing to conditions created by the state institutions. In other words, constructive refoulement has been masked as “voluntary repatriation.”

The UNHCR has taken its own position on state attribution of refoulement.⁵⁷ During the global consultations on international protection, UNHCR explained that refoulement would include “any measure attributable to the state which *could have the effect* of returning an asylum seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she is at risk of persecution.”⁵⁸ While bias in decision-making procedures may be impossible to identify unless

54. EXEC. COMM. OF THE HIGH COMM’R’S PROGRAMME, VOLUNTARY REPATRIATION NO. 40 (XXXVI) - 1985 (Oct. 18, 1985), <https://www.refworld.org/docid/3ae68c9518.html>.

55. GEOFF GILBERT, THE INTERNATIONAL LAW OF VOLUNTARY REPATRIATION, at 1 (Apr. 19, 2018), <https://www.unhcr.org/en-my/5ae079557.pdf>.

56. *Id.* at 2 (“In that regard, cessation under Article 1C.5 1951 Convention ought not to provide evidence vis-à-vis voluntary repatriation since the need for refugee status has ended and there is no question of the need for voluntariness. On the other hand, given that voluntary repatriation and safe return often overlap, the surrounding criteria for Article 1C.5 ought to be relevant even if there has been no formal cessation.”).

57. While some commentators treat the UNHCR’s interpretation as authoritative, this characterization is disputed and the Comments are best viewed as persuasive authority. Alice Farmer, *Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection* 23 GEO. IMMIGR. L.J. 1, 24 (2008) (noting that UNHCR’s Comments themselves rely on principles of customary international law in relation to the principle of non-refoulement and the UNHCR Executive Committee Conclusions, while not binding law, contribute to the formation of *opinio juris*, and are “probative of the views of the international community as a whole”); *But cf.* Anthony M. North & Joyce Chia, *Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees*, in THE UNHCR AND THE SUPERVISION OF INTERNATIONAL REFUGEE LAW 214, 226-27, 235-36 (James C. Simeon ed., 2013) (discussing divergent levels of authority assigned to the UNHCR Guidelines on International Protection across jurisdictions).

58. REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 178 (Erika Feller, Volker Turk & Frances Nicholson eds., CUP, 2003) (emphasis added).

there is an overt breach of legal standards and procedural guarantees,⁵⁹ civil society organizations have been quick to pick up on tendencies of states to establish “low reception standards,” such as poor standards of housing and healthcare, or denial or restrictions on the right to work during asylum procedure, to avert refugee flows.⁶⁰ For instance, Amnesty International criticized the Thai government for engaging in constructive refoulement by indefinitely detaining asylum seekers and subjecting them to dire living conditions, leaving them with no other options but to return.⁶¹

Amnesty’s statement went beyond the existing jurisprudence espoused by the ECHR in the landmark case of *M.S.S v. Belgium and Greece*, wherein the Court found a violation of the applicant’s right to be free from inhuman, cruel, and degrading treatment on account of the state’s failure to provide subsistence or accommodation to cater to his basic needs.⁶² The court called these failures a “particularly serious” deprivation of material reception conditions, but fell short of assessing whether these conditions could potentially lead to refoulement.⁶³ Similarly in the *Saciri* case before the CJEU, the Court held that member states are obliged to provide financial allowance and housing commensurate with a dignified standard of living to asylum seekers. If the state fails to provide housing, it should provide access to private rental markets, or at least refer refugees to public assistance bodies, even in the absence of documents that may have been left in the refugee’s country of origin.⁶⁴ The latter case shows that European courts have attempted to protect even second generation human rights of asylum

59. Courts have repeatedly emphasized on the application of principles of non-discrimination and due process and a duty to ensure that the proceedings are fair, thorough, individual, coherent, objective and predictable. See *Case of the Pacheco Tineo Family n. Bol.*, Inter-Am Ct. H.R. 155-157 (Nov. 25, 2013); *Gebremedhin v. Fr.*, App. No. 25389/05, Eur. Ct. H.R. Section II, 65 (April 26, 2007).

60. Lieneke Slingenbergh, *Reception Conditions Directive (recast): Relevance in Times of High Numbers of Asylum Applications*, in *THE RECAST RECEPTION CONDITIONS DIRECTIVE: CENTRAL THEMES, PROBLEM ISSUES, AND IMPLEMENTATION IN SELECTED MEMBER STATES* 9, 11 (Paul Minderhoud & Karin Zwaan, eds., 2016), <https://research.vu.nl/en/publications/reception-conditions-directive-recast-relevance-in-times-of-high->.

61. AMNESTY INT’L, *Thailand: Act on Commitments to Prevent Refoulement*, (Nov. 13, 2017), <https://www.refworld.org/pdfid/5a0d4bc26.pdf>.

62. *M.S.S. v. Belg.* 137, App. No. 30696/09, Eur. Ct. H.R. 263 (2011).

63. *Id.* at 254 (“Added to that was the ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving. It was to escape from that situation of insecurity and of material and psychological want that he tried several times to leave Greece.”). This shows that, the court recognizes that insecurity could lead to asylum seekers and refugees leaving the host states, but frames the issue only as an Article 3 ECHR violation, not refoulement. But see *A.E.A. v. Greece*, App. No. 39034/12, Eur. Ct. H.R. (Mar. 15, 2018) (declining to find a breach of article 3 ECHR obligations by the state on account of where the plaintiff was living homeless and without access to food, water, or toilets and in violent living conditions).

64. Case C-79/13, *Federaal agentschap voor de opvang van asielzoekers v. Saciri*, ECLI:EU:C:2014:103, ¶¶ 33-51 (Feb. 27, 2014). The judgement concludes that rights of asylum seekers ought to be respected and overflowing refugee numbers cannot be used as a pretext to not meet these standards. *Id.* ¶¶ 47-51.

seekers, such as rights to an adequate standard of living, housing and social protection, right to health, where they are intricately connected to the preservation of life and dignity itself.⁶⁵ Both these examples also show that the European courts have essentially framed the issues in terms of reception conditions that are limited to the period between the asylum seeker makes an application and the day on which the application is granted or denied (along with any appeal period).

Likewise, in African nations such as Uganda, governments have imposed restrictions on Rwandan refugees' engagement in wage-earning employment, such as cultivation of crops,⁶⁶ and issuance of deadlines for the cessation clause to come into effect,⁶⁷ so that any stay beyond that period would attract arrest and imprisonment.⁶⁸

The UNHCR Handbook explains that returns must take place following an assessment of conditions in the country of origin and in the host state,⁶⁹ implying that it must be informed and through the exercise of free choice. Any return must be safe, secure, and dignified allowing the refugees to return at their own pace. Several scholars, including Vincent Chetail, G. J. L. Coles, and Yasmin Naqvi, have inferred that as a prerequisite to the exercise of the right to return, there must exist conducive conditions for

65. *See* Complaint No. 14/2003, Int'l Fed'n of Hum. Rts. Leagues v. Fr., Eur. Comm. on Soc. Rts. ¶¶ 30-32 (Nov. 2004) (finding that any absolute restriction imposed by states upon illegal immigrants on access to healthcare would be in violation of the Charter rights); *see* Case C-562/13, Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Abdida, ECLI:EU:C:2014:2453, ¶¶ 54-58 (Dec. 18, 2014).

66. Under Article 17 of the Refugee Convention, the State cannot deny a refugee who has been lawfully residing within the host country, the right to engage in a wage-earning employment. Convention Relating to the Status of Refugees art. 17, July 28, 1951, 189 U.N.T.S. 137.

67. The Cessation clause refers to the 'cessation' or end of refugee status under Article 1C of the Refugee Convention and applies when the Refugee no longer requires international protection, either because of change in circumstances in his country of origin or because he has re-availed himself of the protection of his home country. Convention Relating to the Status of Refugees, art. 1C July 28, 1951, 189 U.N.T.S. 137. Once the Cessation comes into effect, the refugee's stay in the host country will become illegal. *See* UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION: CESSATION OF REFUGEE STATUS UNDER ARTICLE 1C(5) AND (6) OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES, (Feb. 10, 2003), <https://www.unhcr.org/3e637a202.pdf>; UNHCR, *THE CESSATION CLAUSES: GUIDELINES ON THEIR APPLICATION* (Apr. 26, 1999), <https://www.refworld.org/docid/3c06138c4.html>; UNHCR, NOTE ON THE CESSATION CLAUSES, (May 30, 1997), <https://www.unhcr.org/en-us/excom/standcom/3ae68cf610/note-cessation-clauses.html>; UNHCR, DISCUSSION NOTE ON THE APPLICATION OF THE 'CEASED CIRCUMSTANCES' CESSATION CLAUSES IN THE 1951 CONVENTION (Dec. 20, 1991).

68. AHIMBISIBWE FRANK, VOLUNTARY REPATRIATION OF RWANDAN REFUGEES IN UGANDA: ANALYSIS OF LAW AND PRACTICE (2017), https://www.researchgate.net/publication/318701690_Voluntary_Repatriation_of_Rwandan_Refugees_in_Uganda_Analysis_of_Law_and_Practice.

69. UNHCR, HANDBOOK ON VOLUNTARY REPATRIATION: INTERNATIONAL PROTECTION (Jan. 1996), <https://www.refworld.org/docid/3ae6b3510.html>; *see* UNHCR, HANDBOOK FOR EMERGENCIES 452-54 (3d ed., 2007), https://www.ifrc.org/PageFiles/95884/D.01.03.%20Handbook%20for%20Emergencies_UNHCR.pdf.

such return,⁷⁰ that is, there must be a “cessation of events” that led to the asylum seeker’s initial escape.⁷¹ Hence, if refugees return to a territory owing to events prompted by the state such as denying them essential healthcare rights, refusing to allow them to engage in self-employment, or subjecting them to unnecessary or disproportionate punishments, and under conditions where they still stand at a risk of persecution, it is an act of constructive refolement.

IV. A CASE FOR HATE-TRIGGERED REFOULEMENT

This section deals with the argument that the rise in the xenophobic attitudes of host state population against refugees and asylum seekers could under certain circumstances lead to their “constructive refolement”. The section starts with how modern states have been seeing a reemergence of collective identities and along with it, a rise in hate crimes against refugees. The section quickly moves on to an analysis of how the gravity of these crimes could lead to their return to their country of origin - which would be in breach of non-refoulement where the state institutions incite, are complicit in, or acquiesce in such acts.

In her work, Jennifer Jackson Preece notes that historically, states have been formed either over shared national identities or ethnicity. While discussing ethnic cleansing, she traces the history of mass refugee outflows as a consequence of nation building through “ethnic bonds.”⁷² She notes that those who appeared ethno-culturally distinct were “voluntarily” relocated, transferred, or exchanged to ensure homogeneity.⁷³

Andrew Shacknove points out that politics and scarcity may not be the only reasons behind hostile behavior towards refugees. A negative shift in host state perceptions is often based on the conflation of voluntary migration, prompted by economic reasons or desire for a better standard of living, and refugeehood, prompted by the need to escape violence and questions on how they could be redressed.⁷⁴ The problem would be

70. See Vincent Chetail, *Voluntary Repatriation in Public International: Concepts and Contents*, 23(3) REFUGEE SURV. Q. 26 (2004); Yasmin Naqvi, *Between a Rock and Hard Place? A Legal Analysis of the Voluntary Repatriation of Guatemalan Refugees*, 23 REFUGEE SURV. Q. 82-83 (2004); UNHCR, *Voluntary Repatriation EC/SCP/41* (Aug. 1, 1985), <https://www.unhcr.org/excom/scip/3ae68cca4/voluntary-repatriation.html>.

71. UNHCR, *Discussion Note on Protection Aspects of Voluntary Repatriation (EC/1992/SCP/CRP.3)* (Apr. 1, 1992), <http://www.refworld.org/docid/3ae68cd314.html>; Executive Committee of the High Commissioner’s Programme, *Voluntary Repatriation No 40 (XXXVI)-1985* (Oct. 18, 1985), <https://www.refworld.org/docid/3ae68c9518.html>.

72. Jennifer Jackson-Preece, *Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms*, 20 HUM. RTS. Q. 820 (1998).

73. *Id.*

74. Andrew E. Shacknove, *Who Is a Refugee?*, 95 ETHICS 276 (1985).

compounded for refugees who seek to integrate themselves into the host state as compared to those who see their stay as temporary.⁷⁵

Similarly, the most marginalized sections within the asylum-seeking population—women, children and unaccompanied minors, the disabled, the elderly, and those persecuted because of their sexual orientations and gender identities—have it worse. For instance, the 2016 and 2017 MSF reports on the conditions of detention in the Greek Aegean islands, described the material reception conditions as indicative of “institutional neglect” to prevent violence against transgender men and women because of lack of adequate security.⁷⁶ The report referred to the incidents as hate-motivated crimes,⁷⁷ despite the fact that states are under an obligation to adopt enhanced measures and identify protection needs in the case of those most vulnerable.⁷⁸

The *travaux préparatoires* to the Refugee Convention themselves indicate that when negotiating the chapter on “duties,” states were aware of the xenophobic attitudes prevalent in certain countries and among their officials, who could strip away rights under the Convention or even revoke refugee status for minor infractions of the laws.⁷⁹ Xenophobia and hate crimes have a negative bearing on the host state in recognizing and meeting the needs of asylum seekers and refugees.⁸⁰ Political attitudes towards

75. Daniele Joly, *Odyssean and Rubicon Refugees: Toward a Typology of Refugees in the Land of Exile*, 40 INT’L MIGRATION 9-10, 16 (2003).

76. See European Council on Refugees (ECRE) and Exile & European Legal Network Asylum (ELENA), *The Living Conditions for Migrants and Refugees on the Eastern Aegean Islands (Information Note)*, <https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/ELENA%20Information%20Note%20-%20The%20living%20conditions%20for%20migrants%20and%20refugees%20on%20the%20Eastern%20Aegean%20islands.pdf> (last visited Dec. 15, 2019).

77. *Id.*

78. For instance, in the case of unaccompanied minors, the best interests of a child must be the primary concern at all stages. Likewise, refugee status determination procedures must be sensitive to the risks, informative and where there are children involved, be ‘child friendly’. See UNHCR, *GUIDELINES ON POLICIES AND PROCEDURES IN DEALING WITH UNACCOMPANIED CHILDREN SEEKING ASYLUM* (Feb. 1997), <https://www.refworld.org/docid/3ae6b3360.html>. Although there are no separate treaties for the most vulnerable amongst the refugees, guidance notes and policies have been largely used to fill this gap. For provisions relating to women and disabled refugees, see UNITED NATIONS, *PERSONS WITH DISABILITIES AND MULTIPLE DISCRIMINATION - RIGHTS OF SPECIAL GROUPS*, <https://www.un.org/esa/socdev/enable/comp505.htm#5.2>.

79. See UN Conference of the Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the 35th Meeting*, U.N. Doc. A/CONF.2/SR.35 (1951), <https://www.refworld.org/docid/3ae68ceb4.html> (last visited Dec. 4, 2019). (objecting to Belgium’s proposal to restrict Convention rights to only those who would comply with the laws, regulations of states); 1 GRAHL MADSEN, *STATUS OF REFUGEES IN INTERNATIONAL LAW* 58 (1966).

80. EMMA HADDAD, *THE REFUGEE IN INTERNATIONAL SOCIETY: BETWEEN SOVEREIGNS* 13 (2008) (referring to the clash between the humanitarian interests of the refugees and the sovereign interests of the state). See Andrew E. Shacknove, *Who Is a Refugee?*, 95 ETHICS 274, 275-77 (1985) (noting that a refugee is characterized by lack of state protection and the status of a “refugee” is a privilege granted by the host state).

refugees in the host state may give rise to events which could compel the refugee to return to their country of exile. As Tom Kuhman notes, the attractiveness of the host state lies in the absence of the “source of distress” otherwise present in their countries of origin. In other words, a refugee is one who seeks protection before the host state. But if circumstances in the host state itself involve a policy of persistent threats, reprisals and punishments such that the refugee is forced to return, it would constitute refoulement.

Emerging right-wing governments have recently pushed more anti-immigrant rhetoric and policies. One report correlates this link between government rhetoric and private actor violence across Europe by describing the increase in violence towards immigrants, targeted shootings, and murders, and calls for conducting a census in countries such as Italy, Germany, the UK, and Hungary.⁸¹ In some countries, the government officials themselves have been accused of leading parallel networks that aim to specifically attack activists, refugees, and migrant groups.⁸² When discussing the magnified impact of such statements when made by political representatives, some domestic courts have questioned whether statements inciting hatred or violence can be justified on the grounds of freedom of expression.⁸³

The ICRC opines that the mere compulsion to return is not in itself refoulement as long as it does not have the practical effect of returning asylum seekers to those territories where their fundamental rights would stand violated.⁸⁴ But in reality, in several instances the refugee may not have anywhere else to go, and would have no option but to return to their country of origin. Since both municipal and international law defines people in terms of their membership to sovereign nations, people cannot leave their countries in the first place if they have nowhere to go.⁸⁵ The fact that South-

81. See Adama Dieng, *Street by Street: Dehumanization in Europe*, <https://www.un.org/en/genocideprevention/documents/Adama%20Dieng-Systematic%20Dehumanization%20in%20Europe.pdf> (last visited Dec. 19, 2019).

82. Emran Feroz, *Living as a Refugee in Germany under the Shadow of Violence*, TRT WORLD (Jan. 16, 2019), <https://www.trtworld.com/opinion/living-as-a-refugee-in-germany-under-the-shadow-of-violence-23356>. (noting how prosecution of members of the right-wing group in Germany, Nationalist Socialist Underground led to investigations into the ties between the group and the federal intelligence agency).

83. See *Féret v. Belg.*, App. No. 15615/07, Eur. Ct. H.R. (July 16, 2009); *Le Pen v. Fr.*, App. No. 18788/09, Eur. Ct. H.R. (May 7, 2010).

84. *Note on Migration and the Principle of Non-Refoulement*, 99 INT'L REV. RED CROSS 352 (2017), <https://www.cambridge.org/core/journals/international-review-of-the-red-cross/article/note-on-migration-and-the-principle-of-nonrefoulement/A80BD50762030F43EA3F322D0ABC5E5F>.

85. TOM KUHLMAN, TOWARDS A DEFINITION OF REFUGEES 8 (Refugee Studies Centre Documentation Centre, University of Oxford 1991), <http://repository.forcedmigration.org/pdf/?pid=fmo:676>.

South migration has been witnessing a rise according to a UNDP Report,⁸⁶ lends credence to the fact that refugee flows too are generally regionalized due to geographic, linguistic, and cultural similarities between the neighboring countries. This is primarily motivated by the desire to stay closer to home and to return once conditions allow.

The UNHCR also noted that refugees escaping violence now confront increasing violence in the host countries. A 2009 UN Note went so far as describing intolerance as one of the common causes of flight from the host country, resulting in what is often termed as an “in orbit” situation, in which a refugee is forced to travel from country to country seeking entry and protection, since the previous countries have denied him the same.⁸⁷

Despite the abovementioned guidelines, UNHCR practice has not embraced the concept of constructive refolement in practice.⁸⁸ When Afghan refugees returned home from Pakistan due to police harassment, arbitrary arrests, and increasing hostility towards the community—such as landlords forcibly evicting tenants—the Commission has refused to characterize the phenomenon as refolement and has even been accused of promoting forced returns by influencing refugee decisions through large

86. See Oliver Bakewell, SOUTH-SOUTH MIGRATION AND HUMAN DEVELOPMENT: REFLECTIONS ON AFRICAN EXPERIENCES 16-18, 20, 30-31 (2009), http://hdr.undp.org/sites/default/files/hdrp_2009_07.pdf (identifying ‘proximity’ as one of the main causes for regionalized movements of population).

87. William Spindler, *UN Refugee Chief Calls for Concerted Action to Defend Asylum on International Day of Tolerance*, UNHCR (Nov. 16, 2005), <http://www.unhcr.org/437b5ea94.html>; UNHCR, *Combating Racism, Racial Discrimination, Xenophobia and Related Intolerance through a Strategic Approach*, at 3, 13 (Dec. 2009), <https://www.refworld.org/docid/4b30931d2.html>. This phenomenon of a “refugee in orbit” has been mostly explored in the context of “safe third countries” where countries refer the asylum seeker to those through which he may have passed earlier en route to his final destination country. For an analysis of this phenomenon, see Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 INT’L J. REFUGEE L. (2003).

88. Previously, the UNHCR has similarly erred in assessing information regarding the conflict situation in Myanmar which would have resulted in the cessation of refugee status for Chin refugees. This led to questions over the UNHCR’s standards in practice on “voluntary returns”. See Christopher Finnigan, *How Not to Promote Voluntary Repatriation: UNHCR and Chin Refugees from Myanmar*, LONDON SCH. OF ECON. AND POL. SCI. BLOG (Dec. 5, 2018), <https://blogs.lse.ac.uk/southasia/2018/12/05/how-not-to-promote-voluntary-repatriation-the-unhcr-and-chin-refugees-from-myanmar/>; Jeff Crisp, *Unwilling and Fearful Refugees Should Not Be Forced To Return Home*, GUARDIAN (Oct. 7, 2019).

cash grants.⁸⁹ This conflicts with the expanded recognition of refoulement under an effects-based approach.⁹⁰

This incident suggests a possible pattern. Higher non-recognition rates in asylum claims, the collective nature of expulsions and the arbitrary nature of arrests coupled with disproportionate use of force for reasons not connected to their claims,⁹¹ could all serve as indicators of the rising incidence of bias against asylum seekers and settled refugees.

V. JUDICIAL RECOGNITION OF STATE OBLIGATIONS TOWARDS ASYLUM SEEKERS AND REFUGEES

This section intends to show the role that national and supranational courts could play in assessing whether a refugee's return constitutes refoulement. In doing so, this section intends to apprise the readers of the relevance of considering the motive of attacks, and an assessment of whether there exists a state led pattern inspiring such attacks.

The construction of social identities around refugees, as B.S. Chimni observed, led to a widely held narrative of a normal refugee being "white, male and anti-communist."⁹² While he agrees that this perception has been eventually replaced due to the growing numbers of asylum seekers from third-world countries,⁹³ the bias against certain sub-groups such as Muslims or sub-Saharan immigrants continues.

Unfortunately, the courts in some instances have failed to look at attacks and incidents of violence as being directed at a collective. For instance, consider the case of *Alković v. Montenegro*.⁹⁴ The applicant, a Roma Muslim, claimed that the offenders made several insulting comments about his ethnic descent, defaced properties by painting graffiti over the walls, and hanging

89. See Sune Engel Rasmussen, *UN accused of failing Afghan Refugees forced to return home from Pakistan*, GUARDIAN (Feb. 13, 2017), <https://www.theguardian.com/global-development/2017/feb/13/un-accused-of-failing-afghan-refugees-forced-to-return-home-from-pakistan>. Similarly, economic crisis and similar hostilities in Iran have been responsible for Afghan returns despite the ongoing violence. See Stefanie Gliniski, *Coming Home to Conflict: Why Afghan Returnees say they were better off as Refugees*, NEW HUMANITARIAN (Aug. 1, 2019), <https://www.thenewhumanitarian.org/news-feature/2019/08/01/Afghan-conflict-returnees-better-off-refugees>.

90. See *supra* Part I.

91. See *Geor. v. Russ.*, App. No. 13255/07, Eur. Ct. H.R. (July 3, 2014) (involving Russian practice of detaining and collectively expelling Georgian nationals). The high number of expulsion orders (more than 4,600) issued within a small timeframe were held as going against the Russian claims of individually assessing all applications. *Id.* ¶ 175. See also *Conka v. Belg.*, App. No. 51564/99, Eur. Ct. H.R. (May 5, 2002), (finding Belgium violated the rights of Slovakian Roma nationals after they were served with identically worded deportation orders and collectively detained and deported).

92. B. S. Chimni, *The Geopolitics of Refugee Studies: A View from the South*, 11 J. REFUGEE STUD. 350, 351 (1998).

93. *Id.*

94. *Alković v. Montenegro*, App. No. 66895/10, Eur. Ct. H.R. (Dec. 5, 2017).

crosses. Additionally, the applicant also perceived a threat to his life after several gunshots were fired in the direction of his apartment's terrace.⁹⁵ The applicant alleged that these threatening behaviors were made repeatedly over a length of time.⁹⁶ The ECHR emphasized the importance of "private life" and "psychological integrity" and that the right to be free from arbitrary interference extends to the adoption of a legal framework to protect against violence emanating even from private individuals. But in the subsequent paragraphs, the court also stated that most of the remarks and actions were neither made in the applicant's presence nor directed at him and he was not physically harmed by the acts.⁹⁷ In the *M.C. and A.C. v. Romania* case,⁹⁸ the court itself suggested that in cases where the motive of the offender is not taken into account during an investigation, hate-motivated crimes would be treated as if they were committed without such overtones, and this "indifference" could be "tantamount to official acquiescence to, or even connivance with, hate crimes."⁹⁹ The court goes on to explain that such investigation also becomes necessary for the implementation of appropriate anti-discrimination measures.¹⁰⁰

Another common tendency has been to conflate xenophobia with racism, since discrimination is generally more likely to happen over overtly visible characteristics such as race. The case of *Grigoryan and Sergeyeva v. Ukraine* drives home this concern.¹⁰¹ In this case, the applicant, an Armenian national with a refugee status, was subjected to racially motivated insults during his period in detention and was additionally physically assaulted by security forces, as confirmed through medical evidence, on account of such status.¹⁰² The Court found a violation of the Applicant's rights to be free from cruel, inhuman, and degrading treatment (Article 3, ECHR) read along with the right to enjoy the rights and freedoms set forth in the Convention free from discrimination (Article 14, ECHR) in the absence of state led investigations, especially where there were "racial or ethnic overtones" involved.¹⁰³ The judgement further went on to state that in light of international reports on racial profiling and harassment by police of those

95. *Id.* ¶¶ 8-15.

96. *Id.*

97. *Id.* ¶¶ 64-69.

98. *MC v. Rom.*, App. No. 12060/12, Eur. Ct. H.R. (Apr. 12, 2016). Although *Alković* was decided in the context of homophobic attacks and charges for "jeopardising the security of the individual," *MC v. Romania* explains why motives must be taken into account.

99. *M.C. v. Rom.*, App. No. 12060/12, Eur. Ct. H.R., ¶¶ 123-24 (April 2016).

100. *Id.*

101. *Grigoryan v. Ukr.*, App. No. 63409/11, Eur. Ct. H.R. (Mar. 28, 2017).

102. *Id.* ¶¶ 7-18.

103. *Id.* ¶ 92.

bearing a non-Slavic appearance and foreign origin, greater caution should have been exercised by the state.¹⁰⁴

This need to distinguish between racism and xenophobia becomes amplified for asylum seekers and settled refugees. Initially, the Turkish government had made efforts to promote the reintegration of Syrian Muslim refugees by circulating information regarding the contributions they could potentially make to the economy and refuting any rumors about high incidence of refugee crime rates.¹⁰⁵ The ruling party promoted this notion on the basis of common religious identities,¹⁰⁶ and believed that those with a Sunni Muslim identity could easily assume a Turkish identity over time through integration and assimilation.¹⁰⁷ However, this did not prevent the rise of anti-Syrian sentiments.¹⁰⁸ Turkey's example shows a clear us-versus-them dichotomy prompted by feelings of xenophobia. If the Turkish state institutions were to now create conditions or support, acquiesce in or be complicit in the actions of private actors that left refugees with no other choice but to return to the brutal regime, they would be internationally responsible for constructive refoulement. Similarly, in India, the issue of the Bangladeshi refugee influx into the bordering states of Assam and Bengal has been extremely contentious, despite shared language and culture. The hostilities in these states which ultimately led to the Apex Court's intervention in the matter, were prompted by feelings of this otherness.¹⁰⁹

Refugees do not generally have a right to vote, since states generally restrict this right to citizens. This is why, states are not similarly accountable to refugees and asylum seekers as they are to citizens.¹¹⁰ As UK public

104. *Id.* ¶ 97.

105. *Turkey's Syrian Refugees: Defusing Metropolitan Tensions*, INT'L CRISIS GRP. (Jan. 29, 2018), <https://www.crisisgroup.org/europe-central-asia/western-europemediterranean/turkey/248-turkeys-syrian-refugees-defusing-metropolitan-tensions>.

106. *Id.*

107. See Alan Makovsky, *Turkey's Refugee Dilemma*, CTR. FOR AM. PROGRESS ¶ 3 (Mar. 13, 2019), <https://www.americanprogress.org/issues/security/reports/2019/03/13/467183/turkeys-refugee-dilemma/>.

108. Kareem Shaheen, *A Rising Tide of Anti-Syrian Xenophobia Is Sweeping Through Turkey's Cities*, NAT'L (July 17, 2019), <https://www.thenational.ae/opinion/comment/a-rising-tide-of-anti-syrian-xenophobia-is-sweeping-through-turkey-s-cities-1.887307>; *COI Query Response*, ECOI (Dec. 12, 2019), https://www.ecoi.net/en/file/local/2021291/2019_12_TURKEY_Query_Treatment_Syrians_TP_beneficiaries_Q24.pdf.

109. *It's Not About Religion: It's About Assam and Assamese Pride: AASU Advisor on Anti-CAA Protests*, PRINT (Dec. 21, 2019), <https://theprint.in/india/its-not-about-religion-its-about-assam-assamese-pride-aasu-advisor-on-anti-caa-protests/338982/>.

110. Apart from the rights to life, freedom from cruel, inhuman and degrading treatment, access to courts, etc., most of the rights under the Refugee Convention are extended only on a most-favored nation basis. For example, several countries have entered reservations on matters concerning wage-earning employments, social security, education, freedom of movements. See James C. Hathaway, *The International Refugee Rights Regime*, in 8 COLLECTED COURSES OF THE EUROPEAN ACADEMY 91, 117 (2000).

servant Emma Haddad points out, in granting the refugee status, states do not offer a full political membership within their jurisdiction,¹¹¹ and the refugee only receives a subset of rights that are otherwise granted to citizens.¹¹² The fact that these individuals have a precarious legal status and lack the ability to effectively respond to such situations should impel the states to commence appropriate and ex-officio criminal investigations. On a similar note, in the *Abdullah Elmi* judgement, the concurring opinion of Judge Albuquerque proves insightful. Although agreeing with the findings of the case, Judge Albuquerque found it pertinent to describe the intermixing of criminal and immigration law,¹¹³ and noted that the attitude of the state authorities indicated not merely a lack of good faith but involved a systematic practice of racism and xenophobia, where all refugees were dehumanized and portrayed as a threat to the ethnic, religious, and social order. The state's liability arose on account of its indifference and condonation of these trends.¹¹⁴

Throughout the cases discussed, the European Courts have yet to determine whether the breach of a refugee's rights to life and to be free from cruel, inhuman, and degrading treatment could potentially rise to the level of refoulement when the refugee is driven out by violence perpetuated or institutionally tolerated by the state. The Court would have to consider whether the refugee could viably seek refuge in another host state, instead of returning to the refugee's country of origin.

In this regard, the African Commission of Human Rights' conclusions in *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v. Guinea*,¹¹⁵ could fill the unaddressed legal void. The Commission found that the proclamation made by a public official to arrest, search and confine Sierra Leonean refugees led to widespread violence and discrimination to such a degree that the refugees had to return despite the ongoing violent conditions at home,¹¹⁶ violated the principle of non-

111. See Ruma Mandal, *Political Rights of Refugees*, in UNHCR LEGAL AND PROTECTION POLICY RESEARCH SERIES (2003), <https://www.refworld.org/pd/fid/3fe820794.pdf>.

112. See EMMA HADDAD, *THE REFUGEE IN INTERNATIONAL SOCIETY: BETWEEN SOVEREIGNS* 88 (Steve Smith et al. eds., 1st ed. 2008) (describing refugees as "quasi citizens").

113. Also, known as "crimmigration," the process affects the detention of asylum seekers during processing of their claims, criminalizing illegal residence, withdrawing residence rights because of any acts that are perceived to have been committed. For an analysis of crimmigration practices, see Cesar Cuauhtemoc Garcia Hernandez, *Deconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197 (2018).

114. *Elmi v. Malta*, App. No. 25794/13 and 28151/13, Eur. Ct. H.R. ¶ 5 (Nov. 22, 2016) (Pinto, J., concurring).

115. *Inst. for Hum. Rts. and Dev. in Afr. (on behalf of Sierra Leonean refugees in Guinea) v. Guinea*, Communication No 249/02, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (December 2004), <https://www.refworld.org/cases,ACHPR,51b6fc794.html>.

116. *Id.* ¶¶ 3-7, 33, 43, 47 The Statement of Facts submitted by the Complainants speak of lootings, extortions, evictions, beatings and rapes, arrests without due cause, and failure to approach the State authorities for fear of reprisals. *Id.* ¶¶ 1-7.

refoulement and the right to be free from mass expulsions.¹¹⁷ The matter addressed the fact that the violence perpetrated against the refugees was a direct result of government instigations and direct discriminations, and affected the “voluntary” return of the refugees to Sierra Leone in the middle of the civil war. The matter also observes how the Complainants refrained from pursuing any action within the state against state and private actors for fear of reprisals from state institutions.

Currently, non-binding mechanisms of redressal and codes of conduct do exist.¹¹⁸ Some courts and supranational agencies have also pulled up countries for failing to enact legislations specifically addressing hate crimes.¹¹⁹ Some states have provided refugees with housing with state citizens, rather than other refugees, to facilitate integration into the community.¹²⁰ Others have called for the participation of civil society and community leaders in evolving conflict resolution programs and supporting dialogues.¹²¹ Additionally, states could provide additional security during the initial phases of integration to subdue tensions. Community policing model systems could be adopted to bridge tensions between locals and refugees.¹²²

117. *Id.* ¶¶67-74 (finding violations of the African Charter, the AU Convention Governing Specific Aspects of Refugee Problems in Africa and the 1969 OAU Convention Governing Specific Aspects of the Refugee Problem in Africa).

118. For instance, there exists an EU High Level Group on Combating Racism, Xenophobia and Other Forms of Intolerance. Countries like Spain have sought to establish an Anti-Rumour Agency which seeks to disseminate factual information about migration and to counter negative stereotypes. The UN Human Rights Office has also evolved the Rabat Plan of Action on the prohibition of incitement to hatred. The plan lays out a six-step test to evaluate whether statements made qualify as ‘hate speech’. The New York Declaration for Refugees and Migrants adopted in 2016, also strongly condemned racism, racial discrimination, xenophobia and related intolerance against Migrants and Refugees.

119. *See* *Kaya v. Turk.*, App. No. 22535/93, Eur. Ct. H.R. 115 (March 28, 2000) (holding that state responsibility could be engaged where the framework of law failed to provide adequate protection); UN OFF. OF THE HIGH COMM’R FOR HUM. RTS., FACT SHEET NO 15 (REV.1), CIVIL AND POLITICAL RIGHTS: THE HUMAN RIGHTS COMMITTEE, 5 (May 2005), <https://www.refworld.org/docid/4794773e0.html> (discussing ‘legislative and policy framework and devoting sufficient resources to their effective implementation’); *see also* Concluding Observations on the Initial Report of Morocco, U.N. Doc. CRPD/C/MAR/CO/1, (Sept. 25, 2017), https://www.ecoi.net/en/file/local/1416323/1930_1508851726_g1727967.pdf. (criticizing Morocco for the lack of specific legislation providing protection against multiple and intersectional forms of discrimination and effective sanctions against perpetrators).

120. *Leverkusen Tests New Refugee Housing Model*, DEUTSCHE WELLE (Sept. 9, 2013), <https://www.dw.com/en/leverkusen-tests-new-refugee-housing-model/a-17074633>.

121. *E.g.*, William Aroccha, *Combating Xenophobia and Hate Through Compassionate Migration: The Present Struggle of Irregular Migrants Escaping Fear and Extreme Poverty*, 71 CRIME, L. & SOC. CHANGE (2019), <https://link.springer.com/article/10.1007%2Fs10611-019-09833-w>.

122. *Community Policing in Refugee Neighborhoods*, CARNEGIE CORP. N.Y. (June 19, 2017), <https://www.carnegie.org/topics/topic-articles/community-policing-refugee-neighborhoods/>.

National courts on their part could also more readily grant interim measures, including the provision of medical attention and counselling.¹²³

VI. CONCLUSION

In current times, anti-migrant discourses have constructed the image of one insecure collective against another. The increasing incidence of attacks on foreign nationals and refugees have been dismissed as mere criminality by states who wish to avoid any legal or moral responsibility. Again, while the vast majority of victims largely belong to racial or ethnic minorities, Turkey, South Africa or India's examples would show that their classification as hate crimes motivated by xenophobia is more appropriate and would prompt an apt solution. Where there appears to be no change in country of origin circumstances, the voluntariness of any return must be questioned, particularly when attacks over refugees are well-known in the host state. The view that it should be rightly termed as refoulement and not only a Charter or Convention right violation, assumes importance in the characterization of such accountability. Refoulement arises on the violation of the rights to life and to be free from cruel, inhuman, and degrading treatment, since more often than not, it would have the effect of compelling the refugee to return to their country of origin. Owing to the special vulnerabilities of the refugees as a collective, to deflect any responsibility, the host state must not merely take measures after the commission of offences, but also adopt preemptive measures such as enhancing security or promoting trust-building activities, wherever violations are foreseeable or within its knowledge.

123. *Lavrov v. Russ.*, App. No. 66252/14, Eur. Ct. H.R. ¶ 19 (Mar. 1, 2016); *Kondrulin v. Russ.*, App. No. 12987/15, Eur. Ct. H.R. ¶ 43 (Sept. 20, 2016).