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Master's Dissertation

Self-reliance and the Right to Work for Refugees

**Lessons from the case studies of South Africa and Germany for the implementation
of the Global Compact on Refugees by the European Union**

by

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26 648 words

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Declaration

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws in Human Rights Law by approved courses and minor dissertation. The other part of the requirements for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of the University, and that this dissertation conforms to those regulations

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Marie-Isabelle Heiss

Acknowledgements

Abstract

The right to work is a fundamental human right and regarded essential for a life in dignity. It is explicitly granted to refugees in international and regional law, as well as in numerous national constitutions. In practice, however, refugees have to overcome many obstacles in order to participate in working life in the host country.

This paper uses South Africa and Germany as case studies to explore causes and remedies for this discrepancy. To this end, the legal provisions regarding the right to work and their implementation in practice in South Africa and Germany are assessed against the respective socio-economic background. Subsequently, proposals for a coherent future EU policy on the access to work and the promotion of refugee self-reliance as driven by the UN Global Compact on Refugees are made.

South Africa is the scene of an increasingly restrictive handling of traditionally generous refugee laws. Administrative or bureaucratic hurdles undermine the right of refugees to work or receive social benefits. Xenophobia often leads to further marginalization against the backdrop of high unemployment. In Germany, protective labour market regulations have been gradually relaxed since 2013 to address labour shortage. However, new restrictions were introduced in 2018 that make it more difficult for asylum seekers in particular to access the labour market. As in South Africa, the long duration of asylum procedures and processing backlogs keep them in limbo for a long time with very limited work opportunities.

Legal scholars and researchers agree that the realization of the right to work can increase social cohesion by turning formerly aid-dependent refugees into integrated, self-reliant, and contributing members of their host society. This gives rise to the call for targeted support measures to provide more effective access to fair, paid work for refugees as early as possible. In implementation of the Global Compact on Refugees (GCR), the EU should lead by example by applying a protection-based approach in their own legislation and policies and support developing countries in promoting refugee's self-reliance.

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Abbreviations

AVaV	General Administrative Regulation on the Residence Act
BAMF	Federal Office for Migration and Refugees
CEAS	Common EU Asylum System
CRRF	Comprehensive Refugee Response Framework
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EEA	Employment Equity Act, South Africa
ESA	Employment Services Act, South Africa
ESC	European Social Charter
EU	European Union
GCR	Global Compact of Refugees
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
NGO	Non-Governmental Organisation
OAU	Organisation of African Unity
SDGs	Sustainable Development Goals
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UIF	Unemployment Insurance Fund
UN	United Nations
UNHCR	United Nations High Commission for Refugees

Key Definitions

Refugee	a person who has fled his or her country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, regardless of whether he or she has been recognized as a refugee by a country of asylum or UNHCR.
Asylum-seeker	a person who has fled his or her country of origin and is seeking recognition and protection as a refugee.
Protracted refugee situation	a situation in which 25 000 or more refugees of the same nationality have been in exile for five consecutive years or longer in a given asylum country. (UNHCR ‘Global Compact on Refugees: Indicator Framework <i>July 2019</i> ’ (2019))
Self-reliance	the social and economic ability of an individual, a household or a community to meet essential needs in a sustainable manner and with dignity.’ (UNHCR ‘Global Compact on Refugees: Indicator Framework <i>July 2019</i> ’ (2019))
Forcibly displaced people	include asylum seekers, refugees, and internally displaced persons. (UNHCR <i>Global Trends: Forced Displacement in 2016</i> (2017))

Chapter One

1.1 BACKGROUND

Self-reliance of refugees is one of the main objectives of the UN Global Compact on Refugees (hereinafter ‘GCR’),¹ a policy framework introduced by the UN General Assembly to strengthen international solidarity with refugees and those countries that carry the lion’s share of refugee protection worldwide. The right to work is valued as one of the most essential socio-economic rights fostering refugee’s self-reliance. It allows refugees to provide for themselves and contribute to their host society.² It enables refugees to live a productive, meaningful life in dignity in their host state.

A job further creates the opportunity for local integration by improving the refugees’ language skills, creating intercultural exchange and building social and economic relationships with the host community.³ It can therefore foster social cohesion by increasing refugee's self-worth and resilience on the one side and reducing reservations and xenophobia within the host community on the other side.⁴ During the drafting of the 1951 Refugee Convention, the U.S. delegate Mr. Henkin highlighted the key function of this right by aptly noting that “Without the right to work, all other rights were meaningless.”⁵ The realisation of the right to work for refugees depends on host states to enshrine it in law, remove legal and factual barriers and create an enabling environment by involving different key actors.

¹ UN General Assembly, Global Compact on Refugees, 17 December 2018 (A/RES/73/151) available at <https://www.unhcr.org/5c658aed4.pdf> accessed on 21/01/2021.

² Colloquium on Challenges in International Refugee Law, ‘The Michigan Guidelines on the Right to Work (2010) 31 Michigan Journal of International Law’ (2010) vol 31 *Michigan Journal of International Law* at 294 (hereinafter ‘*The Michigan Guidelines*’), available at: <https://repository.law.umich.edu/mjil/vol31/iss2/2t> accessed on 10/02/2021.

³ UN High Commissioner for Refugees (UNHCR), *A guide to international refugee protection and building state asylum systems* (2017) Handbook for Parliamentarians no 27, at 208, available at: <https://www.refworld.org/docid/5a9d57554.html> accessed on 29/01/2021.

⁴ Council of Europe, Parliamentary Assembly, *Resolution 1994 - Refugees and the right to work*, 11 April 2014, Resolution 1994 (2014), available at: <https://www.refworld.org/docid/537ef91a4.html> accessed 10/02/2021.

⁵ UN ‘Statement of Henkin (US), Ad Hoc Committee on Refugees and Stateless Persons’ (1950) UN Doc. E/AC.32/SR.37 at 12 as quoted in Andreas Zimmermann (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) para 1 at 954 and *The Michigan Guidelines* op cit n2 at 295.

The GCR was developed in the aftermath of the ‘European refugee crisis’⁶ under the auspices of the United Nations Office of the High Commissioner (UNHCR). It was adopted by the UN General Assembly in 2018.⁷ It acknowledges and addresses the unequal burden-sharing in refugee admissions and care, with most of all refugees having found refuge in structurally weak and low-income countries.⁸ The GCR calls for an improved global system of responsibility-sharing to address this imbalance. The implementation of the GCR remains on a voluntary basis due to its non-binding nature.⁹ Its success to tangibly improve the lives of refugees and their host communities depends on States giving effect to it,¹⁰ as well as involving a variety of stakeholders ranging from the local to the international level, from the public to the private sector, and last but not least the refugees themselves.¹¹ However, the adoption of the GCR strongly manifests the joint will and commitment of the international community to collaborate for the benefit of refugee protection worldwide.

(a) General International Legal framework of refugee’s rights

The need for international protection of refugees has been recognized by the international community since the Second World War. Consequently, legal instruments, policies and practices have been developed to address this responsibility. Today’s regime of international refugee protection is composed of international conventions, regional instruments, and national legislation. Its development has been preceded by the adoption of the right to seek and enjoy asylum in Article 14 of the Universal Declaration of Human Rights (UDHR). Refugee protection laws also exist in the context of various other international human right instruments.

⁶ The so-called ‘refugee crisis’ refers to the mass influx of refugees mainly from Syria into Europe from 2014 to about 2019. The term is criticized for its Eurocentric coining. See also Gurminder K. Bhambra ‘The current crisis of Europe: Refugees, colonialism, and the limits of cosmopolitanism’ (2017) vol 23(5) *European Law Journal* 395-405.

⁷ 181 countries voted in favour, United States of America and Hungary in opposition and Libya, Liberia and Eritrea abstained from voting; United Nations ‘General Assembly Endorses Landmark Global Compact on Refugees, Adopting 53 Third Committee Resolutions, 6 Decisions Covering Range of Human Rights’ 17 December 2018 Meeting Coverage and Press Releases, available at <https://www.un.org/press/en/2018/ga12107.doc.htm> accessed on 29/07/2020.

⁸ UNHCR *Global Trends: Forced Displacement in 2018* (2019) at 22. See also Global Compact on Refugees op cit n1 para 3.

⁹ Global Compact on Refugees op cit n1 para 4; Jane McAdam, ‘The Global Compacts on Refugees and Migration: A New Era for International Protection?’ (2018) vol 30(4) *International Journal of Refugee Law* at 574.

¹⁰ Ibid.

¹¹ Volker Türk, ‘The Promise and Potential of the Global Compact on Refugees’ (2018) vol 30 (4) *International Journal of Refugee Law* at 577, available at <https://doi.org/10.1093/ijrl/ey068> accessed on 21/01/2021.

The cornerstone of international refugee protection is the UN Convention Relating to the Status of Refugees, 1951 ('1951 Refugee Convention') supplemented by its 1964 Protocol. Various regional instruments have been introduced that extend and specify the rights and obligations laid out herein. The European Union, for example, is in the process of developing a harmonised Common EU Asylum System (CEAS). Further, many countries have adopted their own domestic legislation regarding refugee protection that interdepend with other national laws, such as constitutional provisions and immigration laws. This thesis will take a closer look at the legal framework in South Africa and Germany in the context of refugees' right to work. The lessons learned will be used to evaluate ways of improving the EU's asylum system's approach to economic integration.

1.2 RESEARCH PROBLEM STATEMENT

As we mark the 70th anniversary of the 1951 Refugee Convention, the constantly growing number of displaced persons worldwide,¹² including asylum seekers, refugees, and internally displaced persons, demonstrates that finding durable solutions for refugee protection has never been more important.¹³ In 2019, a total of nearly 80 million people, including 26 million refugees, were displaced worldwide, an increase of nearly 10 million displaced people compared to 2018.¹⁴ Countries neighbouring refugees' origin countries like Turkey and Colombia continue to host the largest number of refugees, followed by Germany, Pakistan and Uganda.¹⁵ It is particularly significant to note that 85 per cent of those seeking protection are accommodated in developing countries which, already struggle to increase the low standard of living of their population. Nearly one third of all refugees received asylum in the least developed countries of the world.¹⁶ Germany is the only developed country among the top ten host countries with the largest refugee population which highlights how disproportionate the burden of accepting refugees is between developed and developing countries.¹⁷

¹² *Global Trends 2019* op cit n8 at 6.

¹³ *Global Trends 2019* op cit n8 at 6.

¹⁴ *Global Trends 2018* op cit n12 at 4.

¹⁵ *Global Trends 2019* op cit n8 at 9 (while at 22 Germany ranks 5th).

¹⁶ *Global Trends 2019* op cit n8 at 22.

¹⁷ *Global Trends 2019* op cit n8 at 22.

South Africa and Germany, both major destination countries for people seeking refuge, have themselves produced refugees at one point in their history.¹⁸ This may explain their traditionally generous refugee laws that reflect a heightened sense of responsibility towards persons fleeing from persecution.¹⁹ In both host countries, Germany and South Africa, the right to work is valued as a basic right for recognized refugees and guaranteed on paper by international and national refugee law,²⁰ while the question is more complicated for asylum seekers. However, in practice, access to the labour market is subject to direct and indirect restrictions.

Protective labour market regulations, factual barriers such as language barriers, administrative or bureaucratic hurdles as well as political considerations further make it hard for refugees and asylum seekers to successfully find employment.²¹ Restrictions may also force them into the informal sector where they face a higher risk of exploitation or unfair working conditions.²² In combination with absent refugee assistance models, as it is the case in South Africa, destitution often follows. Economic integration thus becomes particularly important for refugees' source of livelihoods and self-reliance.²³

From their arrival in a host country, during the status determination process and after their asylum application has been approved, refugees need to be sustained or enabled to sustain themselves in a safe and legal manner. As Filippo Grandi, UN High Commissioner for Refugees, points out, the phenomenon of forced displacement is not only growing significantly, but is also becoming a more long-term concern.²⁴ This development requires a shift in focus towards more sustainable and durable solutions for refugee protection, including self-reliance

¹⁸ From 2008 until 2012, South Africa received the largest number of new asylum applications worldwide, registering 800,000 new asylum claims, mostly from Zimbabweans. Germany received the highest number of new asylum applications overall for the decade, with more than 2.1 million new asylum applications registered between 2010 and 2019. See *Global Trends 2019* op cit n8 at 38-40.

¹⁹ For South Africa see *Union of Refugee Women v The Director of the Private Security Industry Regulatory Authority* 2007 (4) BCLR 339 (CC) 325, para 30; for Germany see Tanja Podolski, '70 Jahre Grundgesetz - das Asylrecht aus Art. 16a GG: "Ein Symbol der Humanität"' 07 May 2019 *Legal Tribune Online*, available at <https://www.lto.de/recht/hintergruende/h/grundgesetz-70-jahre-art-16a-interview-seegmueller/>.

²⁰ Articles 17 and 18 of the 1951 Refugee Convention; Section 27(f) of the Refugee Act of South Africa 130 of 1998 and section 4a(1) of the Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory ('Residence Act').

²¹ For example, section 6 of Council of Europe, *Refugees and the right to work* (2014) op cit n4.

²² UNHCR Handbook, 2017 op cit n3 at 208.

²³ Sergio Carciotto & Filippo Ferraro 'Building Blocks and Challenges for the Implementation of the Global Compact on refugees in Africa' (2020) 8 *Journal on Migration and Human Security* at 83.

²⁴ *Global Trends 2019* op cit n8 at 6.

through the opportunity to work. The recognition that the right to work is key to further rights is already widely acknowledged by EU institutions and policy makers, as shown below:

‘[The right to work] is essential for realising other human rights and to preserve human dignity; it enables individuals and their families to maintain livelihoods, receive income, and contribute to development and recognition in the community.’²⁵

The EU is looking to take up its role in a more equitable arrangement for global responsibility-sharing and effective protection for refugees. As one of the economically strong regions, the EU has the responsibility to step up to this role and lead by example. Thus, the robust guarantee of the right to work as easy and as early as possible will be a key step in ensuring refugee's self-reliance, resilience, and integration and discharge in host countries. Best practices and key learnings from countries such as South Africa and Germany, with extensive experiences in the field of integrating refugees in their labour market, may offer an orientation guide for the EU's implementation of the GCR.

However, when assessing these efforts, the social challenges in the host country must also be considered. A common fear within society assumes a correlation between asylum seekers' or refugees' access to the labour market and a host country's unemployment rate. A high unemployment rate in the host country can thus curtail the willingness of the government to provide refugees with access to employment.²⁶ Highlighting the link between the right to work and refugee's self-reliance can argue for the contrary: refugee policies ensuring effective implementation of the right to work give asylum seekers and refugees the chance to contribute their skills and support themselves. This improves their well-being, safeguards their dignity, and turns their presence which may be perceived as a burden, into a long-term development opportunity for the host state.²⁷ This is suggested by several studies finding that the presence of refugees has an overall positive effect on the economy of the host community as their assets, skills and productivity fosters trade and entrepreneurship.²⁸ Further, refugee self-reliance can

²⁵ Section 1 of Council of Europe, *Refugees and the right to work* (2014) op cit n4.

²⁶ UNHCR ‘Livelihoods and self-reliance’ (2016) EC/67/SC/CRP.15 *UNHCR Executive Committee*, para 3, available at: <https://www.unhcr.org/576ba7257.pdf> accessed on 16/12/2020.

²⁷ Section 7 Council of Europe, *Refugees and the right to work* (2014) op cit n4.

²⁸ The World Bank Group ‘Mixed Migration, Forced Displacement and Job Outcomes in South Africa’ (2018) (at 3) finds that one immigrant worker generates approximately two jobs for South Africans. See also Shoghik Hovhannisyanyan, Christopher F Baum et al. ‘Mixed migration, forced displacement and job outcomes in South Africa’ (2018) World Bank Group; ‘Livelihoods and Self-reliance’ (2016) op cit n26 paras 4-7; Apurva

also counteract security threats by creating legal and safe employment possibilities and promoting the ties between refugees and the host community.²⁹

This thesis aims to explore through case studies on asylum laws and implementation in the South African and Germany how refugee protection is guaranteed through the right to work. The thesis will scrutinize how each of the two countries' legal provisions and practical constraints on refugees' right to work influence the scope of effective protection of refugees at the different stages of the asylum procedure. Further, the meaning of access to the labour market for the refugees will be evaluated. It will focus on how the realization of the right to work is influenced by and correlates to other rights, such as the rights to social support in the host state, to dignity and equality of all (found in ss 9 and 10 of the Constitution of the Republic of South Africa³⁰ and Art. 1 and 3 of the Basic Law for the Federal Republic of Germany³¹).

The two case studies allow for observing best practices and challenges on the matter of economic integration in South Africa and Germany, and how the right to work promotes the self-reliance of refugees. Consequently, this thesis will evaluate the possible implication of these observations on the development of an EU policy for the implementation of the GCR and its strong focus on self-reliance.

1.3 JUSTIFICATION

(a) Choice of Countries for case studies

Germany and South Africa are both important regional migration hubs with traditionally generous and progressive refugee regimes. However, their potential to improve the lives of refugees has been hampered by countervailing political shifts in recent years and partly flawed implementation. This leads to long periods of insecurity and uphill struggle for those seeking asylum instead of genuine protection and meaningful support for this already vulnerable group.

Sanghi; Harun Onder & Varalakshmi Vemuru *Yes in my backyard? The economics of refugees and their social dynamics in Kakuma, Kenya (English)* (2016) World Bank Group, available at: <http://documents.worldbank.org/curated/en/308011482417763778/Yes-in-my-backyard-The-economics-of-refugees-and-their-social-dynamics-in-Kakuma-Kenya> accessed on 06/01/2021.

²⁹ Karen Jacobsen, 'Can refugees benefit the state? Refugee Resources and African Statebuilding' (2002) vol 40(4) *Journal of Modern African Studies* 577-596.

³⁰ Constitution of the Republic of South Africa, 1996.

³¹ Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, Classification Number 100-1, as last amended by Article 1 of the Act of 28 March 2019 (Federal Law Gazette I at 404).

This thesis will examine the extent to which recent legislative and policy changes about the right to work in both countries are compatible with international legal standards and, particularly, with the idea of protection as the overarching goal of refugee law in general. First, it looks at South Africa's approach which has a recent policy shift towards an increasingly restrictive application of its historically generous refugee legislation. This is followed by an assessment of the legal provisions and practice in Germany. Despite its better economic position and shortage of skilled workers, Germany is also not immune to the polarised public debate regarding refugees. Instead, it openly engages in containment practices on a national and European level. Moreover, the German asylum system suffers from the lack of coherent and efficient European legislation.

The overall intention is to offer insights from the learnings from either country's current legislation and practice towards future EU policies about labour market access and the promotion of self-reliance of refugees. This should result in the successful application of the GCR into practice by the EU and its member states and contribute to the adoption of a more coherent European Refugee law regime that improves on existing laws within the EU, particularly the Common European Asylum System.

(b) Conceptual approach: Protection of Refugees and Asylum Seekers

The thesis will examine the topic from the conceptual approach of refugee protection. Protection is one of the key objectives in the GCR and serves as an overall guide to its application. The UNHCR and other international organisations, states, scholars, and courts frequently refer to refugee protection as an underlying principle. Addressing modern challenges through the high and rising number of refugees, Volker Türk, Assistant High Commissioner for Protection of the UNHCR, states: '[T]he answer can be found in a more robust, comprehensive, and good-faith application of the tenets of protection.'³²

This thesis will examine what this means in the light of refugee rights and what role the concept of protection plays regarding the right to work. Protection in the context of refugee law refers to the substitute for the protection a person did not obtain in their own country of nationality or origin. While refugee protection initially implies that refugees are being sheltered

³² Volker Türk 'The Promise and Potential of the Global Compact on Refugees,'(2018) Vol 30(4) *International Journal of Refugee Law* at 576.

from harm by someone, such as the host state, regarding the right to work it rather encompasses the allowance that refugees may take action to ensure their well-being themselves.

Protection remains the guiding principle even in later stages of refugeehood when the concern becomes about access to the labour market and fair labour conditions. It becomes critical for host state's institutions, to continue playing a key role in unlocking the refugees' potential to become self-reliant. Measures ought to be taken to effectively ensure that refugees can access their right to work, which protect them from being further marginalized, falling into poverty, being exploited, or forced to turn to illegal activities to sustain themselves and their families. Additionally, effective protection requires that conditions in the host country do not result in the refugee feeling compelled to leave for a place where protection from persecution is not guaranteed, which would effectively amount to a violation of the paramount principle of non-refoulement.³³

1.4 RESEARCH HYPOTHESIS

The assumption at the outset of this research is that while the right to work is theoretically granted to refugees in international and national law, the legislative restrictions, and practical barriers to seeking, let alone finding employment remain manifold. This is expected to be particularly the case in host countries with strained labour markets. As granting the right to work is generally linked to the gradual integration into the host community, it is further understood, that asylum seekers are more vulnerable in this respect than recognised refugees. Accordingly, unreasonably long waiting periods for the determination of their status due to overburdened authorities or a deterrence strategy may further infringe on the right to work. The realization of labour market access is arguably even more important for refugees in countries where they are not granted social benefits by the host state during or after their status determination process.

It is further understood, that effectively protecting the right to work for refugees and promoting their access to the labour market has the potential of creating a mutually beneficial situation. Enabling refugees to become self-sufficient reduces the burden on the host state and strengthens refugees' resilience, integration, and more generally, social cohesion within the host society. Another assumption underlying the work is that the political will and ability of

³³ Violation of Article 33(1) of the 1951 Refugee Convention. See also Zimmermann op cit n5 para 29 at 963.

governments to implement the concept of self-reliance depends largely on the reversal of perceptions in the host country. Once refugees are recognized for their potential to enhance development in the refuge state, host communities will be less reluctant and governments more willing to turn their international and humanitarian responsibility into economic and political opportunities.

1.5 RESEARCH QUESTION

This research aims to answer the following question:

What lessons can be drawn from the protection of refugees' right to work in South Africa and in Germany for promoting refugees' self-reliance, as advanced in the GCR, through future EU policies?

To be able to answer this question, the following sub-questions will be asked and answered:

1. How is the right to work of asylum seekers and refugees protected in South Africa in theory and practice?
2. How is the right to work of asylum seekers and refugees protected in Germany in theory and practice?
3. What is the EU's role in implementing the GCR's principle of refugees' self-reliance to achieve more effective refugee protection?

1.6 RESEARCH METHOD

The research for the thesis will be desktop-based and material will be gathered from library and internet sources. Gathered materials will be analysed to understand the existing legal framework, the challenges in practice and possible solutions to formulate proposals for policy implementations of the GCR on European level.

An overview of the legal framework will be drawn from the international law and domestic refugee law of South Africa and Germany. The thesis will also collect and interpret relevant international and national case law to deal critically with problematic practices, the interpretation of the legal provisions by courts, and the legislative and political developments following the outcome of such court cases. Further, secondary material consisting of reports from international organisations and commentary by legal scholars will be examined.

1.7 CHAPTER BREAKDOWN

The second chapter describes the legal framework that secures the right to work for refugees at the international level. It offers a brief overview of the relevant provisions in the 1951 Refugee Convention to which both countries in the following case studies are signatories. A brief analysis of the right to work as enshrined in the 1951 Refugee Convention is offered. The current legal framework of asylum law in the European Union is also outlined.

The third chapter explores the extent to which South Africa protects and promotes the right to work for refugees and asylum seekers. It will start by analysing the protection of the right to work for asylum seekers and refugees on paper based on relevant national provisions and their interpretation by jurisprudence, as well as recent legislative developments.³⁴ Further, it will assess how the realization of this right is secured or restricted in practice.

Chapter four entails the case study of Germany. It examines the realization of the refugee's right to engage in paid work in Germany in the various stages of the asylum procedure. It outlines the shift from a restrictive asylum regime aimed at deterrence to a gradual dismantling of labour protection laws in the last decade and the rationale behind it. Measures and policies that have the purpose or effect of restricting the right to work will be presented.

The fifth chapter engages with the lessons concerning the right to work that can be fashioned from the findings of the case studies, using on the concept of self-reliance as promoted by the GCR as the baseline. Further the role of the EU and the prospects for EU policy in the implementation of the Global Compact on Refugees will be critically discussed. This chapter will advocate for coherent European refugee policies that ensure the right to work as effectively and early as possible upon arrival in the European host countries.

The sixth and final chapter concludes the study. It offers a summary of the previously discussed findings and offers recommendations for the promotion of labour market access in the EU. It also highlights further areas of study concerning the right to work which include, the

³⁴ Such as the new legal dispensation for asylum seekers under the new Section 22 of the Refugees Act of 1998, as amended by Section 15 of Act 33 of 2008 and by Section 13 of Act 12 of 2011 and as substituted by Section 18 of Act of 11 of 2017.

refugee rights at work and post-employment and the impact of the Covid-19 pandemic on economic integration of refugees.

Chapter Two

2.1 THE RIGHT TO WORK OF REFUGEES IN INTERNATIONAL LAW

The rights and obligations of refugees towards their host state, and vice versa, are governed by international, regional, and national refugee regimes. In particular, the UN Convention Relating to the Status of Refugees, 1951 ('1951 Refugee Convention' or 'Convention') is the cornerstone of international refugee regime. The Protocol Relating to the Status of Refugees of 1967 ('1967 Protocol') expanded refugee protection by going beyond the initially limited and Euro-centric scope of the Convention to refugees worldwide.

The 1951 Refugee Convention, as well as the complementary Protocol, specify a set of refugee rights³⁵ whose purpose is to satisfy Article 14 of the Universal Declaration of Human Rights ('UDHR') which entitles refugees not only to seek but also 'enjoy' asylum.³⁶ The right to work, together with other socio-economic rights such as the right to shelter and the right to social security, allows for more than a sheer presence and basic protection of refugees, but a meaningful existence in the state of refuge. It is most prominent since other fundamental human rights, such as the right to life, health, equality, and human dignity, are inextricably linked to and build upon it.³⁷

The right to work is contained in various human right instruments on international and regional level, as well as constitutionally guaranteed in many states worldwide. Article 23 of the UDHR guarantees the right to work and free choice of employment for everyone. Of similar scope, the right to work is contained in Article 6 of the International Covenant on Social and Economic Rights (ICESCR). It is further supplemented by sub-Article 6(2) which obliges states to take concrete measures to ensure the realisation of the right to work and further work-related rights in Article 7 and 8 of the ICESCR, as well as Article 15 of the African Charter on Human and Peoples' Rights³⁸ and Article 2 to 4 of the Revised European Social Charter³⁹ protect the right to satisfactory working conditions and equal pay.

³⁵ See Articles 3 to 34 of the UN Convention Relating to the Status of Refugees, 1951.

³⁶ Universal Declaration of Human Rights, 1948.

³⁷ *The Michigan Guidelines* op cit n2 at 293.

³⁸ African Charter on Human and Peoples' Rights, 1979.

³⁹ Revised European Social Charter of 1996.

In the specific case of refugees, the 1951 Refugee Convention is the principal legal framework. Its importance is encapsulated in the following:

‘[T]he 1951 Convention gives refugees a solid basis on which they can progressively restore the social and economic independence needed to get on with their lives. Host States should make every effort to assure to refugees the rights envisaged under the 1951 Convention, particularly those rights which relate to income generation.’⁴⁰

Articles 17, 18 and 19 of the 1951 Refugee Convention set out different rights related to the right to work, whereas Article 24 concerns the rights at work.⁴¹ These provisions complement the protection provided under general and specific human rights provisions as laid out above, intersecting particularly for vulnerable groups within the refugee population, such as women or children, who make up most of the refugee population.

Article 17 is regarded one of the most important provisions of the 1951 Refugee Convention.⁴² Sub-Article 17(1) entitles refugees ‘lawfully staying’ in the host country to engage in any wage-earning employment to at least the same extent as most favoured foreign nationals under the same circumstances. This considers the special circumstances that refugees are compelled to live outside of their home country, while having no government engaging on their behalf to reach favourable agreements with the country of refuge.⁴³

The term ‘lawfully staying’ lacks a generally accepted interpretation and has been the subject of extensive discussion by refugee law scholars as well as between the parties during the drafting process of the Refugee Convention. As a result, the meaning differs from country to country.⁴⁴ Based on the drafting history as contained in the *Travaux Préparatoires*, anyone not just temporarily present in the host state’s territory is regarded as ‘lawfully staying’ in the country.⁴⁵ While the Commentary of the Refugee Convention suggests that such stay must be authorized by the authorities to be considered lawful, the UNHCR expands the scope of the term to include ‘implied lawfulness.’ This is convincing, as the good faith interpretation reflects

⁴⁰ UN ‘Local Integration and Self-Reliance, United Nations High Commissioner for Refugees’ (2005) Executive Committee of the High Commissioner’s Programme, 33rd meeting, June 2, 2005, UN Doc. EC/55/SC/CRP.15 para 11 available at: <https://www.refworld.org/docid/478b3ce12.html> (accessed 28 June 2020).

⁴¹ 1951 Convention op cit n35.

⁴² UNHCR *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis* (1990) at 106 available at: <https://www.unhcr.org/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html> accessed 12/02/2021.

⁴³ *The Michigan Guidelines* op cit n2 at 294.

⁴⁴ Zimmermann op cit n5 paras 32-7 at 964.

⁴⁵ *The Travaux préparatoires* op cit n42 at 267.

the Refugee Convention's purpose of fully ensuring the realisation of refugees' rights. It follows that unauthorised stays should be considered lawful if the host country knows or should know that the refugee is staying on its territory and tolerates this.⁴⁶ So any person falling under the refugee definition, who files an asylum application and is not just temporarily present in the host country, is entitled to labour market access.⁴⁷

According to sub-Article 17(3), refugees shall be exempted from protective labour market provisions applied to foreign nationals under certain circumstances; (a) after residing in the host country for three years or, (b) if their spouse or child is a national of the host country.⁴⁸ Defence or civilian service may be reserved for nationals in the interest of national security. However, employment restrictions designed to shield the national labour market from foreign workers, whether in specific occupational fields or for a fixed percentage of the workforce, should not apply to refugees.⁴⁹

Article 18 affords the right to self-employment to refugees lawfully present in the host country under conditions no less favourable as for foreigners generally. This means that any entrepreneurial activity is permissible for refugees if other foreigners are allowed to be self-employed.⁵⁰ In distinction to the term 'lawful stay,' a temporary presence in the territory of a state suffices. This includes recognised refugees, as well as registered asylum seekers.⁵¹ Thus the right is granted earlier and more broadly compared to the right to wage-earning employment, although the latter was deemed more relevant for refugees given their limited resources and status.⁵²

Article 19 provides the right to exercise a liberal profession for those lawfully staying in the host country who are holding a recognised diploma of such profession. Refugees lawfully staying in the host country are entitled to existing fair labour regulations and social security legislation to the same extent as national citizens of their host state under Article 24 of the 1951

⁴⁶ UNHCR, 'Lawfully Staying' – A Note on Interpretation, 1988, para 17, 23. See also *The Michigan Guidelines* op cit n2 at 298.

⁴⁷ Asylum Access, *Global Refugee Work Rights Report* (2014) at 12 available at <https://www.refworld.org/docid/542903a64.html> accessed on 09/03/2021.

⁴⁸ Articles 17(2) of the 1951 Convention op cit n35.

⁴⁹ *The Travaux préparatoires* op cit n42 at 107.

⁵⁰ *Refugee Work Rights Report* op cit n47 at 11.

⁵¹ *Ibid*; *The Travaux préparatoires* op cit n42 Commentary to Article 18 at 109. See also *The Michigan Guidelines* op cit n2 at 298.

⁵² Zimmermann op cit n5 para 13 at 957.

Convention. This ensures not only the principle of equity but also provides for fair labour market competition with national employees.⁵³

2.2 THE FUNCTION, SCOPE AND POTENTIAL OF THE RIGHT TO WORK

The right to work is the basis for durable solutions for refugees during displacement. By enshrining it in the Convention, it is recognised that in many cases the granting of asylum is not a short-term matter. As conditions of persecution or serious human rights violations in refugees' countries of origin are often protracted, this also applies to the condition of displacement in many cases.⁵⁴ This causes high costs and burden for host countries, sponsors, and donors to provide care, and a gruelling state of limbo for the refugees if medium- to long-term perspectives for this period are not created.

Furthermore, the right to work expresses the understanding that, beyond physical safety, refugees must be allowed and enabled to build a meaningful life and achieve self-sufficiency during this period.⁵⁵ This can best be achieved by giving refugees ownership of their lives and unlocking their potential, skills, and human capital. Behind this, the human image of the Refugee Convention comes to light, which recognises refugees as independent and self-responsible persons whose inherent human dignity must be protected in the period of displacement.⁵⁶

However, the scope of protection offered under the work rights in the Convention only reflect what countries were at that time willing to concede. The contentiousness of the concrete formulation of the provisions, in particular Article 17 of the Convention, still shows in the range of reservations states parties made to the provision.⁵⁷

One can see how constrained this right is if comparison between the 1951 Convention's scope is made against the ICESCR's. Article 6 of the ICESCR attributes the opportunity to earn a living through freely accepted work to everyone, regardless of one's nationality, including

⁵³ *The Travaux Préparatoires* op cit n42 Commentary to Article 24, s 1. This argument is relevant in responding to the nationalist argument against employment of foreign nationals that is premised on them being more exploitable by employers and thus saturating the job market.

⁵⁴ *Refugee Work Rights Report* op cit n47 at 2.

⁵⁵ *Ibid.*

⁵⁶ *Refugee Work Rights Report* op cit n47 at 3.

⁵⁷ Zimmermann op cit n5 para 11 at 956.

refugees and asylum seekers.⁵⁸ It follows that the personal scope of the right to work under the ICESCR is broader than that under the 1951 Convention.⁵⁹

It is, however, in its material scope subject to the internal limits of the ICESCR. First, only the effort towards a ‘progressive realisation’ of the right is owed, no concrete result.⁶⁰ Second, at least for developing countries, distinctions between nationals and non-nationals in the granting economic rights are permissible, provided they are reasonable and objectively justified.⁶¹ National economic and human rights considerations need to be carefully balanced and the principle of non-discrimination upheld.⁶² The right thus includes that everyone may freely seek, choose and not be arbitrarily denied work, as well as protection against forced labour.⁶³

Yet the right to work does not function as a guarantee of a job or result in an obligation to provide employment.⁶⁴ It rather encompasses the freedom to provide for oneself by engaging in productive work of choice.⁶⁵ To respect, protect and promote this freedom states must ensure, through legislation and practice, a secure and documented legal status as well as supportive measures and infrastructure⁶⁶ to enable access to the labour market for refugees. Its implementation in practice must further be flanked with the necessary measures to enable refugees not only to seek, but also to successfully find work.

⁵⁸ UN Committee on Economic, Social, and Cultural Rights *Non-Discrimination in Economic, Social and Cultural Rights*, General Comment No. 20, U.N. Doc. E/C.12/GC/20 (2009), para. 30.

⁵⁹ Zimmermann op cit n5 at 961 para 23.

⁶⁰ Article 2(1) ICESCR; *Refugee Work Rights Report* op cit n47 at 13.

⁶¹ Article 2(3) ICESCR.

⁶² Zimmermann op cit n5 paras 18-20 at 959-960.

⁶³ Zimmermann op cit n5 para 15 at 958.

⁶⁴ Ibid at 11; *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) para 32.

⁶⁵ *The Michigan Guidelines* op cit n2 at 294.

⁶⁶ These can include employment offices; language and skills training; loans and grants for small businesses; see *The Michigan Guidelines* op cit n2 at 303-4.

2.3 REGIONAL PROTECTION OF THE RIGHT TO WORK IN THE EUROPEAN UNION

(a) *Legal Aspects*

EU primary law entails the obligation of the EU to help those seeking international protection,⁶⁷ namely the Treaty on the Functioning of the European Union (TFEU)⁶⁸ and the Charter of Fundamental Rights of the European Union.⁶⁹ Articles 18 and 19 of the Charter of Fundamental Rights of the European Union commit to upholding the rights of refugees under other international conventions, including non-refoulement. The EU itself is not party to the 1951 Refugee Convention and its Protocol, and thus not directly bound by them,⁷⁰ yet all EU member states are signatories to both treaties.⁷¹

Since the 1980s, the surge in refugee flows has become increasingly noticeable as a global challenge. The Western industrialized countries have reacted to this by interpreting their international obligations narrowly and adopting more restrictive measures. In the EU, the traditionally generous asylum laws and policies became increasingly focused on the goal of immigration control.⁷² Europe responded with the 1985 Schengen Agreement, whereby internal EU borders between Schengen states⁷³ were opened and dissolved, but external borders were correspondingly sealed off more tightly. Subsequently, visa requirements were introduced for most countries of origin of refugees and agreements were concluded with third countries like Turkey, acting as buffer zones.⁷⁴ This shift made it more difficult and even dangerous for refugees to reach the European Union, earning the EU the nickname ‘Fortress Europe’ which persists today.⁷⁵

⁶⁷ Article 18 of the EU Charter of Fundamental Rights; Articles 67(2), 78 and 80 of the Treaty on the Functioning of the European Union (TFEU).

⁶⁸ European Union, Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ L. 326/47-326/390.

⁶⁹ European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, available at: <https://www.refworld.org/docid/3ae6b3b70.html>; entered into force in 2009.

⁷⁰ Andreas Zimmermann op cit n5 para 66 at 135.

⁷¹ UNHCR, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, available at <https://www.unhcr.org/en-au/3b73b0d63.pdf>. accessed on 18/02/2021.

⁷² Zimmermann op cit n5 para 34 at 128.

⁷³ The Schengen area includes all EU member states except Ireland and Cyprus, and additionally the following non-EU member states: Iceland, Norway, Switzerland and Liechtenstein.

⁷⁴ See European Parliament ‘8 Towards A New Policy on Migration: EU-Turkey Statement & Action Plan’ (2021) *Legislative Train* available at <https://www.europarl.europa.eu/legislative-train/api/stages/report/current/theme/towards-a-new-policy-on-migration/file/eu-turkey-statement-action-plan> accessed on 20/02/2021.

⁷⁵ Zimmermann op cit n5 para 34 at 128. See also M.I. Franklin, ‘Refugees and the (Digital) Gatekeepers of “Fortress Europe”’ (2018) vol 7 no 1 *State Crime Journal* at 78.

EU refugee law is further shaped by the Dublin III Regulation,⁷⁶ allocating the basic responsibility for asylum seekers to the country of first entry, and by secondary law instruments aimed at developing the Common European Asylum System (CEAS),⁷⁷ such as the EU Qualification Directive.⁷⁸ The Reception Directive⁷⁹ sets standards for the reception, accommodation and care of persons seeking protection, while the Asylum Procedures Directive⁸⁰ concerns standards for the conduct of asylum procedures and judicial proceedings. The Dublin III Regulation determines which Member State is responsible for conducting the asylum procedure (“Dublin system”). The European Union has been developing the CEAS since 1999 with the intention to safeguard that asylum seekers and refugees are provided with the same standards of protection and reception throughout the Union.⁸¹ While minimum standards have been established and harmonized in a first phase until 2004, the establishment of a common asylum procedure and uniform protection status in the second phase was the subject of protracted negotiations, repeated adjournments and finally came to a standstill.⁸²

(b) Application of Laws

Provided the borders have been crossed and the refugees have arrived in a European country, access to employment and self-employment shall be provided by Member States immediately upon granting of protection and employment support measures should be made available as for nationals, following Article 26 of the recast Qualification Directive.⁸³ According to Article 34 of the recast Qualification Directive Member States are obliged to ‘take into account the specific needs of the beneficiaries’ with regard to integration measures. Further, According to EU standards member states are supposed to allow asylum seekers

⁷⁶ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III Regulation), entered into force in July 2013.

⁷⁷ Zimmermann op cit n5 para 16 at 134.

⁷⁸ European Union ‘Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)’ (2011).

⁷⁹ European Union ‘Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)’ (2013) (Reception Directive).

⁸⁰ European Union ‘Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection’ (2013) (Asylum Procedures Directive)

⁸¹ European Parliament ‘Factsheets of the European Union: Asylum Policy’ [Online] available at <https://www.europarl.europa.eu/factsheets/en/sheet/151/asylum-policy> accessed on 25/02/2021

⁸² Zimmermann op cit n5 para 35 at 128 and para 46 at 130. See also EU Factsheets op cit n. 81.

⁸³ Article 26(1) of the Qualitative Directive op cit nFehler! Textmarke nicht definiert. reads: ‘Member States shall authorise beneficiaries of international protection to engage in employed or self-employed activities.’

pending their status determination to seek employment nine months after their application at the latest.⁸⁴

Yet, some member states' legislation grant access earlier, some later and certain groups of refugees or asylum seekers are barred from taking up work altogether. Yet, some member states' legislation grant access earlier, some later and certain groups of refugees or asylum seekers are barred from taking up work altogether. While the access to the labour market is fully granted and supported for recognized refugees in Germany, asylum seekers in refugee camps on the Greek islands practically barred from the right to work, as many other human rights. Consequently, there is a lack of a unified approach within the EU and the legal and factual situation varies widely.

2.4 SHIFTING THE FOCUS TO SELF-RELIANCE: THE GCR AND CRRF

While the reasons behind the shortcomings in EUs asylum policy are manifold, the lack of collaboration and fair burden sharing lie at the heart of it. On the international level, this topic has been addressed in a ground-breaking development in 2018. With the adoption of the GCR, the global community has agreed on a new, collaborative approach to provide durable solutions for protracted refugee situations. Strengthening refugee self-reliance became one out of four main objectives,⁸⁵ together with the aim to ease pressure on host countries, expand access to third-country solutions and support conditions in countries of origin that allow refugees to return in safety and dignity.⁸⁶

The GCR's operational pillar, the Comprehensive Refugee Response Framework (CRRF),⁸⁷ provides for the realisation of the key objectives through two key innovations: First, the linking of humanitarian aid with development goals for long-term solutions, aiming at achieving self-reliance.⁸⁸ This represents a major paradigm shift. Secondly, the involvement of the host community in order to improve the livelihoods of refugees and locals alike.⁸⁹ This can address concerns of the local host community that refugees might in a better position as a result of international assistance. Context-specific and conflict-sensitive implementation is not only

⁸⁴ Article 15(1) of the Reception Directive, provided that any delay in the first instance decision cannot be attributed to the applicant.

⁸⁵ Paragraph 7 (ii) of the Global Compact on Refugees op cit n1.

⁸⁶ Paragraph 7 (i), (iii) and (iv) of the Global Compact on Refugees op cit n1.

⁸⁷ As agreed to by Member States in Annex I of the New York Declaration *ibid.*

⁸⁸ Para 8 of the GCR.

⁸⁹ Para 100 of the GCR.

but especially required in impoverished host societies, to ensure mutual developing benefits and prevent conflicts.⁹⁰

Although the GCR has been criticised for its lack of binding nature, hopes are held that it can nevertheless be effective.⁹¹ As soft law, the GCR and the CRRF can serve as a reference point for discourse, future policy development and the allocation of funds. They promote new cooperation and thus represent a major development in international asylum law.

⁹⁰ Sergio Carciotto & Filippo Ferraro ‘Building Blocks and Challenges for the Implementation of the Global Compact on refugees in Africa’ (2020) vol 8(1) *Journal on Migration and Human Security* at 87.

⁹¹ *Ibid* at 85.

Chapter Three

3.1 BACKGROUND

After its transition into a constitutional democracy, South Africa ratified the 1969 OAU Refugee Convention in 1994 and the 1951 Refugee Convention in 1995, both without any reservations. In confirmation of these international commitments, South Africa's progressive refugee legislation was adopted a few years later in the form of the Refugees Act 130 of 1998 (Refugees Act).⁹² The South African refugee legislation is often lauded as progressive and generous.⁹³ It reflects the country's commitment to human rights⁹⁴ and affords strong protection to refugees and asylum seekers, including the general entitlement to the right to work.

However, although refugee rights are supported by international laws and anchored in the country's constitution, the practical implementation continues to pose substantial difficulties. In the years between 2006 until 2011, South Africa was the leading recipient of new asylum seekers.⁹⁵ Such large numbers of asylum seekers proved overwhelming to the under-resourced South African refugee system.⁹⁶ Following a global trend,⁹⁷ the government has since began adopting increasingly restrictive asylum policies and practices. This recent political shift also affects the right to work, especially for asylum seekers.⁹⁸ In addition to the general trend to curtail refugee rights, opposing laws, policies, and administrative requirements as well as structural shortcomings continue to, directly and indirectly, restrict access to the South African labour market for refugees and asylum seekers.

⁹² Refugees Act 130 of 1998 (Refugees Act), which came into force in April 2000 and was recently amended by the Refugees Amendment Act 11 of 2017.

⁹³ See The UN Information Centre Pretoria 'UNHCR urges resolution to refugee protests' (2018) UNHCR Press Release, 30 October 2019, available at <https://unicpretoria.org.za/2019/10/30/press-release-unhcr-urges-resolution-to-refugee-protests/> accessed on 26/11/2020.

⁹⁴ Roni Amit '(Dis)placing the Law: Lessons from South Africa on Advancing U.S. Asylum Rights' (2018) vol 20 *Loyola Journal of Public Interest Law* at 138.

⁹⁵ UNHCR *Global Trends 2012* (2013) at 26.

⁹⁶ Roni Amit op cit n64 at 143.

⁹⁷ Alice Edwards 'Human Rights, Refugees, and The Right "to enjoy" Asylum' (2005) vol 17(2) *International Journal of Refugee Law*, at 293-4.

⁹⁸ Carciotto, Sergio & Filippo Ferraro 'Building Blocks and Challenges for the Implementation of the Global Compact on refugees in Africa' (2020) 8(1) 83-95 *Journal on Migration and Human Security* at 85.

3.2 THE RIGHT TO WORK OF ASYLUM SEEKERS AND REFUGEES

South Africa is a party to all major treaties and regimes in international refugee law, including the 1951 UN Convention⁹⁹ and its 1967 Protocol,¹⁰⁰ as well as the 1969 OAU Convention.¹⁰¹ Consequently, South Africa is obliged to respect the international conventions under domestic law as stipulated by s 6 of the Refugee Act of 1998.¹⁰² The Act provides for extensive refugee and asylum seekers' rights that complement the set of rights from the 1951 Refugee Convention and reflects the particularities of the causes of refugee flight on the African continent.¹⁰³ Further, refugees can invoke a wide range of constitutional rights by virtue of s 27(b) of the Refugee Act. Except for citizens' rights and the right to choose a profession or trade, all rights set out in the Bill of Rights¹⁰⁴ apply for everyone, including refugees and asylum seekers.¹⁰⁵

Once a person seeking asylum is recognised as a refugee, s 27 grants a set of rights, including the right to apply for permanent residence status under the Immigration Act should certain additional conditions be met. For refugees, the right to work is explicitly granted under s 27(f) of the Refugees Act, stating 'a refugee is entitled to seek employment.' This reflects the scope of the Convention's right to employment for those legally staying in the host country. It is, however, limited by s 22 of the Constitution in two ways. First, the right to choose one's trade, occupation and profession freely is explicitly reserved for citizens.¹⁰⁶ Secondly, the practice of a trade, occupation or profession can be subject to regulations by laws.

With the Refugee Amendment Act of 2017, the threshold to gain permanent residency – and with it access to the broader rights and benefits linked to this status¹⁰⁷ – was raised considerably since January 2020. The preconditions for a refugee to apply for permanent residency in Section 27 (c) of the Refugee Act were amended, raising the time period of continuous residence from date of the granting of asylum from five to ten years.¹⁰⁸ The

⁹⁹ Convention Relating to the Status of Refugees, 1951.

¹⁰⁰ Protocol relating to the Status of Refugees, 1967.

¹⁰¹ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969.

¹⁰² Refugees Act 130 of 1998 (as amended by the Refugees Amendment Act 11 of 2017).

¹⁰³ Roni Amit op cit n at 144.

¹⁰⁴ Chapter II of the Constitution of South Africa, 1996.

¹⁰⁵ Section 7(1) of the Constitution provides: 'The] Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.'

¹⁰⁶ Section 22 of the Constitution.

¹⁰⁷ Section 25 of the Immigration Act.

¹⁰⁸ See s 27 of the Refugees Act of 1998, as substituted by s 21 of Act 33 of 2008 and amended by Section 10 of Act 12 of 2011 and by Section 23 of Act of 11 of 2017 (all wef 1 January 2020).

amendment also includes a stricter assessment of the prospect of indefinite refugee status.¹⁰⁹ With asylum seekers often waiting for a decade and more until they obtain the refugee status in the first place, this lessens the chances to become a permanent resident further, even for refugees who may have been in South Africa most of their life. If a refugee is granted the status of a permanent resident¹¹⁰ Section 25 (1) of the Immigration Act affords him or her with “all rights, privileges, duties and obligations of citizens, save those (...) which a law or the Constitution explicitly ascribes to citizens”.

The right to work is not explicitly granted to asylum seekers, as s 27 of the Refugee Act does not apply for those still waiting for asylum to be granted.¹¹¹ Under the previous legal dispensation¹¹² asylum seekers were not formally entitled to work, but following a significant court victory in the case of *Minister of Home Affairs v Watchenuka*¹¹³ (*‘Watchenuka’*) the right to work was entrenched into the legal system.¹¹⁴ However, since the amendments of the Refugee Act came into effect from January 2020, the right to work is limited again.

(c) The right to work in the 2017 Refugees Amendment Act and its interpretation in the light of the Watchenuka case.

Prior to January 2020, the right to work was established by case law through an interpretation of the former s 11(h) of the Refugee Act¹¹⁵ in conjunction with the right to human dignity in s10 of the Constitution, 1996.¹¹⁶ In *Watchenuka* the court established that human dignity is protected by the South African Constitution for citizens and non-citizens alike and that the ‘freedom to engage in productive work’ falls under this foundational right,¹¹⁷ although possibly subject to limitations. As asylum seekers are not entitled to state support in South Africa, working is often the ‘only reasonable means’ for a person’s support. Otherwise, ‘a person who exercises his or her right to apply to apply for asylum, but who is destitute, will have no

¹⁰⁹ Assessment if the situation in the country of origin justifies refugee status indefinitely ‘including efforts made to secure peace and stability in the refugee’s country of origin,’ See s 27 of the Refugees Act of 1998, as substituted by s 21 of Act 33 of 2008 and amended by s 10 of Act 12 of 2011 and by s 23 of Act of 11 of 2017 (all wef 1 January 2020).

¹¹⁰ According to s 27 (d) or 31 (2) (b) Immigration Act in conjunction with s 27 (c) Refugee Act.

¹¹¹ *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA).

¹¹² The former s 11(h) of the Refugees Act No. 130 of 1998 stated that the Standing Committee of Refugee Affairs hat to determine ‘the conditions relating to study and work in the Republic’ for asylum seekers.

¹¹³ *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA).

¹¹⁴ F Khan & Schreier (eds.) *Refugee Law in South Africa* (2014) at 225.

¹¹⁵ Refugees Act 130 of 1998 (before 2020 amendments).

¹¹⁶ Constitution of the Republic of South Africa of 1996.

¹¹⁷ *Watchenuka* supra n111 paras 25-27.

alternative but to turn to crime, or to begging, or to foraging.¹¹⁸ The permission to seek employment was, therefore, to be interpreted into the asylum seeker permit.¹¹⁹

With effect from January 2020 the Refugee Amendment Act of 2017¹²⁰ comes into effect. It poses new challenges to asylum seekers upon obtaining an asylum seeker visa. Section 22(8) now explicitly prohibits endorsing the right to work for asylum seekers if the applicant can sustain herself otherwise,¹²¹ or has been offered shelter and basic necessities by the UNHCR or any other organisation or person.¹²² Should the right to work be endorsed, it will be revoked after six months if the asylum seeker cannot prove employment then.¹²³ No extension can be granted if an asylum seeker who was in the possession of a work permit failed to find and prove employment within the period of validity¹²⁴ unless they are able to produce an offer of employment whilst their asylum application is pending.¹²⁵

There are questions to be raised regarding whether this restrictive regulation is in conformity with South Africa's constitution and international law. One can criticise the new laws for threatening asylum seekers' human dignity and self-reliance. Not only may asylum seekers lose the freedom to earn a living but under s 22(6) read with s 22(7), they may be forced to deplete their savings in an unsustainable manner, effectively decreasing their ability to build up a meaningful and resilient life. Furthermore, the enforced unemployment under s 22(7) perpetuates their dependency on aid, which diminishes their self-esteem and wastes valuable skills they may hold.¹²⁶

It can also be argued that the prohibition of extensions and the revocation after six months in cases where a living is not secured can amount to a violation of the fundamental principle of non-refoulement.¹²⁷ This principle, which is the cornerstone of refugee protection, safeguards refugees from being returned to a country where they might fear persecution.¹²⁸

¹¹⁸ *Watchenuka* supra n111 para 32.

¹¹⁹ *Watchenuka* supra n111 paras 17, 18, 24-27, 32.

¹²⁰ Refugees Amendment Act 11 of 2017.

¹²¹ As assessed under s 22(6) of the Refugee Act of 1998 (as amended by Section 15 of Act 33 of 2008 and by Section 13 of Act 12 of 2011 and as substituted by Section 18 of Act of 11 of 2017).

¹²² Section 22(7) *ibid.*

¹²³ Section 22 *ibid.*

¹²⁴ Section 22(9) *ibid.*

¹²⁵ Section 22(8)(c) *ibid.*

¹²⁶ *The Michigan Guidelines* op cit n126 at 296.

¹²⁷ Article 33(1) of the 1951 Refugee Convention and Article 2(3) of the 1969 OAU Refugee Convention.

¹²⁸ UNHCR 'Note on the principle of non-refoulement' (1977) EC/SCP/2 available at:

<https://www.unhcr.org/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html> accessed on 21/01/2021.

State policy or conduct may add up to constructive or indirect refoulement when asylum-seekers find themselves forced to leave the country of asylum.¹²⁹ This is the case when socio-economic rights are denied in a form severe enough to motivate a person to return to a country of persecution.¹³⁰ Further, such conduct can be argued to constitute a violation of the prohibition on inhuman or degrading treatment.¹³¹

It should be highlighted that the arguments as set out in *Watchenuka* remain valid despite the amendments. While s 22 of the Refugees Act indeed ensures that the ability to provide for a living is fulfilled by either the asylum seekers themselves or by a charitable organisation before limiting the issuance of a work permit, the right to work interpreted in compliance with the Constitution encompasses more than just shelter and the bare necessities. The ‘most fundamental constitutional right of all,’¹³² the right to human dignity protects the freedom to engage in productive work to satisfy the human need for a meaningful life. This was aptly captured by the court in *Watchenuka* as follows:

“The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity, as submitted by the respondents’ counsel, for mankind is pre-eminently a social species with an instinct for meaningful association.”¹³³

The general limitation to the right to work as entailed in s 22(8) of the Refugee Act cannot be justified convincingly either. The burden of proof for the justification of such limitation lies with the party introducing it.¹³⁴ After considering a series of arguments brought before it in favour of a general prohibition, such as fraud or the protection of national applicants, the court in *Watchenuka* invalidated them and called the general prohibition of employment ‘a material invasion of human dignity that is not justifiable in terms of s 36 (of the Constitution).’¹³⁵ It can therefore be expected that this new restrictive legislation will again be challenged and that the South African jurisprudence may establish another victory re-establishing asylum seekers’ right to work as in *Watchenuka*.

¹²⁹ Khan & Shreier op cit n114 at 12. See also *The Michigan Guidelines* op cit n126 para 20 at 301.

¹³⁰ Penelope Mathew, *Reworking the Relationship between Asylum and Employment* (2012) at 44.

¹³¹ Article 5 of the UDHR; Article 7 of the International Covenant on Civil and Political Rights (ICCPR); *The Michigan Guidelines* op cit n126 para 22.

¹³² *Watchenuka* supra n111 para 28.

¹³³ *Supra* para 27.

¹³⁴ *Supra* para 33.

¹³⁵ *Supra*.

Further, it was only in a second step that the Supreme Court of Appeal held in *Watchenuka* that all temporary asylum seeker visa should be interpreted to include the right to work.¹³⁶ This interpretation resulted from the assumption of the practical inability of the Standing Committee to provide the required case-by-case evaluation on whether working was the only reasonable means of the particular asylum seeker to sustain him- or herself.¹³⁷ This practical challenge will continue to exist for ss 22 (6), (7) and (8) of the Refugee Act. It is therefore likely that under the new legal situation too, only a general endorsement of the right to work for asylum seekers will ensure compliance with the Constitution. What remains until then is an increased sense of legal uncertainty for an already vulnerable group. Denying access to formal employment will increase the need for asylum-seekers to set up their own business or force them into the informal sectors, where it is more difficult to protect them from exploitation and prevent wage erosion.¹³⁸

3.3 LEGISLATIVE RESTRICTIONS TO THE RIGHT OF WORK

Although the right to work is generally established for a refugee under s 27(h) or by the issuance of a valid work permit in the asylum seekers visa, this right can be restricted by law. Section 22 of the Constitution states that '[t]he practice of a trade, occupation or profession may be regulated by law.' Legislation that arbitrarily limits the right to work is unconstitutional and violates international and national law.¹³⁹

Direct restrictions of the access to certain industry sectors for foreign nationals are conflicting with the constitutional right to equality¹⁴⁰ that also protects foreign nationals,¹⁴¹ but can be justified, however.¹⁴² In *Larbi-Odam v MEC for Education*¹⁴³ the Constitutional Court held that the right to equality is conferred on 'everyone,' including non-citizens whom the court recognized as a vulnerable group.¹⁴⁴ It declared restrictions that deterred non-citizens from

¹³⁶ Khan & Shreier op cit n114 at 226.

¹³⁷ Khan & Shreier op cit n114 at 226.

¹³⁸ *Refugee Work Rights Report* op cit n47 at 6.

¹³⁹ Khan & Shreier op cit n114 at 226.

¹⁴⁰ Section 9 of the Constitution of South Africa, 1996.

¹⁴¹ *Larbi-Odam v MEC for Education (North-West Province)* 1998 (1) SA 745 (CC), para 23. See also *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004, para 47.

¹⁴² see *Union of Refugee Women v The Director of the Private Security Industry Regulatory Authority* 2007 (4) BCLR 339 (CC) („*Union of Refugee Women*”).

¹⁴³ *Larbi-Odam v MEC* supra n141.

¹⁴⁴ *Supra* para 23.

certain professions, in this case, the applicants who were permanent residents from obtaining a permanent teaching post, as unfair discrimination and thus unconstitutional.¹⁴⁵

Under s 25(1) of the Immigration Act, permanent residents¹⁴⁶ are afforded with ‘all rights, privileges, duties and obligations of citizens, save those which a law or the Constitution explicitly ascribes to citizens.’ The legislator has made use of this possibility for example by ascribing certain privileges to designated groups of South African citizens¹⁴⁷ in the Employment Equity Act,¹⁴⁸ the Broad-Based Black Economic Empowerment Act¹⁴⁹ and the Employment Service Act.¹⁵⁰ The Employment Equity Act encourages proactive employment measures and planning, aiming to create equal opportunities and redress of disadvantages, that designated groups have been and still are experiencing. The Employment Equity Act explicitly declares in s 6(2) that it does not constitute discrimination to take affirmative action. In this regard, the provision of s 15 that encourages the preference of suitably qualified people from designated groups is not critical.¹⁵¹

Another objective behind some regulations is to protect the labour market from external workforce and bar non-citizens from certain sectors. For example, the Employment Service Act, which came into effect in August 2015, aims to ‘facilitate the employment of foreign nationals in a manner that is consistent with the objects of this Act and the Immigration Act, 2002.’ A foreign national is defined in s 1 as an individual who is neither citizen nor a permanent resident of South Africa.

While the purpose of the ESA is, amongst others, to ‘improve the employment prospects of work seekers, in particular, vulnerable work seekers,’¹⁵² the employment of foreign nationals in the South African economy shall only be facilitated, ‘where their contribution is needed in a manner that does not impact adversely on existing labour standards or the rights and

¹⁴⁵ Supra para 25. Note that the court’s rights-affirming understanding was not followed in 2007 in the *Union of Refugee Women v The Director of the Private Security Industry Regulatory Authority* 2007 (4) BCLR 339 (CC) 325 where the limitation in s 23(1)(a) of the Private Security Regulation Act 56 of 2001 to nationals was found to be justified by the need for an easily and objectively verifiable trustworthiness.

¹⁴⁶ Refugees can obtain this status according to ss 27(d) or 31(2)(b) of the Immigration Act in conjunction with s 27(c) Refugee Act of 1998 (as amended).

¹⁴⁷ Designated groups of the Employment Equity Act are Black people, including Africans, Coloureds, Indians, women and people with disabilities.

¹⁴⁸ Employment Equity Act 55 of 1998.

¹⁴⁹ Broad-Based Black Economic Empowerment Act 53 of 2003.

¹⁵⁰ Employment Service Act 4 of 2014.

¹⁵¹ Employment Equity Act 55 of 1998

¹⁵² Section 2(d) of the Employment Service Act 4 of 2014.

expectations of South African workers; and that promotes the training of South African citizens and permanent residents.’¹⁵³ What this means can be seen in s 8(2)(a) of the Employment Service Act, which allows the employment of a foreign national only if ‘no other persons in the Republic with suitable skills’ can be found. This high threshold deters employers to employ foreign citizens. Even for those with recognised refugee status and authorization to work through their permit, this may create a threat by colleagues and peers, who may not be aware of their right to work.¹⁵⁴

Whether such regulations fall under Article 17(2) of the 1951 Convention, depends on their justification and purpose. Article 17 (2) only deals with measures for the protection of the national labour market. The objective of legislation such as the EEA and the Broad-Based Black Empowerment Act is to enhance economic participation of particular groups within the South African people, increased equity and redress for former injustice. Measures based on national security or ensuring the necessary qualifications do not fall under Article 17(2) of the Convention. On the other side, when the differentiation is drawn upon the status as a citizen and aims to protect the national labour market, the restrictive measures shall not be applied to refugees under certain circumstances that include three years’ residence in the country, ongoing marriage to a national and or having children with a national.¹⁵⁵ It can be argued, that to the same extent that affirmative action privileges nationals, it should be applied to refugees.

The employment of foreign nationals, including refugees and asylum seekers, is regulated by the Immigration Act. The socio-economic situation in South Africa greatly strains the labour market that has more work-seekers than job vacancies and is not spared the impact of deeply rooted inequalities within society. The Immigration Act, as well as further employment legislation, must be understood in the context of the political campaign to increase employment amongst South African citizens, especially those who belong to designated groups that have been deprived of economic participation and opportunities under the Apartheid regime. However, besides the desirable objectives of Employment Equity, the fight for employment equity by affirmative action should not be led to the expense of another vulnerable or disadvantaged group and ignite further discrimination. The vulnerable situation of refugees

¹⁵³ Section 2(1)(h)(ii) and 2(1)(h)(iii) *ibid*.

¹⁵⁴ Pumla Rulashe ‘Recognised refugees in SA call for public education on their right to work,’ 27 March 2017 UNHCR available at <https://www.unhcr.org/afr/news/stories/2017/3/58d9153f4/recognised-refugees-in-south-africa-call-for-public-education-on-their.html> accessed on 10/02/2021.

¹⁵⁵ Article 17(2) of the 1951 Convention Relating to the Status of Refugees.

and asylum seekers needs to be considered, recognising the involuntary nature of their presence in South Africa¹⁵⁶ and the lack of reasonable alternatives to provide a livelihood.¹⁵⁷

The right to self-employment for asylum seekers and refugees was confirmed in *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism*.¹⁵⁸ Carefully weighing the content, scope and interdependence of s 10 and 22 of the Constitution and international rules, as well as the reasoning in previous jurisprudence of *Union of Refugee Women* and *Watchenuka*, the Supreme Court of Appeal in *Somali Association of South Africa and Others* rightly concluded that refugees and asylum seekers are not generally barred from trading or engaging in self-employment, either by s 22 of the Constitution or by any other law. The Court followed the reasoning of *Watchenuka*,¹⁵⁹ a licence to trade should not be denied in the case of otherwise imminent existential hardship and destitution.¹⁶⁰ Granting the right to self-employment is further necessary in order to uphold the requirements of the 1951 Convention. To deny it or to make it conditional on status recognition would violate the right, as foreseen in Article 18 of the 1951 Convention for all persons ‘lawfully in’ the host country.¹⁶¹

3.3 RESTRICTIONS IN THE PRACTICAL IMPLEMENTATION OF RIGHT

While extensive refugee rights are guaranteed on paper, the implementation remains subject to substantial flaws.¹⁶² As long as responsible institutions in South Africa fail to put those rights in practice, asylum seekers and refugees continue to face significant obstacles to their right to live in dignity and safety.¹⁶³ In addition to the legal restrictions outlined above, the realization of the right to work is further hampered in practice by technical inadequacies that, although not as an objective, effectively limit the right to work and the unwillingness or inability of authorities to overcome them.

Besides the legislation and practice of affirmative action for designated groups of South African citizens, there are various further reasons for employers’ hesitance to accept a refugee

¹⁵⁶ *Union of Refugee Women v Director* supra n145 paras 28-29.

¹⁵⁷ *Watchenuka* supra n111, para 32.

¹⁵⁸ *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* 2015 (1) SA 151 (SCA) para 46.

¹⁵⁹ *Watchenuka* supra n111, para 32

¹⁶⁰ *Somali Association of South Africa v Limpopo* supra n150 para 43-44.

¹⁶¹ *Refugee Work Rights Report* op cit n47 at 11.

¹⁶² Khan & Schreier op cit n114 at 14.

¹⁶³ Nobuntu Mbelle ‘*Living on the Margins: Inadequate Protection for Refugees and Asylum Seekers in Johannesburg*’ Human Rights Watch Report (2005) Human Rights Watch.

applicant for a job vacancy. One of the main obstacles is the unclear documentation of the status of asylum seekers and refugees and the rights obtained due to that status. Regarding employment, the unclear status documentation also brings its own difficulties. The right to work under s 27(f) is not visibly indicated on the refugee status documents, leaving most South Africans and many employers unaware of the rights afforded to its holder. On the other side, the time limitation of usually two years of the refugee permit discourages employers further from employing refugees due to the lack of long-term perspective and security.¹⁶⁴

The short validity period and lack of security features of refugees' or asylum seekers' permits stand in the way of the most basic necessities in modern life, such as opening a bank account, concluding a telephone contract, taking out health insurance or confirming a person's identity and work authorization to authorities or employers. In short, they complicate almost every area of life and thus hinder integration immensely.¹⁶⁵ The nature of identity documents and the host societies' ignorance about their scope, do not just render them impractical for the daily life in South Africa but sometimes it even puts them in danger. An example of some extreme results of the lack of awareness of the rights afforded by a refugee permit, like the authorization to study and work, is a case in which ignorant colleagues resorted to assaulting a permit holder.¹⁶⁶

The limitation against using refugees' or asylum seekers' permits as identification documents for basic services has been repeatedly challenged and condemned in case law, for example regarding access to banking. The case *Consortium for Refugees and Migrants in South Africa v ABSA Bank Limited*¹⁶⁷ lead to an out-of-court settlement that ensures that verified refugee and asylum seeker permits are recognized as sufficient identification documents. The lengthy verification process at the Department of Home Affairs risks undermining this apparent success.¹⁶⁸ This shows that even if obstacles are formally surmounted, the implementation of remedies in practice remains an uphill battle.

¹⁶⁴ Khan & Schreier op cit n114 at 224.

¹⁶⁵ Khan & Schreier op cit n114 at 14.

¹⁶⁶ Rulashe op cit n154.

¹⁶⁷ *Consortium for Refugees and Migrants in South Africa v ABSA Bank Limited* Case 34220/10.

¹⁶⁸ Khan & Schreier op cit n114 at 226.

Chapter Four

4.1 BACKGROUND

The legal foundations of German refugee law consist of a series of domestic asylum and residence laws that contextualise Germany's international and European obligations. At the international level, the Federal Republic of Germany, ratified the 1951 Refugee Convention in 1953 without reservations as a founding member and acceded to its 1967 Protocol in 1969.¹⁶⁹ The duties arising from these are supplemented by Germany's various obligations under international and regional human rights instruments applicable to refugees and asylum seekers such as the Universal Declaration of Human Rights, the ICCPR, the ICESCR,¹⁷⁰ the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁷¹ (ECHR) and the revised European Social Charter (ESC).¹⁷²

At the regional level Germany, as a member state of the European Union, has ratified the EU primary law that articulates the obligation of the EU to help those seeking international protection,¹⁷³ namely the Treaty on the Functioning of the European Union (TFEU)¹⁷⁴ and the Charter of Fundamental Rights of the European Union.¹⁷⁵ Further, secondary EU law is applicable or has been implemented into domestic German law. The EU standard regarding the right to work foresees access to employment and self-employment immediately upon granting of protection,¹⁷⁶ or nine months after the asylum application at the latest.¹⁷⁷ Yet some member states' legislation grant access earlier. This is the case in Germany, where a former limitation

¹⁶⁹ UNHCR 'State parties, including Reservations and Declarations, to the 1951 Refugee Convention' [Online], available at

<https://www.unhcr.org/protection/convention/5d9ed32b4/states-parties-including-reservations-declarations-1951-refugee-convention.html> accessed on 12/02/2021.

¹⁷⁰ Both signed in 1968 and ratified in 1971 by Germany; ICCPR available at

https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND; ICESCR available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en.

¹⁷¹ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols 11 and 14, 1950 (European Convention of Human Rights or ECHR).

¹⁷² Applicable to 'refugees and stateless persons lawfully staying in their territory,' see paragraph 1 of the Appendix to the revised European Social Charter, 3 May 1996, 3.V.1996, ETS No. 163.

¹⁷³ Article 18 of the EU Charter of Fundamental Rights; Articles 67(2), 78 and 80 of the Treaty on the Functioning of the European Union (TFEU).

¹⁷⁴ European Union, Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ L. 326/47-326/390.

¹⁷⁵ European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, available at: <https://www.refworld.org/docid/3ae6b3b70.html>; entered into force in 2009.

¹⁷⁶ Article 26(1) of the Qualitative Directive op cit nFehler! Textmarke nicht definiert. reads: 'Member States shall authorise beneficiaries of international protection to engage in employed or self-employed activities.'

¹⁷⁷ Article 15(1) of the Reception Directive, provided that any delay in the first instance decision cannot be attributed to the applicant.

of up to five years has been reduced to a period of three months in principle in 2014.¹⁷⁸ However, as will be shown, there are groups of asylum seekers or those with a suspended deportation, that are banned from taking up work for a longer period.

4.2 GERMAN DOMESTIC REFUGEE LAW

A series of Germany's domestic refugee and asylum laws are crafted within the framework of the international obligations and implementation of the regional regulations outlined above. To begin with, the right to asylum for politically persecuted persons is enshrined as a judicially enforceable right in Article 16a of the German Basic Law (Grundgesetz), the German constitution. The constitutional commitment of the Federal Republic of Germany not to deny the right of asylum to any politically persecuted person draws on the historical lessons from the National Socialist reign of injustice and can be traced back to the experiences of persecution in the Soviet sector at the time of the creation of the Basic Law.¹⁷⁹ Thus, a traditionally generous handling of the right of asylum that is regarded as an integral part of the European tradition followed from this.¹⁸⁰ However, its independent significance alongside claims for protection under European law was significantly reduced when the scope of the fundamental right to asylum was considerably narrowed down in 1993 by the constitutional amendment introducing the safe third-country regime.

Further, Germany adopted domestic law governing the administrative procedure for obtaining the right to asylum. The Act on the Residence, Economic Activity, and Integration of Foreigners in the Federal Territory (Residence Act),¹⁸¹ as the name suggests, regulates the rights of foreigners to reside, work and integrate in Germany. Asylum procedures in Germany

¹⁷⁸ Thränhardt, "Die Arbeitsintegration von Flüchtlingen in Deutschland: Humanität, Effektivität, Selbstbestimmung", Bertelsmann Stiftung, 2015 at 6, available at <https://www.bertelsmann-stiftung.de/de/publikationen/publikation/did/die-arbeitsintegration-von-fluechtlingen-in-deutschland-1/> accessed on 23/02/21.

¹⁷⁹ Tanja Podolski, "70 Jahre Grundgesetz - das Asylrecht aus Art. 16a GG: "Ein Symbol der Humanität"" 07 May 2019 *Legal Tribune Online*, available at <https://www.lto.de/recht/hintergruende/h/grundgesetz-70-jahre-art-16a-interview-seegmueller/>. See also Zimmermann op cit n5 para 78 at 138.

¹⁸⁰ Zimmermann op cit n5 para 2 at 120 and para 77-8 at 138.

¹⁸¹ Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory ('Residence Act'), in the version promulgated on 25 February 2008 (Federal Law Gazette I at 162), most recently amended by Article 4b of the Act of 17 February 2020 (Federal Law Gazette I at 166), available in English at: https://www.gesetze-im-internet.de/englisch_aufenthg/englisch_aufenthg.html). It is supplemented by the Residence Ordinance and the general administrative regulations on residence, although the latter are only binding on the administration.

are conducted based on the Asylum Act,¹⁸² which refers to the Refugee Convention's scope of protection in Article 2(1). Together with certain provisions of the Residence Act, it forms an essential part of German refugee law.

(a) The right to work for refugees and asylum seekers in Germany

Germany is generally considered to have a good record in granting full access to employment opportunities towards its refugee population, particularly recognized refugees.¹⁸³ This positive assessment may be justified to some extent in international comparison. It may also survive scrutiny under the narrow interpretation of Article 17(1) of the 1951 Refugee Convention, considering that Germany does provide accommodation and social assistance to asylum seekers as soon as they apply for asylum in Germany under Section 1(1)1 of the Act on Benefits for Asylum Applicants.

However, it masks the difficult and restrictive legal situation for asylum seekers and those with a temporary postponement of deportation, who often stay long periods of time in Germany. For years, both groups were almost completely excluded from taking up employment in Germany and are still limited to do so by law and practice, as shown below. While the regulations in question have since been tentatively relaxed in the last years,¹⁸⁴ the after-effects of the previous decades-long political strategy of deterrence continue to echo.¹⁸⁵ Furthermore, a downward trend is emerging again in a series of legislative changes since 2019,¹⁸⁶ summarized as the 'asylum pact.'¹⁸⁷ Fundamental external factors favouring the integration of refugees in the labour market are on the one hand, the demographic decline due to the aging

¹⁸² Asylum Act in the version promulgated on 2 September 2008 (Federal Law Gazette I, p. 1798), last amended by Article 2 of the Act of 11 March 2016 (Federal Law Gazette I, at 394).

¹⁸³ Roger Zetter 'Refugees' Right to Work and Access to Labor Markets – An Assessment: Part II Country Case Studies (Preliminary) Refugees' Right to Work and Access to Labor Markets – An Assessment: Part II Country Case Studies (Preliminary) (2016) Knomad Study Series at 48, available at <https://www.knomad.org/publication/refugees-right-work-and-access-labor-markets-assessment-country-case-studies-part-2> accessed on 08/02/2021.

¹⁸⁴ Bertelsmann Stiftung (ed) 'From Refugees to Workers: Mapping Labour-Market Integration Support Measures for Asylum Seekers and Refugees in EU Member States, Volume II: Literature Review and Country Case Studies' (2016) *Bertelsmann Stiftung* at 69.

¹⁸⁵ Dietrich Thränhardt 'Die Arbeitsintegration von Flüchtlingen in Deutschland' (2015) *Bertelsmann Stiftung* at 10.

¹⁸⁶ Some of which entered into force in 2020.

¹⁸⁷ Michael Kalkmann 'Country Report: Germany, 2019 Update' (2020) AIDA / ECRE, at 94, available at https://asylumineurope.org/wp-content/uploads/2020/07/report-download_aida_de_2019update.pdf accessed on 23/02/2021.

German society,¹⁸⁸ and on the other, sustained economic growth with a consistently high employment rate.¹⁸⁹ There is a shortage of personnel in many industries which includes installers, programmers, and nurses.

(b) Work permit by law for temporary residents

The temporary residence permit issued for persons granted asylum, refugee status or subsidiary protection¹⁹⁰ is valid for three years or in the case of subsidiary protection, for a year¹⁹¹ with possible extension.¹⁹² Since 2019, the due date for the subsequent mandatory revision procedures for those granted asylum or refugee status has been extended from three years up to five years to cushion the vast increase in these procedures following the mass influx of refugees in the years 2015 and 2016. In doing so, the legislature fell short of a complete abolition of the no-cause review requirement. Refugee advocates call for the abolition of this requirement because of the considerable psychological strain on refugees who undergo the procedure and the significant additional workload for administrative courts. Another factor is the high retention rate of around 96.7% as of 2019.

In the case of persons granted asylum or refugees, the temporary residence permit can be converted into a permanent settlement permit after five years subject to eased conditions that include developed language skills and the ability to secure one's own livelihood.¹⁹³ The temporary residence permit under ss 25(1) sentence 4 and 25(2) of the Residence Act comes with an unrestricted work permit by law, thus giving beneficiaries full access to the job market, self-employment, training and education. This is a result of the newly introduced s 4a(1) of the Residence Act,¹⁹⁴ which reverses the rule-exception that placed a prohibition proviso for taking up gainful employment for holders of a residence permit. Accordingly, the law has to be

¹⁸⁸ If immigration is disregarded, the German population has been shrinking since 1972, as more people have died than have been born every year since then. See German Federal Statistical Office Press Release of 12 January 2021, available at https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Bevoelkerung/Bevoelkerungsvorausberechnung/_inhalt.html accessed on 18/02/2021.

¹⁸⁹ Zetter op cit n183 48.

¹⁹⁰ Section 25 (1) and 25(2) of the Residence Act op cit n181.

¹⁹¹ Section 26 (1) sentence 1 and 3 *ibid*.

¹⁹² According to the interpretation in conformity with the Directive in accordance with Article 24(1) of the Qualification Directive, according to which the Member States are obliged to provide persons who have been granted refugee status with a residence permit of at least three years, which may be renewed

¹⁹³ Section 26(3) read with s 9(2) of the Residence Act.

¹⁹⁴ With the Skilled Workers Immigration Act's entry into force on March 1, 2020, the system of employment permits was 'reversed,' in principle allowing for gainful employment under all residence titles unless where expressly prohibited or restricted.

explicitly clear when the permit has a work prohibition, and every residence permit must now contain an explicit reference to the work allowance and its potential conditions.¹⁹⁵

(c) Restriction of the access to work for asylum seekers and tolerated persons

Asylum seekers and those whose deportation is suspended are not entitled to work by law.¹⁹⁶ They can apply for an authorization to work under certain conditions and in limited scope.¹⁹⁷ However, for the first three months¹⁹⁸ starting with the issuance of their arrival certificate¹⁹⁹ or their toleration,²⁰⁰ asylum seekers and those with a toleration are banned from undertaking employment (“Beschäftigung”) under s 61(2) of the Asylum Act. This period is extended for those that are obliged to stay in Initial Reception Centres. Section 61(1) sentence 1 of the Asylum Act holds that asylum seekers in Initial Reception Centres are not allowed to take up any work (“Erwerbstätigkeit” – which includes employment and unemployment). Since 2019, asylum seekers must regularly stay in such centres for up to 18 months pending their application for asylum.²⁰¹ This period can be prolonged if federal states make use of the possibility to prolong the obligation to stay in these centres for up to 24 months²⁰² or if the applicants are from a safe country of origin.

However, there are exceptions under s 61(1) sentence 2 of the Asylum Act. Asylum seekers who are not from a safe country of origin, are to be granted an employment permit once their asylum procedure has been pending for more than nine months. Those that hold a toleration under s 60a of the Residence Act for more than six months may also be granted a work permit.

After this period and provided there is a concrete job offer, a permit can be applied for under section 4a (4) of the Residence Act at the Foreigners' Registration Office, in some cases with internal involvement of the Federal Employment Agency (‘Bundesagentur für Arbeit’ or

¹⁹⁵ Section 4a(3) sentence 1 of the Residence Act op cit n181.

¹⁹⁶ Section 61 of the Asylum Act and section 4a(4) of the Residence Act op cit n181. See also section 60a(6) of the Residence Act.

¹⁹⁷ Section 31(1) and (3) of the the Ordinance on the Employment of Foreigners (Beschäftigungsverordnung BeschV) of 6 June 2013 (BGBl. I S. 1499).

¹⁹⁸ Relaxed in 2014 from six months to up to five years before that. See Thränhardt, ‘Die Arbeitsintegration von Flüchtlingen in Deutschland,’ (2015).

¹⁹⁹ Section 63a of the Asylum Act.

²⁰⁰ Section 60a of the Residence Act op cit n181.

²⁰¹ Section 47(1) of the Asylum Act.

²⁰² This applies in some Federal States. See s 47(1b) of the Asylum Act.

BA).²⁰³ According to the wording of s 61(2) sentence 1 of the Asylum Act, a work permit ‘may’ be granted at the discretion of the Immigration Office. This indicates that there is no obligation to do so. However, authorities are bound by the principle of non-discrimination.²⁰⁴ This ‘subordinate’ work permit is valid for three years, but no longer than the specific employment for which it was issued. Asylum seekers and those with a suspended deportation only have full access to the labour market after four years in Germany.²⁰⁵ Internships, voluntary work, vocational training, and highly skilled jobs are exempt from the requirement to get prior work authorisation.²⁰⁶

Until 2014, the issuance of such work permit has additionally required a priority review (‘Vorrangsprüfung’) by the German Federal Employment Agency (Bundesagentur für Arbeit) to confirm that no equally qualified German, EU citizen or person with equal rights was available as an applicant for the specific job.²⁰⁷ This requirement was initially relaxed, then suspended in 2016, and finally abolished permanently across the board²⁰⁸ for persons with toleration and asylum seekers in 2019 following corresponding demands from business associations and humanitarian organizations.²⁰⁹ Nonetheless, a review of employment conditions is still required before a work permit is issued to ensure that they are consistent with those for nationals.²¹⁰

Lastly, the Immigration Office can even completely ban individuals from working under immigration law. In 2019, new denial grounds for a work permit for a person with toleration were introduced.²¹¹ A work permit can be denied if the applicant is deemed responsible for the hinderance of his or her deportation,²¹² inter alia such as by deceit about their identity. The sanction character of this new regulation was strongly criticized. This disregards the fact that this group of people are often in Germany for a long period of time.

²⁰³ Section 31 (1) sentence 1 and (3) of the Residence Act and the Ordinance on the Employment of Foreigners in conjunction with Section 39 and 40 Residence Act op cit n181.

²⁰⁴ Art. 21 of the Charter of Fundamental Rights of the EU (EU Charter).

²⁰⁵ Section 32(2)5 of the Ordinance on Employment (BeschV) op cit n197.

²⁰⁶ Section 32(2) *ibid*.

²⁰⁷ See Sections 61 (2) Asylum Act in conjunction with Section 39 (3) Nr. 3, (5) of the Residence Act and Section 32 (5) of BeschV (old version before 6.8.2019). See *Abschaffung der Vorrangprüfung beim Arbeitsmarktzugang für Asylsuchende und Geduldete*, published on 06/08/2019, available at <https://www.asyl.net/view/detail/News/abschaffung-der-vorrangpruefung-beim-arbeitsmarktzugang-fuer-asylsuchende-und-geduldete/>

²⁰⁸ This was on the grounds of low relevance to labour market law and high bureaucratic costs.

²⁰⁹ Section 32(3) of BeschV.

²¹⁰ Section 39(3)1 of the Residence Act op cit n181.

²¹¹ Section 60a (6) *ibid*.

²¹² Section 60a (6)2 *ibid*.

4.3 INFRINGEMENT OF THE RIGHT TO WORK IN THEORY AND PRACTICE

In practice, several of the above-mentioned legal criteria for access to the labour market pose difficulties for refugees or asylum seekers in Germany. Unfortunately, few studies regarding labour market integration explicitly differentiate between migrants and people with a refugee background, making it difficult to draw separate conclusions.²¹³ The so-called refugee gap, which is the employment and wage gap between refugees and other migrant groups, can be partly explained by those aspects refugees are more exposed to compared to other migrants, such as traumatic experiences due to being forcibly removed from home country, weak ties to the host state or missing documents. These intersect with other factors like insufficient language skills, lengthy vocational training recognition procedures or a mismatch between supply and demand of skills. Altogether, they acutely contribute to the challenges of labour market uptake for persons with a migration background. However, there are also domestic laws and policies that directly or indirectly restrict refugees' ability to enter the labour market. In particular, a series of recent legislative changes concerning the reception context, the so-called 'migration package' in 2019²¹⁴ undertaken during a time where the GCR was already agreed on and under way of implementation – had a considerable impact on employment opportunities for refugees and GCR-understood self-reliance in practice.

(a) Extension of obligation to stay in initial reception centres

A notable impediment is the de facto prolonged obligation to stay in initial reception centres during the asylum procedure and or after a negative decision according to s 47 of the Asylum Act. This indirectly extends the waiting period for labour market access from three to up to nine months.²¹⁵ Although not designed for long-term stays, the German legislature has regularly extended the obligation to stay in these centres in the last years. The maximum stay was doubled from the original three to six months in 2015, and subsequently tripled to 18 months for anyone

²¹³ Linda Bakker Jaco Dagevos & Godfried Engbersen 'The Importance of Resources and Security in the Socio-Economic Integration of Refugees. A Study on the Impact of Length of Stay in Asylum Accommodation and Residence Status on Socio-Economic Integration for the Four Largest Refugee Groups in the Netherlands' (2014) Vol 15 *Journal of International Migration & Integration* 431–448. See also Phillip Connor, 'Explaining the Refugee Gap: Economic Outcomes of Refugee versus Other Immigrants' (2010) Vol 23(3) *Journal of Refugee Studies*, 377-397.

²¹⁴ Most significantly the adoption of the Skilled Worker Immigration Act (FEG) as of March 1, 2020. See Michael Kalkmann, *Country Report: Germany 2019 Update* (2020) AIDA / ECRE, at 11, available at https://asylumineurope.org/wp-content/uploads/2020/07/report-download_aida_de_2019update.pdf accessed on 23/02/2021.

²¹⁵ Section 61(2) of the Asylum Act.

except families with minors²¹⁶ by the 2019 amendment of the Asylum Act.²¹⁷ Federal state law can further extend it to up to 24 months²¹⁸ and those from safe countries of origin must stay there indefinitely pending their procedure.²¹⁹ The overall stay is limited to the total duration of the asylum proceeding, including court proceedings.²²⁰ With the total time to a final decision reaching a record high of 21.3 months on average in 2019,²²¹ a shortcut to mandatory placement is unlikely possible for most individuals. Additionally, an unrecorded time between the date of entry²²² and formal application for asylum comes on top, which in average amounted to 8.5 months in the first half of 2020, again a significant increase from 6.8 months in 2019.²²³

This seemingly minor legislative change has a tangible effect on life since during the obligation to stay in a reception centre, inhabitants are banned from taking up work.²²⁴ The impact of the extended maximum duration of the accommodation obligation on labour market access is mitigated by section 61(2) of the Asylum Act that entitles asylum seekers to a work permit after nine months, provided the additional legal requirements are met.²²⁵ Tolerated persons may be granted an employment permit on a discretionary basis after six months from toleration issuance²²⁶ as long as no grounds for prohibition apply.²²⁷ Undertaking small activities for the maintenance and operation of the facility is mandatory for certain inhabitants,²²⁸ with new constitutionally-worrisome sanction grounds created for refusal.

The prolonged stay in a reception centre has further negative effects on the persons concerned and their search for work beyond the immediate work ban of at least six or nine

²¹⁶ Section 47(1) of the Asylum Act.

²¹⁷ Kalkmann, Country Report op cit n214 at 82.

²¹⁸ Section 47(1b) of the Asylum Act.

²¹⁹ The maximum stay is 18 months, except for families with minor children, for whom it remains six months, and for persons from safe countries of origin for whom it is unlimited. See section 47(1) of the Asylum Act.

²²⁰ Section 47(1b) of the Asylum Act.

²²¹ Deutscher Bundestag ‘Reply of the Federal Government to the small inquiry of the deputies Ulla Jelpke, Dr. André Hahn, Gökay Akbulut, further deputies and the parliamentary group DIE LINKE’ (2020) Printed Matter 19/22330 23 October 2020 at 5, available at <https://dip21.bundestag.de/dip21/btd/19/236/1923630.pdf> accessed on 24/02/2021.

²²² as stored in the BAMF's MARiS system according to self-reporting by asylum seekers.

²²³ It must be noted that there are considerable variations between countries of origins, for example 3.5 months for those in Russia and 12.4 months for Syria). See ‘Reply of the Federal Government’ op cit n221 at 48.

²²⁴ Section 61(1) of the Asylum Act.

²²⁵ These are (i) a concrete offer of employment exists; (ii) the BA has approved it regarding the conditions of employment (or approval is not required); (iii) not nationals of a country of origin classified as safe; and (iv) application for asylum was not rejected as ‘manifestly unfounded’ or as ‘inadmissible.’ See section 61(2) sentences 1-4 of the Asylum Act.

²²⁶ Section 61(2) of the Asylum Act.

²²⁷ As newly expanded and specified according to section 60a (6) and section 60b(5) of the Residence Act.

²²⁸ adults who can work but have no employment elsewhere are obliged to take up the work opportunity provided hereunder; for the reduced remuneration of € 0.80 per hour, see section 5(1) and (2) of the Asylum Benefits Act of 1993 (AsylbLG).

months. Interviews and testimonials show that the stay in such centres is psychologically stressful and patronizing, as it considerably restricts the possibilities of private living arrangements. Lack of retreat options, no privacy, high noise levels and high conflict potential are some of the aspects complained about by residents.²²⁹ Their criticism is supported by experts, NGOs and recent studies that confirm the negative effects of living conditions in these centres on the mental health of the residents.²³⁰ The impact that collective housing has on mental health is not a new finding.²³¹ Yet the legislator continues to ignore the demands to minimize the length of the mandatory stay in collective housing and the recommendation of decentralized housing, especially for vulnerable groups.²³² While most studies highlight the particularly glaring situation of children in reception centres,²³³ the circumstances described are hardly reasonable for adults as well, especially for a longer period of time as provided for by the new legal situation.²³⁴

Additionally, several other disadvantages in other areas of life are linked to residence. First, social assistance for residents of reception centres is provided at a lower level and almost exclusively limited to benefits in kind. Furthermore, mobility is restricted by the so-called ‘Residenzpflicht,’ which usually applies for three months only but, like the initial prohibition to work, continues for the duration of the mandatory accommodation in reception centres.²³⁵ The restriction of mobility during this period decreases the flexibility and mobility conducive to finding employment.

This disadvantage is exacerbated by the fact that life in a reception centre is sealed off from the host society, leaving residents with few points of contact in terms of language, values, and networking in their host society. As a result, the mutually dependent efforts to integrate and

²²⁹ Fluchtpunkt ‚Mitten in Hamburg, und doch am Rand: Unzumutbare Bedingungen im Ankunftszenrum Rahlstedt‘ 14 November 2019 *Fluchtpunkt*, available in German at <https://bit.ly/3iJgGtb>. See also <https://asylumineurope.org/reports/country/germany/reception-conditions/housing/conditions-reception-facilities/> accessed on 25/02/2021.

²³⁰ Fluchtpunkt *ibid*; Terre des hommes ‚Kein Ort für Kinder: Zur Lebenssituation von minderjährigen Geflüchteten in Aufnahmeeinrichtungen‘ June 2020, 7, available in German at: <https://bit.ly/38Etah0> accessed on 15/02/2021; Bundesweite Arbeitsgemeinschaft der Psychosozialen Zentren für Flüchtlinge und Folteropfer (BAfF) ‚Living in a box - Psychosoziale Folgen des Lebens in Sammelunterkünften für geflüchtete Kinder‘ (2020) at 55, available in German at: <https://bit.ly/2W5DaLo> accessed on 15/02/2021.

²³¹ Bakker, Dagevos & Engbersen op cit n213 ; Franziska Schreyer, Angela Bauer & Karl-Heinz P. Kohn, ‚Betriebliche Ausbildung von Geduldeten Für den Arbeitsmarkt ein Gewinn, für die jungen Fluchtmigranten eine Chance‘ (2015) *Institut für Arbeitsmarkt- und Berufsforschung* at 6.

²³² Terre des hommes op cit n230 at 7.

²³³ *Ibid*. See also Bundesweite Arbeitsgemeinschaft op cit n230 at 55.

²³⁴ Fluchtpunkt op cit n229.

²³⁵ see sections 55, 56 and 59a (1) sentence 2 of the Asylum Act. See also Kalkmann, *Country Report* op cit n214 at 80.

find a job are impaired. Further, when determining the place of residence, the criteria for the initial distribution of asylum seekers (*‘Erstverteilung der Asylbegehrenden’*) not only disregard the availability of job opportunities matching qualifications, but also existing family ties or other networks, both which are highly relevant for realizing access to the labour market.²³⁶

(b) Requirement of a definite job offer

One legal requirement that practically makes access to a work permit considerably more difficult is the requirement of a concrete job offer.²³⁷ First, finding a job as a migrant worker with a refugee background is already fraught with many obstacles ranging from language difficulties to lacking networks to xenophobia.²³⁸ But even more, convoluted legal provisions and frequent changes in the law since 2013 made the legal situation increasingly unclear. If even asylum law practitioners find it difficult to keep track of the regulations,²³⁹ it is to be expected that employers will struggle even more to be adequately informed about refugee rights. They may be discouraged by the lengthy procedures or the uncertainty of promising a job to an asylum seeker. The latter, however, is in turn dependent on the firm commitment to obtain permission for employment in the first place. For this procedure, the obligatory and often only declaratory reference to the approval of the employment is therefore also of no use.²⁴⁰

In addition, the work permit is also limited to the employment for which it was issued.²⁴¹ The restriction to a specific job makes the employees more dependent on a specific employer, since a termination or change of job also leads to the expiration of the permit. Asylum seekers or those with a toleration will therefore be less likely to quit a job if it is found to have unsatisfactory conditions. This increases their vulnerability and likelihood for exploitation.

(c) Duration of the asylum process

Since the status determination is decisive for the access to the labour market, the realization of the right to work depends on the speed and quality of the decision. It usually takes several months until asylum seekers can file an application for asylum. Based on the figures from the

²³⁶ Kalkmann *ibid* at 80-81.

²³⁷ Section 61(2) of the Asylum Act; Roger Zetter & Heloise Ruauudel ‘Refugees’ Right to Work and Access to Labor Markets – An Assessment, Part I: Synthesis’ (2016) Knomad Study, at 12, available at <https://www.rsc.ox.ac.uk/publications/refugees-right-to-work-and-access-to-labor-markets-an-assessment-part-1> accessed on 19/02/2021.

²³⁸ Connor *op cit* n213.

²³⁹ A Schuster & C Voigt ‚Neuerungen beim Arbeitsmarktzugang – Die Schere geht auseinander: Erwerbstätigkeit mit Schutzstatus, humanitärem Aufenthalt, Duldung und Gestattung‘ (2020) *Asylmagazin Zeitschrift für Flüchtlings- u. Migrationsrecht*, at 64.

²⁴⁰ Section 4a (3) of the Residence Act.

²⁴¹ Section 61(2) of the Asylum Act.

first half of 2020, it currently takes on average 8.4 months until applicants receive a decision from the BAMF.²⁴² The average duration has decreased from 10,7 months in 2017 to 6,1 months in 2019 and increased again to 10 months in the second quarter of 2020.²⁴³ However, the average duration says little about the individual chance of getting early access to the labour market, as the actual duration of the asylum process depends on the country of origin and may vary significantly to up to 12.7 months for asylum seekers from Guinea, for instance.²⁴⁴ Further, the duration before a final decision is reached takes much longer and is steadily increasing.²⁴⁵

Remarkably, unaccompanied minors experience higher average processing times – on average 7.3 in 2019, and 8.8 months in the first half of 2020. In 2019, minors from Nigeria waited nearly two years on average for a first decision by the authorities.²⁴⁶ This is critical not only in view of their right to good administration under EU law,²⁴⁷ their increased vulnerability and need for protection, but also because of certain rights to which they are entitled as minors and which can be irretrievably frustrated by the passage of time. As once they become of age, they might lose the right to family reunification. Even if no malicious intent is assumed, failure to meet the target for reasonable length of proceedings may result in the permanent separation of families as a result.

Given the rates of judicial overturns following an appeal, which in 2019 stood at 14.5 percent,²⁴⁸ the long waiting period can also be explained to some extent with a lack of quality of the decisions. However, coming from 22 percent in 2017 this is a positive trend, yet still reveals considerable quality deficiencies that increase the likeliness of appeals.²⁴⁹ Every second asylum decision is appealed against, a rate that the BAMF traces back to a lower protection rate compared to earlier years.²⁵⁰ This prolongs the overall procedure and adds up to the backlog in

²⁴² Reply of the Federal Government op cit n221 at 7.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Bundesamt für Migration und Flüchtlinge ‘Das Bundesamt in Zahlen 2019: Asyl Migration und Integration’ (2020) at 61, available at

https://www.bamf.de/SharedDocs/Anlagen/DE/Statistik/BundesamtinZahlen/bundesamt-in-zahlen-2019.pdf?__blob=publicationFile&v=5 accessed on 23/02/2021.

²⁴⁶ Reply of the Federal Government op cit n221 at 9.

²⁴⁷ Article 47 of the Charter requires a fair and public hearing within a reasonable period.

²⁴⁸ 41 percent of the decisions were upheld whilst 44 percent were so-called ‘other settlements of proceedings.’

²⁴⁹ Bundesamt für Migration und Flüchtlinge (BAMF), Entscheiderbrief 04/2020, at 6, https://www.bamf.de/SharedDocs/Anlagen/DE/Behoerde/Informationszentrum/Entscheiderbrief/2020/entscheiderbrief-04-2020.pdf?__blob=publicationFile&v=3.

²⁵⁰ Bundesamt für Migration und Flüchtlinge (BAMF), Entscheiderbrief 04/2020, ar 6.

the administrative courts. More employee trainings can help improve the quality of the decisions and take pressure from the administrative courts.

The lengthy procedures also partly reflect the five-year backlog still reminiscent of the understaffed and overstretched authorities in the face of the mass influx of asylum seekers in 2015/2016.²⁵¹ The reduction of staff in earlier years with lower applications backfired, which must serve as a lesson for the future. After peaking in 2016 with 433,719 pending first-instance cases, the backlog was significantly reduced in the following years and stood at 57,012 as of 31 December 2019.²⁵²

Another factor that is interdependent with the backlog is the regular "revocation review procedure" for persons who have been granted asylum or refugee status.²⁵³ In order to cushion the huge increase²⁵⁴ in these procedures following the numerous asylum cases from 2015 and 2016, the period for reviewing has been extended from three years to up to five years for final decisions taken from 2015 to 2017. Even if this extension temporarily relieves the competent authority, it prolongs the period towards the necessary legal and planning certainty for recognized refugees. Living with the fear of possible deportation is often described as if under a sword of Damocles.²⁵⁵ Extending this period of uncertainty for them and their employers for up to five years after their recognition, makes medium- to long-term decisions, be it about employment, self-employment, or integration, more difficult and may lead to a significant psychological burden. In the meantime, the measure postpones the problem but does not solve it. The high retention rate of 96.7% in 2019 is an indication of the low practical relevance.²⁵⁶ Against this backdrop, the legislature should take the opportunity to eliminate the significant additional workload on administrative courts by completely abolishing the requirement for a regular review.

²⁵¹ Bundesamt für Migration und Flüchtlinge, *Das Bundesamt in Zahlen 2019: Asyl Migration und Integration* (2020) at 62, available at

https://www.bamf.de/SharedDocs/Anlagen/DE/Statistik/BundesamtinZahlen/bundesamt-in-zahlen-2019.pdf?__blob=publicationFile&v=5 accessed on 18/02/2021.

²⁵² Bundesamt für Migration und Flüchtlinge, "Das Bundesamt in Zahlen 2019: Asyl Migration und Integration", 2020, at 62, available at https://www.bamf.de/SharedDocs/Anlagen/DE/Statistik/BundesamtinZahlen/bundesamt-in-zahlen-2019.pdf?__blob=publicationFile&v=5 accessed on 18/02/2021.

²⁵³ Pursuant to Section 73 (2 a) of the Asylum Act.

²⁵⁴ From 2,527 in 2017, the decisions increased to 85,052 in 2018 and doubled to 170,406 in 2019. See *Das Bundesamt in Zahlen* op cit n252 at 69.

²⁵⁵ Schreyer et al op cit n231 at 6.

²⁵⁶ Bundesamt für Migration und Flüchtlinge, *Widerrufsprüfungen für 2019 fristgerecht erledigt – Widerrufsquote bei 3,3%* (2020) Prozent, Press Release as of 14 January 2020, No. 002/2020, available at <https://www.bamf.de/SharedDocs/Pressemitteilungen/DE/2020/20200113-bamf-widerrufspruefungen.html?nn=282388> accessed on 18/02/2021.

Regarding access to the labour market, the waiting time is more than just time that is lost. Lengthy recognition procedures can severely affect beneficiaries of international protection, particularly if they are deterred from effectively accessing the labour market pending the proceedings. Extended absence from the labour market has been shown to reduce a person's skills and confidence and make it much more difficult to enter the labour market once access is established.²⁵⁷ Being confronted with years of insecurity places an extreme burden on refugees and their integration progress. Professionals in reception centres often describe that many arrive in Germany motivated and willing to work to build a future in Germany. But if they are not supported for years and are confronted with ‘almost insurmountable walls, there is a risk of paralyzing fear and despair.’²⁵⁸

(d) Individual work bans and toleration training and employment

The legal bases for an individual work ban of tolerated people have been newly expanded and specified in s 60a (6) and s 60b (5) of the Residence Act. Employment may not be permitted if a person entered Germany primarily with the intention to obtain asylum seeker benefits.²⁵⁹ The scope of application remains unclear and contradictory, as it presupposes that the foreigners authority can retrospectively prove the motive of social benefit fraud to the tolerated person that applies for a work permit.²⁶⁰ Tolerated persons are further banned from obtaining a working permit for a lack of cooperation with regard to their deportation.²⁶¹ The purely repressive sanction character of both new regulations, motivated by migration policy, was strongly criticized,²⁶² since the prohibition to work does not aim for a change in behaviour and even prevents ‘reparation’ by taking up a job that could shorten the period of benefit receipt. People with tolerated status from countries of origin declared safe²⁶³ have been effectively banned from taking up work since 2015 pursuant to s 60a(6)3 of the Residence Act, whose scope has been significantly expanded as of 1 January 2020.²⁶⁴

On a positive note, the introduction of a new perspective to stay under the employment or training toleration permit under s 60 of the Residence Act is a further step toward unlocking

²⁵⁷ Connor op cit n213.

²⁵⁸ Schreyer et al op cit n231 at 6.

²⁵⁹ Section 60a (6) No. 1 of the Residence Act.

²⁶⁰ A Schuster & C Voigt ,Neuerungen beim Arbeitsmarktzugang – Die Schere geht auseinander: Erwerbstätigkeit mit Schutzstatus, humanitärem Aufenthalt, Duldung und Gestattung‘ (2020) *Asylmagazin Zeitschrift für Flüchtlings- u. Migrationsrecht*, at 72.

²⁶¹ Section 60a(6) No. 2 and section 60b (5) sentence 2 Residence Act.

²⁶² Schuster & Voigt op cit n239 at 72.

²⁶³ Under Section 29a of the Asylum Act.

²⁶⁴ Schuster & Voigt op cit n239 at 71.

the labour market for people with tolerated status. It offers those who have a steady job, earn their own living, and speak German, or who have started an apprenticeship, a firm legal entitlement to the issuance of an employment permit.²⁶⁵ A secure stay during training helps companies and trainees alike. Moreover, regarding a later return to their home countries, it is important to promote the skills, motivation, and drive of tolerated persons and not to keep them artificially in a destructive ‘standstill’.

(e) Perception in the population, xenophobia, and domestic politics

Finally, migration repeatedly becomes a domestic political problem. Xenophobic resentment among the population, fear of economic competition from migrants and fear of the loss of cultural identity (‘Überfremdung’) are widespread.²⁶⁶

As in the early 1990s,²⁶⁷ a resurgence of right-wing orchestrated protests since 2013 have had a significant impact on the public opinion and debate.²⁶⁸ Far-right parties and movements like Pegida exploit and stoke societal fears of foreign infiltration, crime and competition for jobs, public services and social benefits – with success.²⁶⁹ Since the so-called refugee crisis, incidents of anti-asylum rallies in front of refugee shelters have increased, as have vigils of ‘concerned citizens’ patrolling neighbourhoods, and xenophobic campaign posters of far-right parties have become commonplace in the villages. Nevertheless, the majority German population had a positive and welcoming attitude, which has coined the term ‘Willkommenskultur’, and many took voluntarily committed to meeting the challenges that arose from the influx of refugees.²⁷⁰

While the discussion about an upper limit for asylum seekers entering Germany has divided the country and politics, especially since 2015, the population generally supports refugees’ access to the labour market as quickly as possible.²⁷¹ This may be because, of two

²⁶⁵ Section 60c(1) sentence 3 of the Residence Act.

²⁶⁶ Filiz Polat ‘German Residence Law in Transition’(2019) *HBS Heimatkunde migration Politics Portal* 22 August 2019 [Online], available at <https://heimatkunde.boell.de/2019/08/22/deutsches-aufenthaltsrecht-im-wandel> accessed on 23/01/2021.

²⁶⁷ Several right-wing attacks on refugee homes were conducted during this time, including in Rostock, Mölln and Solingen.

²⁶⁸ See Hawley and Wilder op cit nFehler! Textmarke nicht definiert..

²⁶⁹ Filiz Polat op cit n266.

²⁷⁰ Orkan Kösemen ,Willkommenskultur in Deutschland: Mehr als nur ein Modewort?’ (2017) *Policy Brief Migration*, Bertelsmann Stiftung at 3, available at https://www.bertelsmann-stiftung.de/fileadmin/files/Projekte/Migration_fair_gestalten/IB_PolicyBrief_2017_12_Willkommenskultur.pdf accessed on 07/03/2021.

²⁷¹ Zetter op cit n237 at 48.

common fears among so-called "concerned citizens", that of immigration into the welfare system and that of refugees taking jobs away from locals, the latter predominates. Although these prejudices are often juxtaposed, both are contradictory and unsupported by evidence. On the contrary:

‘When governments permit refugees to access their formal economy, refugees become self-sufficient taxpayers who bring new skills and demand for goods and services to host countries, diversifying markets and stimulating economic growth.’²⁷²

This was also emphasised by the German government on the occasion of a recent parliamentary inquiry of the right party AfD concerning the ‘effects of migration on the welfare state’.²⁷³ Accordingly, the employment of people with a migration or refugee background has increased by 50 percent in the last five years. They are often employed in key sectors of the economy such as care, logistics, or local transport, pay taxes and are valued by the government as stabilising with regard to the German social system.²⁷⁴

4.4 EVALUATING GERMAN LAWS AGAINST INTERNATIONAL LAW AND THE GCR STANDARD

It can be argued that should one take a restrictive interpretation, the requirements of the 1951 Refugee Convention to allow any refugee who is ‘legally staying’ access to job search can be considered fulfilled. German laws are clearly designed to define asylum seekers and people with a Duldung as only ‘temporarily’ present and rather on the verge of leaving the country. The authorities do not provide them with a prospect of staying and a corresponding title that legalizes their stay according to national regulations. Instead, their stay is only permitted and tolerated for a short period of time, and their rights are largely restricted accordingly.

However, if one initially sees asylum seekers, including those from safe countries of origin, as potential refugees and persons entitled to asylum, the legal situation in Germany excludes them, at least for the first few months, from their rights, which Germany has promised to protect. This is expressed in the obligation to live in collective arrival centres which creates an artificial separation of asylum seekers and society. Points of contact, networking and

²⁷² *Refugee Work Rights Report* op cit n47 at 14.

²⁷³ Answer of the Federal Government to the minor enquiry of the Members of Parliament René Springer, Jürgen Pohl, Jörg Schneider, Martinichert and the parliamentary group AfD ‘*Effects of migration on the welfare state*’, Printed Paper 19/25781, 10/02/2021, available at <https://dip21.bundestag.de/dip21/btd/19/266/1926609.pdf> accessed on 12/03/21.

²⁷⁴ Ibid at 1.

integration – all aspects that are necessary for finding a job – are made difficult or even impossible. The fact that a permanent job offer is made a prerequisite for a work permit is particularly contradictory. Likewise, ‘standing on one's own two feet’ is demanded as a prerequisite for a toleration but is specifically made more difficult by the current legal situation.

In summary, the system of labour market access for tolerated and permitted persons has not only become more restrictive in many places, but also more complex. Some regulations regarding access to the labour market for asylum seekers are still incompatible with European law. The work ban for those from ‘designated safe countries of origin’ results in a de facto total exclusion, which often does not do justice to the individual case. The prohibition of work for asylum seekers is a deliberate decision of the legislator since 1980 that was intended to deter unwanted immigration but failed. Instead, it causes high costs and curtails the initiative of asylum seekers who spend on average many years in Germany.

It runs counter to the objective of the GCR of promoting self-reliance of refugees, including asylum seekers, who are – as in South Africa – kept in the limbo due to homegrown problems that are the responsibility of the host country. Overall, the regulations are in many cases blatant contradictory to the openings in the system of support for training and employment that took place in 2019. The discrepancy between the interests of labour market and integration policy on the one hand and exclusionary domestic policy on the other is becoming increasingly apparent.²⁷⁵

²⁷⁵ Schuster and Voigt op cit n239 at 72.

Chapter Five

5.1 EU POLICY PROPOSALS TO PROMOTE SELF-RELIANCE UNDER THE GCR IMPLEMENTATION

(a) Commitment to promoting self-reliance under the GCR

Self-reliance is defined as ‘the social and economic ability of an individual, a household or a community to meet essential needs in a sustainable manner and with dignity.’²⁷⁶ According to the UNHCR, the best way to reach it is through integration of refugees into a country’s existing economic ecosystem, as opposed to the establishment of parallel, subsidized systems.²⁷⁷ The means to promote refugees’ self-reliance have been discussed by the UNHCR for decades, long before the adoption of the Global Compact on Refugees in 2018.²⁷⁸

In its 2005 Conclusion on Local Integration, the UNHCR notes the following:

‘[T]he important part, subject to States’ consideration, self-reliance plays in the economic dimension of local integration of refugees whereby individuals, households and communities are enabled increasingly to become self-sufficient and can contribute to the local economy, and in this respect [it] *encourages* all States hosting refugees to consider ways in which refugee employment and active participation in the economic life of the host country can be facilitated, inter alia, through education and skills development, and to examine their laws and practices, with a view to identifying and to removing, to the extent possible, existing obstacles to refugee employment; and in this regard, *affirms* the relevance of the 1951 Convention in providing a framework for the creation of conditions conducive to the self-reliance of refugees’.²⁷⁹

Given the increasing scale and protracted nature of refugee situations, international refugee protection efforts have shifted in the last decade from a still predominant aid-reliance model towards an approach of fostering self-reliance of refugees. The EU Communication ‘Lives in

²⁷⁶ UNHCR ‘Global Compact on Refugees: Indicator Framework July 2019’ (2019) UNHCR at 22 available at <https://www.unhcr.org/5cf907854.pdf>; Amy Slaughter, Ulrike Krause, Jessica Field Anubhav Dutt Tiwari et al ‘Research in Brief: Refugee Self-Reliance: Moving Beyond the Marketplace’ (2017) Issue 7 *RSC Research in Brief*, at 5.

²⁷⁷ *GCR* Indicator Framework op cit n276 at 22.

²⁷⁸ Refugee Self-Reliance op cit n276 at 2.

²⁷⁹ UNHCR, Conclusion on Local Integration No. 104 (LVI) – 2005(m) (ii), Contained in United Nations General Assembly document A/AC.96/1021’ (2005) at para (m), available at <https://www.unhcr.org/excom/exconc/4357a91b2/conclusion-local-integration.html> accessed on 03/03/2021.

Dignity’ in 2016,²⁸⁰ for example, calls for a coherent and collaborative development, human rights, and humanitarian approach to protracted refugee situations.

The unanimous adoption of the 2016 New York Declaration for Refugees and Migrants²⁸¹ in the UN General Assembly, brought this objective into sharper focus. Following the mass influx of refugees to Europe in 2015 and 2016, it aimed at improving the global response to large-scale, protracted refugee situations. It set out a Comprehensive Refugee Response Framework (CRRF)²⁸² defining specific actions and was followed by the GCR as international reference bases for the international community to plan and assess future policies for refugee protection.²⁸³ Strengthening refugee self-reliance became one out of four main objectives.²⁸⁴ The GCR calls for collaboration of all relevant actors on national and international level to deliver on these goals in a refugee protection and human-rights – driven way.²⁸⁵

The GCR emphasizes that it is crucial for wealthier countries to support underserved or overburdened host communities. About self-reliance through jobs and livelihoods, it sets out:

‘To foster inclusive economic growth for host communities and refugees, in support of host countries and subject to their relevant national laws and policies, States and relevant stakeholders will contribute resources and expertise to promote economic opportunities, decent work, job creation and entrepreneurship programmes for host community members and refugees, including women, young adults, older persons and persons with disabilities.’²⁸⁶

The UNHCR rightly sees the inclusion of refugees in the national and international development strategy as an equally beneficial situation: It asserts that inclusion ‘could be one

²⁸⁰ European Commission ‘Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Social Committee and the Committee of the Regions, Lives in Dignity: from Aid-dependence to Self-reliance; Forced Displacement and Development’ (2016) Com(2016) 234 Final Brussels 26.4.2016, available at https://ec.europa.eu/echo/files/policies/refugees-idp/Communication_Forced_Displacement_Development_2016.pdf accessed on 03/03/2021.

²⁸¹ UN General Assembly, New York Declaration for Refugees and Migrants; Resolution adopted by the General Assembly, 3 October 2016

²⁸² As agreed to by Member States in Annex I of the New York Declaration *ibid.*

²⁸³ Sergio Carrera & Roberto Cortinovis ‘The EU’s Role in Implementing the UN Global Compact on Refugees: contained Mobility vs. International Protection’ (2019) No. 2018-04 *CEPS Paper in Liberty and Security in Europe* at 1.

²⁸⁴ Paragraph 7 (ii) of the Global Compact on Refugees *op cit n1.*

²⁸⁵ Carrera & Cortinovis *op cit n283* at 3.

²⁸⁶ Paragraph 70 of the Global Compact on Refugees *op cit n1.*

of the most important platforms at the country and regional levels to foster the resilience and self-reliance of refugees in a manner that also benefits host communities.²⁸⁷

The shift in approach in search for durable solutions for refugees aims at creating opportunities for refugees and host states alike. However, the arguments in support of it are manifold. While refugee's ability to sustain themselves will ease the pressure from the host countries and donors, it can also promote social cohesion, economic development and decrease security threats. Finally, self-reliance increases resilience and well-being of refugees, as well as giving them a sense of dignity and ownership of their lives.²⁸⁸

The effects of excluding refugees from economic participation during their protracted stay in their host country has, as explored above, far-reaching consequences for protection and the realization of related fundamental rights. The inability to work can be a decisive factor for secondary migration, in which refugees often take dangerous routes and are unable to exercise the rights and international protection to which they are entitled.²⁸⁹ In the worst case, it can amount to a violation of the cardinal principle of non-refoulement, if refugees feel forced to move on to a place where they face persecution.

There are also critical voices that argue for the need to complement the prevailing economic and individualistic notion of self-reliance of refugees with a more holistic one, including social and cultural aspects.²⁹⁰ Concerns are expressed that in the name of self-reliance, there may be a reduction in aid and a shift of responsibility to refugees.²⁹¹ The supposed dichotomy of vulnerable and self-reliant is criticized, as is the individualistic perception of refugee income, which in most cases does not correspond to lived realities. Rather, refugees base their support on various sources in the family and community network. Top-down approaches that ignore refugees' perspectives on their situation are also not seen as promising.²⁹²

Instead, a more holistic approach to self-reliance is proposed. One that views it as part of refugees' self-defined well-being, rather than an end in itself, and expands the reference

²⁸⁷ UNHCR 'Refugee Livelihoods and Economic Inclusion, 2019-2023 Global Strategy Concept Note' (2019) <https://www.unhcr.org/5bc07ca94.pdf>.

²⁸⁸ Randall Hansen 'The Comprehensive Refugee Response Framework: A Commentary' (2018) Vol 31 no 2 *Journal of Refugee Studies*.

²⁸⁹ Zetter & Ruaudel op cit n237 at 25-6.

²⁹⁰ Refugee Self-Reliance op cit n276 at 2.

²⁹¹ Refugee Self-Reliance op cit n276 at 2.

²⁹² Refugee Self-Reliance op cit n276 at 3.

points for measuring self-reliance beyond obtaining a decent job. Since it does not reject the concept of self-reliance but improves it, this approach helps to situate the concept more accurately and to test it for its actual effectiveness. Engaging refugees to find solutions to the obstacles that affect them most, and thereby improving protection towards them, is completely within the spirit of the GCR.

The GCR displays the commitment of the global community to work together to share responsibility for and better protect refugees worldwide. Commentators criticise the non-legally binding nature of the GCR²⁹³ and see it as a missed chance at adopting a novel international convention covering refugee matters.²⁹⁴ Nonetheless, its potential lies in the involvement of different stakeholders, including refugees, and the broad international support suggesting an impetus on cooperation and responsibility sharing.²⁹⁵ The concrete success of this framework in practice depends on the continued goodwill of the players.²⁹⁶ Developed countries in particular must live up to the aspirations set out in the GCR by boldly putting it into practice and establishing accountability and evaluation mechanisms. The EU will play a prominent role in this, and its implementation of the GCR will set the bar for other countries.

(b) The EU's role on implementing the GCR

The EU has taken an active role in the GCR's consultation process.²⁹⁷ It is also one of the main donors for CRRF implementation and in humanitarian and development aid.²⁹⁸ However, the EU has a difficult proposition, because the support for the GCR within the EU is ambiguous. Three EU member states have voted against it and five others have abstained from their vote.²⁹⁹ Meaningful cooperation and the ambitious implementation of the GCR by the EU and its member states is therefore not self-evident. As the polarised debate of recent years has shown,

²⁹³ Paragraph 4 of the Global Compact on Refugees op cit n1.

²⁹⁴ James C Hathaway 'The Global Cop-Out on Refugees' (2019) Vol 30 no 4 *International Journal of Refugee Law* at 593.

²⁹⁵ Volker Türk op cit n11 at 580-3.

²⁹⁶ Ibid at 583.

²⁹⁷ Carrera & Cortinovis op cit n283 at 4.

²⁹⁸ European Council on Refugees and Exiles 'Global means global: Europe and the Global Compact on Refugees' (2018) *Policy Note 15* ECRE at 2-3, available at <https://www.ecre.org/wp-content/uploads/2018/11/Policy-Note-15.pdf> accessed on 05/03/2021.

²⁹⁹ European Council on Refugees and Exiles, 'Implementing the Global Compact on Refugees and the Global Compact on Safe, Regular and Orderly Migration – What Role for the EU?'(2019) ECRE at 2.

conflicts seem likely within individual member states, but also within the European institutions, where important reforms can be blocked by individual member states.³⁰⁰

As stakeholders rightly emphasized, it is nevertheless crucial that the EU and its member states assume their responsibility not only in advancing the implementation of the GCR in third countries, but also within the EU.³⁰¹ They must ensure that migration and asylum laws and practices within the EU and each Member State are in accordance with their international and human rights obligations and the protection-driven objectives of the GCR.³⁰² This will gain the EU trust as reliable partner and political leverage.³⁰³

The EU's role is thus not only to support overly burdened developing host countries in upholding a rights-based protection standard, but to ensure with its own policies that it does not exacerbate the unfair burden sharing further. The imbalance is not helped by contained mobility policies, which have been found to be increasingly pursued as a strategy by developed countries from the Global North. On the contrary, the fact that the main host countries tend to be low-income economies is currently perpetuated by the fact that developed countries can better seal themselves off by increasing their spending on border protection and entering into bilateral agreements with less developed economies in a “cash-for-containment” approach.³⁰⁴ This means to use economic inequalities or dependencies to link financial aid or trade facilitation to refugee containment or readmission.

The EU has been strongly criticised for the use of this strategy in the past years, for example, in the highly debated EU-Turkey Statement. This way of externalising responsibility for asylum seekers to countries that have less capacity and often already have a higher burden contradicts the idea of protection-based approach. It also directly undermines the joint understanding from the GCR and jeopardizes the credibility and influence of the EU and its Member States in the field of refugee protection.³⁰⁵ The reluctance to assume their role in global

³⁰⁰ Ibid.

³⁰¹ Carrera & Cortinovis op cit n283 at 5.

³⁰² European Council on Refugees and Exiles ‘Global means global: Europe and the Global Compact on Refugees’ (2018) *Policy Note 15* ECRE at 1, available at <https://www.ecre.org/wp-content/uploads/2018/11/Policy-Note-15.pdf> accessed on 05/03/2021.

³⁰³ European Council and Refugees and Exiles, ‘Implementing the Global Compact on Refugees and the Global Compact on Safe, Regular and Orderly Migration – What Role for the EU?’ (2019) at 2.

³⁰⁴ ‘Global means global’ op cit n302 at 3.

³⁰⁵ Global means global’ op cit n302 at 3.

responsibility sharing and a Eurocentric approach to developing cooperation might very well backfire, if asylum-fatigued developing countries stop to play along.³⁰⁶

It is highly counterproductive, on the one hand, to sign the GCR as a response to the disproportionate burden on the less equipped host countries and commit to better distribute common responsibilities worldwide and, on the other hand, to pursue through its asylum policy at the EU and member states level primarily restrictive migration control through deterrence and to further seal off Europe in the face of increasing refugee movements worldwide.³⁰⁷ It stands in stark contrast not only to the GCR objectives, but also to the protection-based rationale of the CEAS. As Carrera puts it:

‘The GCR arrives in an EU policy context where the focus is mainly on shifting responsibilities on refugees towards third countries of transit and/or origin, which sometimes include admission or mobility opportunities and instruments that are highly selective, discriminatory and migration-management driven.’³⁰⁸

It can be contended that restrictive regulations on labour market protection directly contradict the basic objectives of the GCR. Measures from developed countries aimed at deterring refugees by preventing economic participation will not ‘relieve the burden on countries that are already disproportionately burdened.’ Instead, they run directly counter to the goal of promoting refugee self-reliance. In the two countries outlined above, South Africa and Germany, legislative changes have taken place after the GCR was adopted that restrict rather than promote the right to work of the respective refugee populations. Asylum seekers are discouraged from actively participating in the economy and their integration is hindered through an interplay of restricting access to work permits, long recognition processes or short renewal periods for permits. Whether by purpose or effect, asylum seekers’ self-reliance is hampered.

The existence of such restrictive factors and measures, regardless of the developing status of a host country, and in the case of Germany, even contrary to economic imperatives, show that strong impetus is needed to push for effective implementation of the GCR objectives if they are to not remain mere lip service.

³⁰⁶ Alexander Betts 'Don't Make African Nations Borrow Money to Support Refugees'(2018) *Foreign Policy*, available at <https://bit.ly/2M2JFdn> accessed on 12/03/2021.

³⁰⁷ Carrera & Cortinovis op cit n283 at 7.

³⁰⁸ Carrera & Cortinovis, op cit n283 at 16.

The EU, in its role as an actively contributing party to the GCR with all EU member states being signatories of the 1951 Refugee Convention should act as a role model by boldly implementing measures concerning self-reliance and protect the right to work. Its key role must be to support third countries in a way that is in the best interest of these countries and their refugee populations.³⁰⁹ Furthermore, it is crucial to establish a coordinated EU position for the effective implementation of the GCR that is oriented towards human rights and refugee protection rather than containment and deterrence.³¹⁰ The EU must not shy away from the responsibility that is currently largely shouldered by others that are far less equipped. This is the understanding the international community agreed upon in the GCR in 2018.

5.2 EU POLICIES ABOUT THE RIGHT TO WORK AND SELF-RELIANCE

The EU is rightly expected to take leadership in the implementation of the rights-based approach connecting human rights and development put forward in the GCR. Thus, the bar is to be set much higher for the EU and its member states in comparison to developing countries with less economic leeway and labour market capacity. In this regard, the EU's strong commitment to fostering refugees' self-reliance and regional cooperation in partner countries, outlined in its 2016 Communication, *Lives in Dignity: from Aid-dependence to Self-reliance*, should be lived up to within the Union all the more. It asserts the following:

'The EU is committed to providing the policy framework for a more efficient, context-specific and dignified global response to forced displacement. It intends to do so by bringing together its approaches to political issues, conflict prevention, development, human rights and humanitarian assistance, and by operationally bolstering the resulting nexus.'³¹¹

In the communication, the EU focuses on combating the causes of flight and providing financial support to refugees in other countries to mitigate secondary migration to Europe. Curiously, the reference to 'partner countries' as host countries seems to absolve commitment about its own role and the role of member states in taking responsibility.³¹² In fact, there is sufficient need for action within Europe as well, where protracted refugee situations continue to exist even when the remedies are available.

³⁰⁹ Carrera & Cortinovis op cit n283 at 10.

³¹⁰ Carrera & Cortinovis op cit n309 at 16.

³¹¹ European Commission, *Lives in Dignity* op cit n280 at 4.

³¹² European Commission, *Lives in Dignity* op cit n280 at 3.

Different policy areas have been discussed and brought forward by civil society organizations and scholars concerning the EU's role in the implementation of the GCR.³¹³ Concrete proposals for the EU based on the commitment to establish a multi-stakeholder approach and advance evidence-based policy-making and practice mainly circle around (i) increasing responsibility sharing, (ii) improving refugee mobility, and thus protection, by moving from containment driven measures to creating additional legal pathways, (iii) ensuring transparency and accountability of the allocation of funding in accordance with the rights-based approach of the GCR, the Sustainable Development Goals and human right and refugee law principles and the (iv) assessment of policy outcomes through multi-stakeholder. While proposing complementary legal pathways to Europe includes more inclusive employment and migration policies, there has been less focus on improving the social and economic integration of refugees and would-be refugees within in the EU and its member states.³¹⁴

Accordingly, in the following, concrete proposals for protection-driven migration and asylum policies on the right to work, access to the labour market and the promotion of self-reliance will be put forward. These proposals shall ensure better legal and de facto access to decent work in European host countries to promote self-reliance and integration. For that, they aim to remove legal and factual barriers that keep refugees or would-be refugees aid-dependent for longer than necessary. This includes advocating for the right to work for asylum seekers, early access to language and integration courses, because regardless of the status, the preservation of human dignity should be of highest priority. The earlier refugees obtain the chance to contribute to development and recognition in the community, the better for any durable solution, be it repatriation, resettlement, or integration in their host society. EU institutions recognize the right to work for its paramount significance for realizing other human rights.³¹⁵ They should thus strive to uphold it in the best way possible.

³¹³ Carrera & Cortinovis op cit n283 at 13.

³¹⁴ Carrera & Cortinovis op cit n283 at 13 ff.

³¹⁵ Section 1 of Council of Europe, Parliamentary Assembly, *Resolution 1994 - Refugees and the right to work*, 11 April 2014, Resolution 1994 (2014), available at: <https://www.refworld.org/docid/537ef91a4.html> accessed 10/02/2021.

5.3 RELAUNCH OF EU LEGAL MIGRATION POLICY WITH FOCUS ON REFUGEE CHALLENGES

The strict separation of migration and asylum, as affirmed by the two individual Compacts, creates practical difficulties in view of the multi-faceted reasons and motives for movement.³¹⁶ Individuals who would qualify as refugees³¹⁷ are often wrongly mistaken for and treated as irregular migrants. Prejudices are thus stirred up in the host population and sensitivity to the need for protection is pushed into the background.

Instead of imposing regular visa requirements on refugees that they cannot fulfil (for example, proof of their willingness to return) and subjecting them to ever stricter entry controls that force them into illegality, complementary pathways via humanitarian visa, extended scope of family reunification, study and mobility channels for the admission of beneficiaries of international protection must be created instead.³¹⁸ Allowing refugees to access existing labour mobility opportunities such as removing the legal, administrative, and informational barriers that often prevent refugees from accessing existing labour opportunities may be apt to directly or indirectly promoting refugee protection, integration and self-reliance.³¹⁹

With the labour shortage or skills mismatch and an overall aging society in many European countries, reforming EU migration policy is already a priority.³²⁰ Among refugees are talented bricklayers, trained nurses, internists or experienced electricians, professions that are in demand. It would kill many birds with one stone if they could be offered a path to safety through access to the labour market. Creating safe pathways to Europe while upholding the full protection scope, could take pressure from authorities and the asylum system, foster a more

³¹⁶ Sergio Carrera, Karel Lannoo et al (2018) ‘Some EU governments leaving the UN Global Compact on Migration: A contradiction in terms?’ (2018) No 2018/15 *CEPS Policy Insights*, at 5, available at https://www.ceps.eu/system/files/PI2018_15_SCKLMSVL_UN%20Global%20Compact_0.pdf accessed on 05/03/2021.

³¹⁷ Or as beneficiaries of other forms of international protection

³¹⁸ European Commission, ‘Commission Recommendation of 23.9.2020 on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways’ (2020) Brussels, 23.9.2020 C(2020) 6467 final, available at https://ec.europa.eu/info/sites/info/files/commission_recommendation_on_legal_pathways_to_protection_in_the_eu_promoting_resettlement_humanitarian_admission_and_other_complementary_pathways.pdf accessed on 05/03/2021.

³¹⁹ Carrera & Cortinovis op cit n283 at 14.

³²⁰ European Parliament Integration of Migrants: European Agenda on Migration, New Policy on Legal Migration’ (2021) 02/2021 *Legislative Train*, accessed at <https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-integration-of-migrants>

differentiated public opinion, and help refugees to escape safely, legally, and with less risk for discrimination or being underemployed.

Also, measures directed at specific refugee challenges for labour market integration are needed to make better use of existing tools, that are currently in effect with little relevance and even less so for refugees or migrants from certain areas. The revision of the Blue Card Directive³²¹ is already in work, reacting to the lacking diversity of high-skilled EU Blue Card holder in terms of nationality,³²² that may stem from discrimination at some point of the process.³²³

(a) Reform of the CEAS to embrace rights and protection-based approach

The European Agenda on Migration also sets out further steps towards a reform of the CEAS, which were discussed since 2016 without agreement and overturned on 23 September 2020 by the Commission's 'New Pact on Migration and Asylum.' The proposal to integrate the asylum procedure into overall migration management must be viewed critically in relation to the experiences to-date with this distinction as laid out above. Further the targets and underlying guiding principles differ. Strong borders, modernisation of the EU's asylum system and cooperation with partner countries are priorities for 2019 to 2024 to achieve a fresh start on migration.

Observers and experts share concerns about the change of course in current European asylum policy, as spelled out by the UNHCR in its *Recommendations for the Croatian and German Presidencies of the Council of the European Union (EU)* on 9 January 2020.³²⁴ The protection based GCR approach is not visible in the new pact. When the EU Commission President named the portfolio in which asylum policy were placed 'Protecting the European Way of Life,' the connection to the protection of the lives and rights of refugees remained unclear, - that is if one does not want to join the chorus of those who impute the intention to

³²¹ Facilitating immigration for holders of an academic degree with a concrete job offer.

³²² European Parliament, Report on Blue Card recast, revealed that in 2014, Sub-Saharan Africans only amounted to 2.1 % of the total beneficiaries of the Blue Card Scheme.

³²³ European Parliament, Revision of the Blue Card Directive: European Agenda on Migration' (2021) 02/2021 Legislative Train, available at <https://www.europarl.europa.eu/legislative-train/api/stages/report/current/theme/towards-a-new-policy-on-migration/file/jd-revision-of-the-blue-card-directive> accessed on 05/03/2021.

³²⁴ UNHCR 'UNHCR's Recommendations for the Croatian and German Presidencies of the Council of the European Union (EU)' (2020) 9 January – December 2020 at 2, available at <https://www.refworld.org/country,,UNHCR,,DEU,,5dee08387,0.html> accessed on 05/03/2021.

fish on the right-wing fringe. Even the tone has been softened by referring to ‘Promoting the European Way of Life’ after - to put it mildly – astonishment, a sallow aftertaste remains.

The EU recognizes that the largest refugee displacements and internal displacements are protracted,³²⁵ which is defined as ‘a situation in which refugees find themselves in a long-lasting and intractable state of limbo.’³²⁶ This does not alone depend on size and duration of a conflict on the country of origin, but mainly on ‘political action or inaction’ that determines how the situation of the refugees in the host countries presents itself in terms of access to rights and social and economic integration. The consequences of protracted refugee situations are described as ‘wasted lives, squandered resources and increased threats to security.’³²⁷

Examples of such situations also exist in Europe. The refugee camps on the Aegean islands accommodate thousands under living conditions harshly criticized as undignified.³²⁸ Inhabitants have little or no access to sanitary services, health care, schools, work and are severely restricted in their mobility. Restrictive camp settings limit possibilities for boosting self-reliance. The UNHCR recognizes the potential of camps to save lives in an emergency but warns of the risk to waste the same lives, if they persist.³²⁹ In this regard, the demand for what Europe must do to overcome these protracted situations and live up to the rights-based GCR approach is obvious and more than overdue.

Further situations where European policies are directly infringing on the self-reliance of refugees or would-be refugees and their access to employment is by its containment policies with regard to border management, that leave thousands stuck in the border areas (for example between Bosnia and Croatia, often after having stayed months and years in Camps in Greece, followed by homelessness in Greek cities), subjected to violent push-backs by border police and without access to any of their convention rights.

³²⁵ European Commission, *Lives in Dignity: From Aid-dependence to Self-reliance*, 2016, at 1.

³²⁶ Defined as a situation in which 25 000 or more refugees of the same nationality have been in exile for five years or longer in a given asylum country. See UNHCR, ‘Protracted Refugee Situations’ Executive Committee of the High Commissioner’s Programme Standing Committee 30th Meeting EC/54/SC/CRP.14’ (2004) UNHCR paras 3-5, available at <https://www.unhcr.org/excom/standcom/40c982172/protracted-refugee-situations.html?query=> accessed on 05/03/2021.

³²⁷ *Protracted Refugee Situations* op cit n326 para 8.

³²⁸ Astrid Prange De Oliveira ‘Call for help from the Kara Tepe refugee camp’ (2021) *Deutsche Welle*, 23/02/2021, available at <https://www.dw.com/de/hilferuf-aus-dem-flüchtlingslager-kara-tepe/a-56624407> accessed on 02.03/2021.

³²⁹ *Protracted Refugee Situations* op cit n326 para 10.

With regard to third-countries and refugee protection outside of Europe, the EU must use its political leverage to advocate for better refugee policies and to consistently support host communities, in accordance with their pledge to leave no one behind in their implementation of the Sustainable Development Goals (SDGs).³³⁰ The EU must further revise its third-country agreements, such as the Turkey agreement, to ensure that they are transparent and serve the developing countries rather than perpetuating the unequal burden sharing and refrain from its at times counterproductive and euro-centric approach to development.³³¹

5.4 EU LEVEL REFORMS OF THE CEAS REFORM

(a) Full access to labour market for asylum seekers

At European level, Article 26 (1) of the Qualification Directive provides for access to employment and self-employment from recognition of the protection status. As such, this is in line with Article 17 of the 1951 Refugee Convention. Further in Sub-Article 26(2), it provides for vocational training and counselling to the same extent as nationals. However, to place refugee's rights and agency at the centre, integration should be facilitated as early as possible. While asylum seekers can be denied the right to work under Art. 17 of the 1951 Refugee Convention and – subject to justification – under the ICESCR,³³² the EU should lead by example by moving towards granting labour market access to anyone applying for asylum. Asylum seekers should be allowed to work as 'presumptive refugees.'³³³

The protracted average duration of procedures in combination with the high rate of asylum seekers that are granted some measure of international protection³³⁴ speak for the need for an opening of the labour market for asylum seekers. Regardless of the outcome of the procedure, asylum seekers often spend a long time in the host country. To keep them in limbo and waste their potential, skills, motivation, and the host countries' money is too costly only for them to be reminded that they might not be afforded a right to stay. Effective mechanisms to prevent fraud and separate economically motivated migrants from asylum seekers must of course be in place as well. However, they cannot be upheld untargeted as a deterrence strategy

³³⁰ *Recommendations for the Croatian and German Presidencies* op cit n324 at 8.

³³¹ Kemal Kirisci 'Order from Chaos: How to make concrete progress on the Global Compact on Refugees Starting with Turkey and the EU' (2019) Brookings 7 <https://www.brookings.edu/blog/order-from-chaos/2019/06/07/how-to-make-concrete-progress-on-the-global-compact-on-refugees/> accessed on 07/03/2021.

³³² Zimmermann op cit n5 para 57 at 172.

³³³ Zimmermann op cit n5 para 14 at 958.

³³⁴ For example, 75 per cent apply in Germany, yet only 20 per cent are granted temporary residence permission.

at the expense of asylum seekers with long-lasting negative consequences for their self-reliance and integration.

For self-employment, the EU should accordingly encourage member states to allow entrepreneurship as soon as asylum seekers are officially registered, according to the liberal interpretation of ‘legally present’ under Article 18 of the 1951 Refugee Convention, which clearly requires less than lawfully staying and can be said to be met by anyone not prohibited to be in the territory.³³⁵

(b) Setting time limits on ‘acceptable’ waiting periods

Under self-reliance aspects, a waiting period is not advisable. The refugee gap shows that catching up when starting with a disadvantage takes a long time and the longer a person was out of work, the greater the effect. This speaks in favour of the right to work as immediately as possible. Regarding protection of contracts and employers, the identification should in general be clarified before the right to work is awarded. This could serve as a positive incentive, rather than a repressive sanction, for asylum seekers to support the efforts of the authority in this regard.

Currently the EU legislation foresees a maximum waiting period of 12 months for asylum seekers, whose status has not yet been determined. Considering that refugees might have already been out of work for longer due to persecution, internal displacement, conflict, flight, or secondary migration, and that for different reasons they can often only register after they have already been in the host country for some time, the earlier they can start to lead a life, the better. Further factual barriers will most likely add more waiting time such as learning the host language, bureaucratic procedures, and the actual job search, but those who manage to enter the labour market earlier should not be kept from doing so. Accordingly, the maximum acceptable waiting period of three months after registration will at least not allow unnecessary additional hurdles. This could further work as incentive for states to adhere with the right to good administration and comply with the reasonable duration of asylum procedures of three months.

(c) Common, legally binding standard for the maximum duration of three months in asylum proceedings

The EU should further set out legally binding limits with respect to the duration of asylum procedures in the member states. A limit of three months until the first administrative decision,

³³⁵ Zimmermann op cit n5 para 25 at 981.

as it already exists as recommendation, should be made mandatory. Delays that are within the control of the asylum seeker should not be punishable with sanctions with repressive character or impede on their dignity and self-reliance. In the case of delays on the part of the authorities, the asylum seeker should in any case not suffer any disadvantages. This is because the linking of legal restrictions such as freedom of movement or compulsory living in reception centres unduly places the realisation of the Convention rights unilaterally in the hands of the authorities. Preventing the withholding or circumvention of Convention rights (such as the right to work or family reunification) through excessively long proceedings should be a key aspect of any right-based and protection driven policy approach.

This policy, in combination with a targeted system of measures and collaboration of different stakeholders, enables asylum seekers to gain agency even pending their proceeding. It saves money for the host state, not only due to less aid-dependency, but also with earlier tax revenues through asylum seekers and a smaller time and wage gap to other migrants and natives. It also enables asylum seekers to obtain a certain planning security through a timely decision and, in case of delay, compensation by then concurrent permission to work, so at least the waiting time is not wasted. It avoids long-term stays in a host country with unclear prospects of staying, where, as it is common practice in many countries, integration efforts are omitted as a precautionary measure to facilitate deportation and re-integration into the country of deportation. This proposal builds on the opposite understanding, that taking up training or work better equips asylum seekers for their future, even in the case of repatriation or resettlement.

(d) Comprehensive integration policies upon arrival

Integration should start as early as possible to help asylum seekers with one of the most important factors for self-reliance, that is learning the language of the host country. Language course offers upon arrival should be the European standard, as part of a comprehensive integration policy starting right upon arrival in the host state.

Another important aspect of fostering self-reliance is the early assessment of skills and process of qualifications-recognition. While so far it is still a lengthy affair that particularly sets back refugees who may not have any documents with them due to their flight background, there is already progress through the Qualifications Passport for Refugees facilitating the assessment of foreign qualifications in recognition centres with reach beyond the EU borders. However, so

far only a small number of refugees have benefitted from this since it was launched in 2017.³³⁶ In view of the internal freedom of movement in Europe, skills should also be matched with needs across borders to make it easier for refugees, like EU citizens, to find work.

Opportunities for vocational training and personalised professional training following up on refugee workers³³⁷ Socio-economic inclusion is further promoted by skills provision and practical information on rights and entitlements at work through employers or colleagues. This individualized and tailored approach requires employers that are culturally sensitised and further trained concerning refugee-specific challenges.³³⁸ In particular amongst smaller employers there is a need for a massive education crusade to teach societal members about refugee rights. This will reduce prejudice and prevent xenophobia.

(e) Ensure sufficient social security assistance

A blanket prohibition of labour market access without sufficient social assistance violates the ban on inhumane and degrading treatment and undermines human dignity.³³⁹ Indirect violations of this principle, for example through repressive sanctions or cuts below the subsistence level should be explicitly prohibited. The human dignity cannot be relativized to migration policy considerations.

However, times of exceptional economic hardship may permit a more restrictive application if the limitation of economic rights can be justified under human rights considerations and national economic considerations. Art. 2 I of the ICESCR allows for a progressive realization of the right to work to the maximum of a host country's available resources.³⁴⁰ This lowered standard, again, is subject to two important specifications. First, the wording progressive does not allow for a host country to do nothing. Secondly, it only applies to developing countries. Developed European countries may not invoke it, as it must be expected that their refugee population work even in times of economic insecurity.

Also, it is questionable how 'available resources' must be read in the context of the right to work. In contrast to the right to social assistance, providing a person with access to the labour

³³⁶ <https://www.coe.int/en/web/education/recognition-of-refugees-qualifications>

³³⁷ Carrera & Cortinovis op cit n283 at 15.

³³⁸ S Carrera & Zvezda Vankova 'Issue Paper - Human Rights Aspects of Immigrant and Refugee Integration Policies: A comparative assessment in selected Council of Europe member states' (2019) Council of Europe, available at <https://rm.coe.int/168093de2c> accessed on 07/03/2021. Carrera & Cortinovis op cit n283 at 15.

³³⁹ Zimmermann, op cit n5 para 20 at 960 and para 25 at 962.

³⁴⁰ Zimmermann op cit n5 para 19 at 960.

market is in the first place not dependent on large amounts of resources. Job opportunities cannot be subsumed under it, because providing a job to a person will not reduce or use up the job but may even create more. Even in the case that a developing country can only provide a lower standard of supplementary measures, a tailored integration system and capacities at authorities, the denial of the right to work cannot be denied by invoking the principle of progressive realization.

Countries with high unemployment, like South Africa, or European countries like Spain, Italy, Greece or Bulgaria, might struggle to provide suitable job opportunities. However, the efforts required under refugee law should always be pursued as creating synergy effects to also benefit the host communities and migrant workers. Structural measures and training or retraining programmes should benefit everyone and should especially account for the special needs of refugees. Further, within the EU, the burden sharing system as envisioned under the CEAS, as well as promoted by the GCR at a global scale, should work even more within the EU, so countries with less resources receive support by the EU and other member states to ensure the protection their refugee population. A European employment agency could remedy this situation and create more cross-border opportunities for EU-citizens, migrant workers, and refugees.

Conclusively, in order to be successful and align with a human rights-based approach, all efforts must be ‘underpinned by a notion of respect for refugees and their capacity to bring about change and be productive.’³⁴¹

5.5 FUTURE OUTLOOK

The integration of refugees in the countries’ labour markets remains challenging and takes time.³⁴² To meet this challenge and overcome it, more national and international coordination is required, the responsibility to provide decent work for the refugee population should be shared by different stakeholders, labour market policies as well as training and education should be harnessed to support sustainable livelihoods, and refugee social capital should be more effectively engaged.³⁴³

³⁴¹ UNHCR, *Protracted Refugee Situations*, 2004, EC/54/SC/CRP.14, para 14.

³⁴² *Global Trends 2019*, op cit n8 at 53-55.

³⁴³ Zetter & Ruaudel op cit n237.

Looking ahead to the future of refugee protection, the COVID-19 pandemic may also present opportunities. Both the Council of Europe and UNHCR have encouraged states to allow refugees with foreign health care qualifications to contribute to the health care system and support the Covid-19 response of their host countries and many European member states have followed that call.³⁴⁴ France, for example, has called for refugee health professionals to practise their professions as associate practitioners under the responsibility and supervision of other national professionals.³⁴⁵ This example shows how social cohesion especially thrives in times of crises. By seeing refugees for what they are - people who have been forced to flee and need protection in a foreign state, but have skills, assets, the ability to learn, and the will to be productive - the necessary shift that safeguards refugees to lead meaningful lives can be made.

As Carrera rightly puts it, ‘a substantial improvement is needed in the current policy responses adopted by the EU and its Member States to provide an effective contribution to the achievement of the common goals laid down in the GCR.’³⁴⁶ While there is a broad consensus in evidence-based research on the need for the EU to step up its responsibility and realign the overall direction of its policy response, there is need for more political will and the development of more functional political decision processes within the EU institutions for the real work to be properly implemented.

While at the national level, domestic political sentiment and public assessment of asylum policies prevent governments from fulfilling their international obligations and the scientifically required, at the European level, it is the internal disagreements and the unanimity requirement that gives the most anti-migration governments the power to slow down the necessary course. It will take honest political will to assume responsibility and not to shift it. This will steer the EU into putting its own house in order and become the role model and draught horse that it purports to be regarding human rights and refugee protection.

³⁴⁴ UNCHR ‘The Council of Europe and UNHCR support Member States in bringing refugee health workers into the COVID-19 response’ (2020) 14 April 2020, available at https://www.unhcr.org/news/press/2020/4/5e957e9611/council-europe-unhcr-support-member-states-bringing-refugee-health-workers.html#_ga=2.111957252.1072319615.1611831282-1840330480.1611831282 accessed on 07/03/2021.

³⁴⁵ Authorized by Article R. 6152-632 of the Public Health Code, Version as of July 26, 2005.

³⁴⁶ Carrera & Cortinovis op cit n283 at 17.

Chapter Six

6.1 CONCLUSIONS AND RECOMMENDATIONS

The importance of the right to engage in remunerated work is widely recognized in international, regional, and national law. Rather than a right to employment, the scope of the right to work as contained in the 1951 Refugee Convention and Article 6 of the ICESCR entails a right to seek work and to be supported by the state in this effort. In the case of refugees, the host state owes to provide them labour market access under certain conditions that depend on the rights of other foreigners under the country's national laws.

The role of the right to work for refugees has been repeatedly highlighted as crucial to integration, especially as a key for social contacts, for esteem in the host society as well as for the self-esteem and dignity of refugees and immigrants.³⁴⁷ This finding receives support in research as well as in public discourse.³⁴⁸ Including refugees in the economies of their host countries is widely recognised as an effective way of lifting them out of poverty and increasing their independence and agency. Further, refugee's successful economic integration can reduce reservations and xenophobia within the host society by creating reciprocated relationships and trust.³⁴⁹

Furthermore, granting refugees the right to work can also benefit the economic progress in the host community either by tax revenue, by entrepreneurship or economic boost from purchases resulting from the refugees' presence, as evidence shows.³⁵⁰ In developing host countries, the prospect of developing opportunities through refugees' productivity as well as international engagement of donors can act as an incentive to open the domestic labour market to refugees. The promise of this win-win scenario strongly argues in favour of granting refugees access to the labour market as early and as unimpeded as possible. This is further reinforced by the fact that refugee situations are usually protracted. The negative consequences of a life in limbo and the financial burden of unsustainable aid-dependency are significant. The right to

³⁴⁷ *Supra* para 27.

³⁴⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 18: The Right to Work (Article 6 of the International Covenant on Economic, Social and Cultural Rights)* E/C.12/GC/18 (2006) para 1.

³⁴⁹ *Refugees and the right to work* (2014) op cit n4.

³⁵⁰ Shoghik Hovhannisyan, Christopher F Baum et al. 'Mixed migration, forced displacement and job outcomes in South Africa' (2018) World Bank Group at 3; 'Livelihoods and Self-reliance' (2016) op cit n26 paras 4-7.

work can thus foster durable solutions that improve the lives of refugees as well as of the host communities.

The case studies of South Africa highlighted the corrective role courts play with regard to the interpretation and implementation of refugees' work rights and the safeguarding of constitutional principles. It has further also shown that when trying to reduce disadvantages in access to the labour market for certain groups, for example through affirmative action, a government must be careful that this does not lead to discrimination against other vulnerable groups.

The German case study made clear that even in a host country with the economic possibilities and financial resources for adequate standards, political considerations have the potential to jeopardize a protection-oriented approach in the field of asylum law. In summary, the system of labour market access for refugees in particular has become more restrictive in many places, but also more complex. Some regulations regarding access to the labour market for asylum seekers are incompatible with European law. It runs counter to the objective of the GCR of promoting self-reliance of refugees, including asylum seekers, who are – as in South Africa – kept in the limbo. The discrepancy between the interests of labour market and integration policy on the one hand and exclusionary domestic policy on the other is becoming increasingly apparent.³⁵¹

Both case studies showed that providing the right to work alone is not enough.³⁵² Refugees must also be enabled to actually exercise it. In this regard, a comprehensive and tailored set of integration measures is needed to facilitate the arrival in the host community and the existing host economy.³⁵³ A fast and fair status determination process and practicable identification of documents must go hand in hand with early assessment and recognition of skills, language courses and job search counselling. While the requirements for developed countries can be set higher in this regard, all host governments must strive to create suitable employment opportunities in collaboration with employers.

By highlighting the EU's shortcomings in harmonising the existing rules and living up to its own intentions, the opportunities are also revealed. There is a fundamental will to achieve

³⁵¹ Schuster and Voigt op cit n239 at 72.

³⁵² Ibid at 303-4.

³⁵³ Ibid at 303-4.

a fair distribution in order to be able to carry out effective processes. The EU moves very slowly, due to many different interests. Unfortunately, this inability to change leads to direct disadvantages for the refugees and to more difficult conditions for integration in the labour market. It is astonishing that despite the fundamental will to facilitate access to the labour market, bureaucratic hurdles remain high. A downwards-trend towards narrowing refugee protection general and restricting refugee working rights is visible, even though some progress can be traced back to the stronger advocacy for the manifold benefits of self-reliance by prominent actors, and landmark achievements such as the GCR.

Accordingly, concrete proposals for protection-driven migration and asylum policies on the right to work, access to the labour market and the promotion of self-reliance have been put forward. These proposals shall ensure better legal and de facto access to decent work in European host countries to promote refugees' self-reliance and integration. For that, they aim to remove legal and factual barriers that keep refugees aid-dependent for longer than necessary. This includes advocating for the right to work for asylum seekers and early access to language and integration courses. The earlier refugees obtain the chance to contribute to development and recognition in the community, the better for any durable solution, be it repatriation, resettlement, or integration in their host society. EU institutions recognize the right to work for its paramount significance for realizing other human rights.³⁵⁴ They should thus strive to uphold it in the best way possible, because regardless of the status, the preservation of human dignity should be of highest priority.

As far as the right to work is concerned, the designation of people with a refugee background in studies on integration into the labour market could fuel progress towards understanding and closing the refugee gap. The impact of the COVID-19 pandemic on economic integration and self-reliance of refugees, especially in developing host countries, is a relevant topic that could provide insight into the protection of refugees in future economic crises. For example, technical equipment hinders the payment of UIF assistance in South Africa and asylum seekers had to fight for the payment of COVID-19 assistance in court. In Germany, too, recent changes in the Asylum Seekers' Benefits Act that provide for cuts in social assistance give cause for concern.

³⁵⁴ Section 1 of Council of Europe, Parliamentary Assembly, *Resolution 1994 - Refugees and the right to work*, 11 April 2014, Resolution 1994 (2014), available at: <https://www.refworld.org/docid/537ef91a4.html> accessed 10/02/2021.

As an outlook, the thesis stresses the need to include refugees and host communities in developing durable solutions that benefit all. This collaboration ensures, that policies reflect the different priorities for or definitions of a meaningful and dignified life, which may vary amongst refugees. It allows for refugees to help themselves reach self-reliance, without shifting the responsibility away from the host state government.

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