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A Normative and Legal Analysis of the Convergence of Labour and Migration Policies:

Impacts on Migrant Workers, Undocumented Workers, Refugees, and Asylum Seekers in the European Union

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Abstract:

This thesis's research considers a normative understanding of EU migration policy in tandem with the practice of labour rights for migrant workers, refugees and asylum seekers, and undocumented workers. The reason to uncover the relationship between labour rights for migrant workers and migration comes from the persisting incidences of exploitation in the EU that affect non-EU citizens exponentially more than EU workers. Understanding why this trend occurs and what systems are in place to prevent it is crucial today and requires moral and legal assessment.

The first half of the research places the EU's approach to labour migration in normative contexts. The case for Open Borders migration, based on the work of Joseph Carens, posits an egalitarian liberal ideology seemingly emulated by the border-free EU regime. However, the fortification of the EU external border and increasing securitization of the EU represent the ideas of Christopher H Wellman's right of association. Although oppositional, it is only in tandem that we may understand the EU's labour policies differentiating non-EU workers.

The second half of the research focuses on how the current practice of sponsored work permits, employer's sanctions, migration policy filters, transnational guest worker schemes, and exploitation and trafficking prevention schemes all impact labour rights for migrant workers.

The findings show that economic self-interest and historical colonial relations cause migrant workers to live and work in precarity and residential insecurity and face significant discrimination. Low-skilled, low-wage employment and ethnic economies significantly have heightened risks of exploitation by the shadow economy, the informal sector, and state regulation.

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Dedicated to all the migrant workers who lost their lives at work in Europe.

Introduction:

During the summer of 2024, Satnam Singh, a 31-year-old agricultural worker in Rome of Indian origin, had his arm severed by a machine. Upon being injured, his employer left his unconscious body and his severed arm in a cardboard box in a courtyard near his residence without calling for medical assistance. His wife discovered his body only two hours later, and the medical team was unable to save his life. He had bled to death.

Mr. Singh had worked for over two years on an Italian-owned farm without a valid employment contract. Stories like Mr Singh's represent the issues of social, ethical, legal, and human values deeply connected to the national and European identity. They root themselves deep into the national consciousness and must be reacted to, responded to, and honoured. The figure of the forgotten migrant worker, exploited for the enrichment of the hosting country and left to bleed, is a recurring figure that must be addressed. These are workers considered not worthy of legal protection, workers who are not seen to deserve safe and fair working conditions, and workers who are the backbone of the continent. Mr. Singh's life and death are symbolic of the dark hole of labour rights for migrant workers, undocumented workers, refugees, and asylum seekers.

The normative analysis of the European Union's (EU) migration policies, alongside the practical aspects of EU labour policies for non-EU workers, highlights the role of economic self-interest, historical colonial relations, and state control that cause and exacerbate significant exploitation and discrimination of non-EU migrant workers. The migration and labour policies of high-income receiving countries, such as European states, not only "shape international migration flows" but also actively condition "potential migrants' choices" and their socioeconomic abilities (Higgins, 2015, p168). Understanding the role and impact of EU policies to better attribute accountability for the rise of deaths at the EU's frontiers and the rise of migrant deaths at work in the EU is a pressing issue in today's human rights discussions.

Europe's double standard approach to freedom of movement and labour rights for its citizens compared to non-EU citizens reflects its biased reasoning and manipulative rhetoric. The bids for cultural sanctity and moral high ground that European human rights law professes fail to represent adequate living standards for the many communities of marginalised workers that

allow Europe to maintain its global economic prowess. The potential explanations for such shortcomings may no longer reside in material or resource-oriented limitations but, perhaps instead, warrant moral and legal reassessment.

This research shall compare the work conditions for refugees and asylum seekers (as one group) with the work conditions permitted to migrant workers and the lack of legal apparatuses available for undocumented workers to highlight the inherent vulnerabilities of each group. **Issues of residence instability, skill, nationality, language, culture, and gender all affect the legality and status of such groups, allowing nation-states to impose varying measures and controls that either limit the financial and social development of these groups or, in a few cases, to claim universal human rights recognised in multiple international human rights conventions.**

The thesis will begin by defining these groups and relevant notions and will proceed to analyse how they interact in contemporary Europe. The primary literature that inspires the normative debate is Joseph Carens' work on the notion of open borders. **Carens' argument for freedom of movement, and therefore, a mobile labour force, is an egalitarian analysis of migration and poses contrary to the fortification of borders.** Carens is supported by thinkers such as Sarah Fine, Etienne Balibar, and Paul Higgins. The border-free Schengen zone in Europe reflects such an egalitarian and liberal ethos, allowing the interaction of a mobile labour force to mutually benefit and inspire market innovation without restricting the exercise of labour and movement through claims of cultural, national, or linguistic adversity due to the "transnational" (Shaw, 2018, p164) - or rather, 'supranational' - European citizenship. However, the coexistence of the fortification of the European external borders and restrictive migration policies for third-country nationals requires the exercise of a separate ethos practised alongside Europe's liberal migration policies for its own citizens.

Examining Christopher H. Wellman's counter-argument, recognising the right to association's necessary antithesis, *the right to exclusion*, is also relevant in Europe's approach to migration policy. **In a political community with an identifiable sense of belonging and unity, the freedom of exclusion is required to fulfil the right of association.** Using examples of the freedom of marriage and religion, the freedom of association also implies that one is free *not to accept* someone who walks to their door and asks to enter. However, the right of association is an individual right. Wellman's reasoning for the nation-state's right to exclude as a collective right -

or instead, his representation of the nation's sovereignty having rights - is debatable. Nevertheless, Wellman agrees with the ethical necessity for wealthy liberal states to contribute positively to the duties pertaining to the Rawlsian idea of necessary global wealth redistribution. Highlighting the impacts of colonialism setting the trends for the majority of the wealth distribution around the world today, Wellman claims that to protect one's interest in the right to exclude, one can still fulfil one's duties to aid the global wealth distribution by 'exporting justice.'

Further, these normative approaches will be compared to the different conventions and legal tools currently used in Europe that directly associate migration with labour rights. Firstly, it is necessary to analyse the extent of employer control in work permits. **The balance of shared accountability between employers and the state has made employers responsible for the inherent dependency between residence and labour for migrant workers.** The ability to choose whether or not to hire/sponsor migrant workers, which has a direct impact on the worker's right of residence, is a power that employers do not have over national citizens. This delicate and uneven relationship enhances the precarity of already marginalised workers, forcing them into reliance on their employer and more susceptible to accepting exploitative conditions. It also sheds part of the state's own liability in creating situations of potential exploitation.

Moreover, **the practice of nation-states imposing varying migration filters, such as preferential treatment for specific nationalities, skill sets, genders, and labour sectors, leads to the lack of protection for collective migrant groups and enhances discrimination.** The differentiated work and residence permits for diverse skill sets, such as prioritising high-skilled workers, misrepresents the importance and need for all work skill levels in the labour market. This leads to people who work in low-wage sectors having less access to legal paths to safe labour conditions, enhancing their chances of engaging in illegal or exploitative work. Undocumented people are at an increased risk for this, as many employee protection schemes do not recognise undocumented people as workers or rights-holders. Further, the combination of nationality and skill-sector-specific work permits both greatly reflect overall gender discrimination, as neither takes into consideration gender roles in labour in diverse migrant communities.

The impact of securitisation, physicalised through the fortification of borders, also greatly influences the approach of EU nation-states to a mobile labour force. The 'border' is a vital tool

to restrict the authoritative sovereignty of the nation-state, which is necessary for a democratic political community. However, it intrinsically defines an 'inside' and an 'outside,' an 'us' and a 'them.' This rhetoric is easily manipulated to influence the political community's attitudes toward outsiders' chances of integrating into a new society. **The border is identified as a necessary protector for the community from the dangers outside. Yet, it is simultaneously a destroyer of rights for the person on the other side attempting to reach better living conditions.**

Additionally, the moral condemnation of exploitation and trafficking, which are integral human rights that all are to be protected from, are manipulated to enhance stricter border and migration controls, which only limit and worsen one's ability to exercise freedom of movement. The differentiation between legal pathways of accessing labour, albeit in limited and controlling ways, will be compared to the actuality of exploitative labour and the shadow economy, where many find respite from such limiting and often inaccessible legal employment. **Restrictive migration and labour rights policies for migrant workers eventually lead to an increase in the susceptibility of migrant workers falling into exploitative and forced labour conditions.**

The following research will aim to uncover why, regardless of the multiple EU human rights conventions that recognise the right of nomadic and persecuted communities to sustain a sustainable life and for all workers to access safe and fair working conditions, non-EU migrant workers are disproportionately mistreated in the EU. According to the European Union Agency for Fundamental Rights (FRA), the primary issues that migrant workers face are underpayment or no payment at all; lack of an employment contract; dependence on their employers for residence and transport; substandard housing and living conditions; no sick pay or annual leave; working excessive and irregular hours; haphazard working conditions with little health and safety considerations; having to perform additional, or illegal, tasks (FRA, 2019, p41). The nation-state and liberal democratic political communities that establish borders and bureaucratic and administrative obstacles limit the vocation of labour for migrant communities, stunting the financial benefits they may offer by providing a mobile labour force.

The primary counterarguments to a mobile labour force in popular rhetoric are based on prejudiced security threats, European cultural preservation, and economic conservatism Yet, as nation-states within Europe continue to uphold stringent and discriminatory migration and labour policies, they are revealed to *enjoy economic benefits* from creating situations of mass

exploitation and human rights violations for such marginalised workers. **One is left to wonder, does the European Union truly require an analysis of moral condemnation, dire reoccurring instances of exploitation, multiple workers' deaths, and deaths at the EU external borders, to grant a reassessment of policies that may better protect and honour the lives of workers of all types?** Why have the recent decades of mass discriminatory human rights violations of migrant workers not been enough?

Chapter 1: Notions and Definitions

1.1 Migrants and Labour Rights:

- *There exists a distinction between high-skilled migrants and low-skilled migrants, which is evident in various contexts, such as migration policies and labour markets.*
- *This differentiation is often reflected in political discourse. Yet, there is a notable gap between the formulation of migration policies and their implementation, particularly concerning the correlation between labour opportunities and migration policies.*
- *Numerous conventions and policies are established internationally and regionally to safeguard all workers' rights and establish minimum standards of practice for migrant workers.*
- *However, despite these efforts, there are policy gaps, particularly in the targeting of low-skilled migrants, leading to a discriminatory impact that resembles discrimination based on cultural diversity, nationality, and race, among other factors.*

Since the beginning of communities, migration has been a natural social phenomenon that people have undertaken to find better opportunities and outcomes to grow. The inspirations that instigate most mass migration are “labour market imbalances, inequalities in wealth, and political conflicts in origin countries,” which are essentially structural factors that migration policies themselves have very little influence over (Czaika et al., 2013, p487). **Migration policies only impact the way people choose to travel and navigate across borders.**

Today, with more flexible labour market policies and an infatuation with neo-liberal globalisation, there has been an increase in the desire for both high- and low-skilled migrant labour (Czaika et al., 2013, p489). **Labour is seen as one of the primary incentives for migration.** Whether the intention is to find better financial revenue from labour abroad compared to the economic state of their nation of origin or whether one believes opportunities for growth and education are more fruitful abroad than in their country of origin. This is often celebrated through higher-education exchange programs, specialised international workers' incentives, VISA sponsorships, etc. These are examples of migration policy going hand-in-hand

with labour policy, seeing the movement of a group of people as the potential for profit, revenue, and economic evolution.

The benefits of globalisation have enriched cultures and communities and drive innovation in all sectors at rates never before seen. It is a recognised right in the Universal Declaration of Human Rights, as Article 13 states: "*1) Everyone has the right to freedom of movement and residence within the borders of each state. 2) Everyone has the right to leave any country, including his own, and to return to his country.*" Therefore, the freedom of movement has always been an internationally recognised concept.

The legal definition of the migrant worker in the **International Convention on the Rights of Migrants and All Members of their Families, Article 2(a): "*The term' migrant worker' refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.*"** Within this, subgroups identify the type of labour the migrant worker engages in, such as seasonal, seafarer, frontier worker, project-tiered, itinerant, and worker on an offshore occasion. Whether the migrant worker works abroad within specific time and location limits affects the identification of the migrant worker's rights. Within this category is the self-employed migrant worker: a person who engages in a 'remunerated activity' not under an employer's contract.

The international convention explicitly mentions in Article 3 that this definition does not apply to refugees, asylum seekers, or stateless persons unless specific legislation and documents the State provides consider it so. It also identifies explicitly in Article 4 that within the convention, migrant workers applicable under the convention's rights must be "*documented or in a regular situation if they are authorised to enter, to stay and to engage in a remunerated activity in the State of employment*" and are subsequently considered as undocumented and 'illegal' if they do not comply with these necessities. Therefore, in Article 2, we have the exact definition of a migrant worker, and the supporting articles 3 and 4 specifically identify the difference between migrant workers and refugees, asylum seekers, and undocumented or 'illegally' residing people.

Another element of migrants that must be addressed, which is not explicitly stated within international conventions, is the difference between migrants who come from high- or middle-income backgrounds and migrants who come from lower-income backgrounds. Although migration increased overall and was recognised as a right, there has been an increase in political discourse against particular groups of migrants. Many programs encourage the migration of

high-skilled workers and professionals from abroad to use their skills in a new country or to study in a new country, but the majority of migrant workers come from manual trades, agriculture, or other low-skilled industries.

Migration policy begins to shift, enforcing inspections of the class composition of the migrant groups and enabling access to those that are perceived as economic needs for the state and have compatible social and economic desirability. There have been "increasing restrictions on low-skilled labour migrants" that have "co-evolved with policies that favour migration of high-skilled labour migrants and students" since the turn of the millennia (Czaika et al., 2013, p490).

International conventions are often grounded in non-discrimination clauses. Still, there is undeniable irony between the EU's free-movement regime and the increasing restrictions towards migrants who are considered low-skilled. The passage to be a migrant worker with skill recognition and more opportunities for work is often more successful if one comes from a country of similar income or a background of higher income than for migrants from lower incomes who migrate to alleviate their financial situation.

There is a double barrier for migrants who are third-country nationals, which often implies a shadow of economic difference that is somehow less favourable. This can be seen by migrants who are employed in lower-income jobs abroad, who are depicted as 'economic migrants,' associated with racialised and discriminatory language, related to harmful rhetorics that they occupy labour opportunities for the national workforce, and so on. Meanwhile, migrants from higher income backgrounds are often celebrated for enabling diversity quotas in professional organisations or higher education institutions.

Although the rise of this political rhetoric may shape migration policies that target the entry of irregular or undocumented migrants, there is a lack of proper implementation that safeguards third-country national low-skilled workers, especially since they fill a specifically valuable economic role. **In the EU, we often see this in the employment of migrant workers, undocumented or legal, being the majority of the workforce in agriculture, construction, catering, domestic work, or other services of similar economic strata** (Czaika et al., 2013, p494; Levoy et al., 2004, p41, p47). Later, this propagates the **systemic order that places minority communities in lower-income jobs, cornered in segregated neighbourhoods, with**

fewer opportunities to excel upward compared with the majority population. This double standard must be addressed.

Although not explicit, migration policies that affect the class background of migrants from 'third countries,' such as by having limited mechanisms for skill recognition that are not on an international scale or through point systems and employee sponsorships, often have the objective consequence of influencing the "national, ethnic, and religious origins of migrants" (Czaika et al., 2013, p490). **The differentiation by skill of certain migrant workers as somehow less favourable reveals a discriminatory trend to lessen migration "from poor or culturally distinct countries"** (Czaika et al., 2013, p490). The non-discriminatory clauses enforced across labour conventions are, therefore, no longer reflected in migration policies, even if there is a clear correlation between the two.

In terms of labour rights for migrant workers, extensive international and regional conventions and policies have been put in place. International Labour Organisation (ILO) directives also technically apply to anyone who is considered a worker (unless otherwise stated), with special protections in place for potential victims of exploitation or harassment, such as minorities, migrant workers, particularly female migrant workers, people with disabilities, and young people. **All EU Member States have ratified the fundamental ILO conventions and the Labour Inspection Convention.**[1] All EU Member States except Romania have also signed the Equality of Treatment (Accident Compensation) Convention.

The Violence and Harassment ILO Convention C190/R206 and its Recommendation explicitly encourage that standards regarding equality and protection measures against violence and harassment in the workplace should be reflected and reinforced in national legislation and migration policies. Article 5 declares, "*Members should ensure that provisions on violence and harassment in national laws, regulations, and policies take into account the equality and non-discrimination instruments of the International Labour Organization,* including the Equal Remuneration Convention (No. 100) and Recommendation (No. 90), 1951, and the

[1] These include: Forced Labour Convention, 1930 (No.29); Freedom of Association and the Right to Organise Convention, 1948 (No.87); Right to Organise and Collective Bargaining Convention, 1949 (No.98); Equal Remuneration Convention, 1951 (No.100); Abolition of Forced Labour Convention, 1957 (No.105); Discrimination (Employment and Occupation) Convention, 1958 (No.111); Minimum Age Convention, 1973 (No.138); Occupational Safety and Health Convention, 1981 (No.155); Worst Forms of Child Labour Convention, 1999 (No.182); Promotional Framework for Occupational Safety and Health Convention, 2006 (No.187).

Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111), 1958, and other relevant instruments."

Additionally, Article 10 identifies the inherent vulnerabilities of migrant workers, and specifically female migrant workers, with explicit reference to non-discrimination regarding their migration status: "Members should take legislative or other measures to protect migrant workers, *particularly women migrant workers, regardless of migrant status,* in origin, transit and destination countries (...) from violence and harassment in the world of work."

However, in many situations, due to practical barriers such as language differences or lack of knowledge of bureaucratic measures, migrant workers can easily find themselves in situations that compromise their labour rights even after states ratify such conventions. The lack of a legal work contract or payment of wages in undeclared cash can often note this. **When intending to declare a labour rights violation, the key issues that migrant workers may face are procuring the burden of proof for an undeclared employment relationship and also the fear of being redirected to migration enforcement, threatening their loss of residence status, or being extradited.** This has often been documented in the EU agricultural sector, one of the region's most profitable and high-end exports. These obstacles do not allow migrant workers to properly fulfil their labour rights and access civil claims in court or process complaints (Keith, 2022, p65). This further instigates a status of perpetual vulnerability for migrant workers who are pressured to accept unsafe or unfair working conditions.

The ILO Convention on Labour Inspection C81/C129 explicitly states that the primary duty of labour inspections is to specifically focus on enforcing provisions on work conditions and the protection of workers (Article 3). **There has been a recognised need for a strong firewall between labour inspections and migration enforcement, as noted by the ILO Committee of Experts on the Application of Conventions and Recommendations** (Keith, 2022, p62)**.** Providing or placing an expectation on labour inspectors to engage with migration enforcement duties is beyond their scope and "[interferes] with their primary duties" (Keith, 2022, p62) to ensure employers uphold their standards of safe and fair work conditions. It would also "undermine their relationship with workers" and consequently remove the possibility for migrant workers to feel protected by international human rights and labour laws (Keith, 2022, p62). To ensure this, Article 15 of ILO Convention C81 enforces that labour inspectors must "treat as *absolutely confidential* the source of any complaint" to safeguard workers from

suffering dire consequences of deportation, being fired, or worse if they are with an abusive and exploitative employer.

Crucially, many mechanisms are in place relating to the rights of migrant workers and the protection of their labour and their families. However, there still needs to be examples of how these safeguards are adequately implemented. It seems that the increasing revelations of how migrant workers are abused across Europe, working in some of the produce sectors the region is most famous for, or even victims to mere inconsistencies between protocol and practice, proves that even **further safeguards and monitoring mechanisms are greatly needed.** Policy gaps between migration policy and labour policy need to be addressed at a national and regional level, and **non-discrimination legislation needs to be better implemented in labour or migration policies.**

1.2 Refugees and Asylum Seekers and Labour Rights:

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- *Refugees and asylum seekers are a protected group of individuals with different varieties of vulnerable groups within them.*
- *Conventions addressing refugees and labour rights are usually based on the assumption that refugees and asylum seekers will return to their state of origin once it is safe. Therefore, most labour provisions are based on short-term expectations.*
- *Regardless of the non-discrimination clauses in Refugee Conventions and the factors of persecution being the primary indicators to protect persecuted people, refugees, and asylum seekers from different backgrounds have received differential treatment. Trends show a preference for groups that share linguistic, religious, ethnic or cultural similarities with communities in the EU compared to refugees and asylum seekers that are more culturally diverse.*
- *Extreme cases of backlog, under-resourced migration authorities, and a pile-up of cases have led to refugees and asylum seekers having to wait very long for their visas and permits to be processed and recognised. This also creates a lag in working, learning new skills, or applying to academic institutions.*

International refugee law is primarily based on the 1951 Refugee Convention, established to attend to the refugees deriving from specifically the post-WWII context. Since then, the reasons for the persecution of refugees have evolved, and international case law and customary law have had to evolve to ensure that reasons for economic persecution, climate persecution, and social persecution are also considered valid reasons to seek refuge.

Article 1(a)(2) of the Refugee Convention, amended by the 1967 Protocol, defines a refugee as a person who: "*owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.* In the case of a person who has more than one nationality, the term 'the country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

To add specificity to the conditions of a refugee, the following articles 1(d) to 1(f) highlight that the person must *not* be "presently receiving protection or assistance from another organ of the United Nations," they must not be "presently enjoying rights normally accorded to nationals in a country where they have taken residence," and must not have "committed or participated in…certain serious crimes or heinous acts." These additional clauses ensure the protection of the resources of a state through burden-sharing, as well as concerns for the security of the state, ensuring it does not grant asylum to former or potential criminals. (Arguably, Article 1(f) is most commonly used today to encourage anti-refugee narratives based on claims of increased criminality.)

Within the refugee group, there are also more vulnerable individuals, such as women and children, people with disabilities, and older people. Depending on the regional culture, these individuals are not necessarily integrated into the workforce of their country, nor are they presumably skilled individuals.

According to the 1951 Refugee Convention, Article 17, signatory Member States to the convention have the positive obligation to provide asylum applicants *"the most favourable*

treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment." However, the reality of using this positive obligation has had multiple diverse effects - sometimes good, sometimes harmful.

The EU Directive, 2013/33/EU on the Reception of Asylum Seeker Applications, repeats this in Article 15(1) regarding employment: "*Member States shall ensure that applicants have access to the labour market no later than nine months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant."* Article 16 extends this to include access to vocational training, granted nine months after the asylum application is initially lodged. This deadline of nine months initially came from the expected goal that one would be able to receive their confirmed asylum status from competent authorities by the end of this time. However, with the limited resources going into migration aid and reception centres and the unprecedented number of applicants in recent decades, many asylum applicants receive their asylum or refugee status long after nine months.

Due to the large backlog of asylum requests, some consider nine months too long to wait to begin learning a new skill or actively participating in a job or activity.[2] The applicant cannot study or partake in labour activities during this time. This increases living costs since they are not receiving an income and creates dependency issues on already overwhelmed migration reception facilities. It also can have detrimental effects on the mental health of the applicant, who is left merely waiting for time to pass. **Waiting without the authority or autonomy granted to be able to study, engage in training, or take the initial steps to access labour can be a lag in the integratory steps necessary for one to recuperate from such a journey, which "is generally accompanied by significant costs, including separation from family and friends, from a wider community, and from familiar surroundings"** (Fine, 2010, p347).

Article 15(2) of the EU Directive on the Reception of Asylum Seeker Applications also clarifies that " Member States shall decide the conditions for granting access to the labour market for the applicant, in accordance with their national law, while ensuring that applicants have *effective access* to the labour market. *For reasons of labour market policies, Member States may*

[2] In 2021, Ireland diminished its waiting time to six months after the day the application was initially lodged for applicants to begin to have access to labour and the reason the government has stated is the immense backlog of applications.

give priority to Union citizens and nationals of States to the Agreement on the European Economic Area, and to legally resident third-country nationals."

Article 15's obligations are met with great difficulty in current refugee integration systems. **'Effective access' requires states to ensure that within their asylum application procedure, the applicant has access to work training, language courses and translation, information on how to access the labour market, legal guidance and counselling, and professional assistance in translating their skills in cohesive and appropriate manners.** Most of all, this requires timeliness. To effectively access legal jobs, a legal working permit must be issued. Additionally, one needs such documentation to open a bank account, receive bank transfers, wages, or benefit from loans (Kelley, 2022, p256). The extent to which this has been fully dignitary and efficient is highly variable. However, the majority of work permits provided to refugees and asylum seekers legally impose restrictions on the type of labour they may be employed in. This, therefore, compromises the meaning of granting 'effective access' to refugees and asylum seekers.

According to the United Nations High Commissioner for Refugees in 2022, "70 percent of refugees reside in countries where they face restrictions on their right to work" (Kelley, 2022, p256; Sarzin, 2021, p2), regardless of the number of refugees the state holds. This restriction to work "limits their ability to use their skills and entrepreneurship to benefit local economies" (Kelley, 2022, p256). **Many asylum applicants accept jobs below their skill level due to necessity or because they have still not received their legal documentation from the state authority to allow them to access greater job markets.**

The extent of the guidance given to applicants is not apparent, probably because of the enormous backlog, limited resources invested in migration reception centres, and the high influx of people arriving in the EU daily. Some organisations may include their 'diversity' integration quota in their workforce but might not publicise it as much as they should or offer training to ensure that a greater pool of applicants can be asked. Likewise, higher education institutions may have grant schemes for refugees or asylum applicants but may not publicise these scholarships. The state is responsible for publicising these opportunities and wiggling applicants towards them. However, this may not be in the interest of the institutions or the state if refugees are expected, in most cases, to want to return to their state once they can.

The consequence of this is a repetitive cycle where refugees and asylum seekers accept low-paying jobs that tend to be more available out of necessity to generate an income rather than a fulfilling job for which they are skilled. This is demonstrated by the fact that "migrants occupy over one in four low-skilled jobs in the EU, surpassing 40 % in countries such as Austria, Germany, and Sweden, and even 60 % in Luxembourg" (Orav, 2022, p7). These jobs tend to be manual labour and domestic and care jobs. These jobs are also considered to have "have high automation potential in the future," which means that in an environment that prefers the use of artificial intelligence and digitalisation, the EU is "expected to see a decline in low-skilled employment" (Orav, 2022, p7), which will result in many refugees or asylum seekers losing their already restricted positions in the labour market.

Additionally, refugees are people who emigrate specifically because of persecution, political instability, climate endangerment, or a similar kind of danger. This means that refugees are skilled or unskilled and may be suffering specific psychological and/or physical traumas, considering they are escaping persecution with different legal protection compared to migrants themselves. When assessing the majority of refugees, women and children are accepted more quickly as they are figured as instrumental "good/deserving/real refugees" (Mavelli, 2017, p819), inspiring emotional piety for governments intending to enforce morality points. However, the primary identity of a refugee in Europe is that of a middle-aged man. There comes an apparent dissonance between work abilities and intake of refugees. Middle-aged men are most likely more easily assumed to have had working experience, rather than women and children - especially if they come from particular cultures where the social norm is for women to fulfil domestic roles (Kelley, 2022, p260).

Furthermore, although the primary definition of a refugee outlined was composed in 1951, the 1967 Protocol, and subsequent case law attempted to update the view of the refugee as being primarily of white or European settler descent, European biases can be seen to remain (Czaika et al., 2013, p490). **Ethnicity has a clear and active role in intersectional access to labour, and the *kinds* of labour refugees usually can partake in.** When it comes to migrant workers, refugees, and asylum applicants who are foreign, there tends to be preferential treatment over which kind of foreigner is more accepted. The Refugee Convention is supposed to be the same for all, but it is clear that it is more respected for some and less so for refugees of other origins. For instance, the different treatment that MENA region refugees have faced

compared to Ukrainian refugees coming to Europe. It would be dishonest to speak of labour integration without speaking of the racialisation of certain labour tasks and specific work sectors. These particular tasks later have an extended effect on the person's social integration.

Ultimately, Article 15(2) of the EU Directive on the Reception of Asylum Seeker Applications grants EU Member States the right to restrict access to labour to asylum applicants or refugees in whichever way they feel best reflects their needs and desires. Even if refugees "comprise less than one percent of the population (in most host countries)...governments often assert that legal limitations on refugees' right to employment and ability to move freely are necessary to protect the local labour market and welfare of host populations" (Kelley, 2022, p256). **What this creates is an inevitable trend of people from refugee backgrounds, ethnic minorities, or gender exclusion, intensifying and affirming existing inequalities amongst labour sectors. This causes a correlated increase in pull factors for people to work in the informal sector under more exploitative and dangerous conditions than nationals of host states** (Kelley, 2022, p256)**.** This decisively does not uphold the positive obligations the EU has to ensure that refugees and asylum seekers fleeing from persecution receive a refuge of decency or protection.

1.3 Undocumented Migrant Workers and Labour Rights:

- *States have the authority to restrict their labour policies to apply only to migrant workers who are legally residing. However, this can conflict with international human rights and labour laws that require non-discrimination policies to be upheld in employment.*
- *Numerous conventions concerning labour rights for undocumented workers still exist. They address workers regardless of their legal status and aim to shield them from discrimination based on nationality, among other factors.*
- *Undocumented migrant workers are particularly vulnerable to exploitation by unscrupulous employers due to their lack of official residency papers or work visas.*
- *Establishing a clear separation between labour inspections and migration authorities is imperative to enforce labour standards effectively.*
- *Minimum requirements targeting employers should also afford undocumented workers better protection when they lodge complaints.*

Undocumented workers withhold a "juridical status that entails a social relation to the state" and a "political identity" (de Genova, 2002, p422) that depicts the very limitations of the state's sovereignty. An undocumented migrant worker is also an individual who has not brought the local authorities to the awareness of their residence within the state's territory and then engages in labour, whether contractual, reimbursed, or not. By not possessing the legitimate documentation necessary to reside and work in a host state, the state has the legal authority to deport this individual, unless they are a victim of trafficking.

Although many regional and international conventions require a ground foundation of human rights that must be available to all within the territory of a ratifying Member State, national and European legislation often identifies that without legal residence or proper documentation, the state can exempt these people from legal protection. In the case of refugees and asylum seekers, victims of trafficking, or child victims of forced labour, the host state is responsible for providing travel documents or identity documents. However, the legal pathways for applying for this sort of protection are more narrow than many of the realities of various undocumented migrant workers, who may still be suffering unjust working conditions.

Even if the legal status "is only one subset policy" of integration and labour policies (Hernes, 2018, p1310), it provides the ability to claim one's rights without fear of deportation. In fact, "in everyday life, undocumented migrants are invariably engaged in social relations with 'legal' migrants as well as citizens," yet it is only in specific contexts where their 'illegality' becomes a limiting superimposition on all other aspects of their life (De Genova, 2002, p422). Most strikingly, in efforts to claim labour rights and labour protection in the economic realities of the nation where they reside (De Genova, 2002, p423). **The insurance of the minimum standard of labour rights for all living people within a territory should be a legal reality that is achievable for all, reflecting universal human rights ideologies, regardless of their permissibility to acquire legal status.**

People who are undocumented may have entered through irregular or clandestine means, be involved in criminal activity, have had their visas expire, or may be victims of trafficking. Often, there have been recounts of refugees or asylum seekers feeling obliged to destroy their documentation to complete their journeys towards safety due to the bureaucratic difficulties of applying for asylum or fear of being rejected at the borders. In the UK, the "tigh(ening) of border

controls over the last decade" has led the number of "irregular migrants" to rise exponentially (Lukes et al., 2009, p14). Regardless of the higher border controls and the more expensive fees for residence and work permits that fewer people can comply with, migrants are "driven to migrate by overwhelming need," so they choose to do so "whether it is legal or not" (Lukes et al., 2009, p14).

The fortification of borders and criminalisation of illegal entry, combined with the lack of legal pathways or sufficient safe routes for migrants to enter, has heightened the risks of being undocumented. Risks of being undocumented can be imprisonment (Hungary criminalised illegal entry up to 3 years imprisonment (Nedoh, 2022, p4)), being reprimanded and pushed back, inability to access healthcare, or safe and fair working conditions. **Often, individuals who are undocumented prefer to stay undocumented in fear that if they let local authorities know of their illegal residence, they will not be granted the chance to stay after having already settled in the host state.**

Although every EU Member State may have specific national legislation on dealing with the existence of undocumented people within their territory, the EU Employer Sanction Directive 2009/52/EC is of significant importance as it highlights provisions for EU Member States to ensure that employers do not exploit undocumented people and employ them for labour. If employers are discovered employing undocumented people, they are susceptible to sanctions being imposed on them or their practice by the state. It requires employers to go through the legal registration of all their employees to check that they are documented before assuming them. However, the monitoring and implementation of this directive varies between states.

For migrant workers, it also provides an avenue in an abusive situation to claim unpaid or withheld wages by the employer, even if they are undocumented (FRA, 2015, p203). However, when one is undocumented, confronting authorities to claim this right proves to be frightening and sometimes compromises one's ability to stay in the state. The convention itself provides little support to undocumented migrant workers because of the insurmountable crux that inevitably states do not want to have individuals reaping resources from within their territory if they cannot ensure that they are mutually reciprocating their legal obligations. To respect a state's sovereignty, as shown by obliging its bureaucratic documentation, taxation, and residence permits, a state can ensure that one is not a threat to the state's security - or if they are, reprimanded accordingly.

However, many key trade sectors in Europe have been known to benefit from labour from undocumented migrant workers. This is because due to the vulnerable position of the person, fearing deportation, which could lead to more significant economic difficulties or endanger their livelihood, employers can impose meagre wages or unjust work environments. **In a competitive and capitalist market, the goal to create as much labour as possible with minimal expenses leads many to view undocumented workers as a means to maximise profit.** This is noted in:

1) Italy: the General Confederation on Italian Agriculture, assumes around 2,500 migrant workers, many of whom are undocumented, provide fundamental labour in the viticulture sector (Spaggiari, 2024);

2) Belgium: in 2021, when 500 undocumented migrants went on hunger strike for two months, contesting against the state's unfair policies (Madia, 2021);

3) Greece: the case by at the European Court of Human Rights application No. 21884/15: *Chowdury and Others v Greece*, where undocumented migrant workers endured inhumane working conditions in the strawberry-picking sector in 2017.

Thankfully, the European Commission expressed in a 2021 Communication the need for the Employer Sanction Directive to also recognise the necessary protection for undocumented migrant workers to file complaints and pursue legal procedures against employers that exploit them without the fear of being reprimanded for being illegal residents or fear of being deported (Keith, 2022, p15).

The Commission formally called on ratifying Member States of the EU Directive to ensure that trade unions and civil society organisations are well supported to be able to provide undocumented migrant workers with legal advice and information, as well as find a means to establish a safe way for undocumented migrants to report to authorities when their rights are being violated to authorities without fearing for risks arising to their migration status. This requires complaint mechanisms to be easily accessible and understandable, with confidentiality to be respected to achieve the greater goal of fighting exploitation. As the EU Directive targets 'employers' specifically, the complaints system must also ensure that victims may expose their exploitative employers without putting themselves in further danger.

1.4 Definition of Work and Worker:

According to the European Labour Authority (ELA), the definition of an 'employee' is not found in the Treaty of the Functioning of the European Union (TFEU) but can be found in various EU case laws. **The Court of Justice of the EU has provided, under Article 45 of the TFEU, that a 'worker' is any person, regardless of migration status, that "for a certain period of time, provides services under the direction of another in exchange for remuneration."**[3]

According to the European Platform for Tackling Undeclared Work, undeclared work is "any paid activities that are lawful as regards their nature, but not declared to public authorities, taking into account differences in the regulatory systems of the Member States" (van Nierop et al., 2021, p1). The European Labour Authority, however, specifies in its mandate that it has authority solely over individuals "who are subject to the Union law," specifying workers, self-employed persons, and jobseekers who must be either citizens of the Union or third-country nationals who are legally resident in the Union (Keith, 2022, p39).

Third-country nationals may enter "undeclared work and illegal employment under different circumstances" (van Nierop et al., 2021, p2). For instance, "third-country nationals who have a regular status in one EU Member State may be working irregularly in another EU Member State," (Keith, 2022, p39) or, they may have overstayed their temporary employment contracts, classifying them as undeclared workers once surpassing their temporary visa (van Nierop et al., 2021, p2). Non-EU nationals "face different situations due to their country of entry," "residency," "work status," and "form of employment," regardless of whether these factors are legal or not (van Nierop et al., 2021, p2).

Undocumented migrant workers, however, have minimal access to the protection of their labour rights as they often only have direct access to legal protection if they are viewed as victims of exploitation rather than as workers. This is important to note when we see that the few directives that specifically address undocumented workers are people who are victims of trafficking, or directives that primarily target employers - not the employees themselves. Legality and migration status thus become necessary instruments for integration and labour rights recognition (Hernes, 2018, p1310). In so doing, the EU could ensure that the labour

[3] This definition arose from the judgment of the Lawrie-Blum case 66/85 on the 3rd of July, 1986.

law aligns with the non-discriminatory commandments of the European Convention on Human Rights and international conventions by the United Nations that promote non-discrimination in all fields and ensure individuals have equal rights to safe working conditions.

Due to their universalist ideology, multiple UN human rights treaties generally apply to everyone, regardless of citizenship, migration, or residence status. The grounds for prohibited discrimination include 'national origin,' which has not been interpreted as the same as 'nationality' (Keith, 2022, p54). However, Article 2 of the International Convention on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social and Cultural Rights (ICESCR) also includes 'other status,' primarily understood as migration or residence status. Therefore, discriminatory treatment between citizens and non-citizens, including those who are undocumented or illegally residing, may be considered a sufficiently justified form of discrimination. It is also opportune to mention that **discrimination based on national origin or migration status shows trends of also being linked closely with racial discrimination, and this adds a layer of fortitude to discrimination claims.**

This leads undocumented migrant workers to necessarily find directives or legal aid in legislation that does not specify the migration status of an individual for them to be considered a legitimate worker. This is one means to bring security to those victims of exploitation. For instance, the Working Time Directive 2003/88/EC[4] refers to workers as "any person employed" under the definitions provided by international labour law and the case law of the Court of Justice. Additional directives that do not include a specific definition of 'worker' that mentions the necessity of being a legal resident include the Health and Safety in Fixed-term and Temporary Employment Directive 91/383/EEC; the Part-Time Work Directive 97/81/EC; the Temporary Agency Workers' Directive 2008/104/EC; the Young People at Work Directive 94/33/EC and the Transparent and Predictable Working Conditions Directive 2019/1152.

[4] There are specific working time directives for specific provisions in diverse work sectors such as: civil aviation (2000/79/EC), rail (2005/47/EC), fishing and maritime (1999/63/ EC) and road (2002/15/EC) transport.

A significant case, **Tümer vs. Raad, concludes that undocumented workers must not be exempt from the definition of an employee or the rights afforded to employees as to do so would "undermine the purpose of setting minimum standards across the EU"** (Keith, 2022, p25). For undocumented workers to know that they can target litigation towards national governments that are ratifying Member States of directives with a non-exclusive definition of a worker or employee would put the necessary pressure on the EU to ensure better enforceability for the protection of all workers irrespective of migration status.

CJEU C-311/13 *O. Tümer v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen,* 5/11/2014:
Tümer, a Turkish national working irregularly in the Netherlands, was not paid wages by his employer due to insolvency. Tümer applied for pay under the Dutch Law on Unemployment, which implements EU Directive 80/987/EEC (now Directive 2008/94/EC) that protects employees' salary in cases of employer insolvency. The Dutch court ruled that Tümer did not qualify as an 'employee' due to his migration status, even if he had a work contract with the employer. The CJEU ruled that Member States cannot exclude individuals based on migration status. Tümer was entitled to the Directive's protections, and the Netherlands was deemed guilty for not fully complying with its EU obligations. This case recognises workers as rightful to labour protection regardless of migration status.

A fundamental understanding of safe and fair working conditions under human rights law, as noted by the UN Committee on Economic and Social and Cultural Rights (CESCR) General Comment 18, is **the role of work being "essential for realising other human rights" and "an inseparable and inherent part of human dignity."**[5] (Costello et al., 2022, p954). In the case of victims of trafficking, refugees, and asylum seekers, many state provisions allow for financial support. However, "providing financial support" does not justify work restrictions as it "does not address the denial of the dignity-enhancing role of work" (Costello et al., 2022, p954). Additionally, accepting a job out of necessity to generate income after having recently migrated to a new location can also pave the way to facilitate exploitation and labour that lacks dignity. Suppose one is brought to a level of material desperation where they are more willing to accept situations where conditions of dignity are not met. In that case, it is not a proper fulfilment of the state's positive duties to ensure adequate access to labour. **Dignity is a crucial part of the positive obligations and fulfilment of safe and fair working conditions for all workers.**

A critical remark is the gender bias in EU law's understanding of work. As aforementioned, not all cultures promote the inclusion of all genders in the world of labour.

[5] Committee on Economic, SOcial and Cultural Rights, General Comment 18. The Right to Work, Article 6 of the International Convention of Economic, Social and Cultural Rights, UN DOC E/C.12/GC/18; 16/02/2006.

However, EU law does not consider caring as ‘work’ (Shaw, 2018, pg 157). In cultures where certain genders are influenced to be home workers to care for family matters, this negatively affects the free movement of people who are not considered workers from the state but still have a role of labour that others (family or extended relatives) depend on. This will be developed further in the chapter on how migration policy imposes filters on the type of mobile workforce they provide access to.

Chapter 2: Freedom of Movement and the Right to Work in the EU

Freedom of movement is a strong pillar in the liberal human rights narrative. Highly valued as an integral part of democratic contemporary societies, freedom of movement is enshrined in the Universal Declaration of Human Rights, ICESCR, and ICCPR. The human right for free movement recalls and honours the inherent natural qualities of *nomadism* (Balibar, 2017, p29) that have been a long-lasting characteristic of human societies for all time. This is further represented in Europe as the Treaty of Rome was signed in 1957 between Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany, beginning a period of assimilating the free movement and mobility of people with the "free movement of goods, capital, services" (Dorn et al., 2021, p49). The Schengen Agreement of 1985 further strengthened this assimilation by dissolving the national borders between EU Member States and "facilitating cross-border work" (Dorn et al., 2021, p50). The free mobility schemes of EU citizenship became a primal benefactor of EU labour markets.

However, with the creation of such free movement schemes based on formal administrative apparatuses such as the EU passport and the creation of external fortified borders, free movement no longer resembles the free nomadism of our ancestors on an international scale. Instead, **"free movement" is now "primarily linked to economic interests," and such an evolution no longer posits it as an "unconditional 'right' with benefits attached"** (Shaw, 2018, p164). This section will highlight the role of free movement within the EU, the creation of its borders, and selectivity for those who may practically access this right and those who may not. The accessibility to labour in the EU has become highly dependent on one's accessibility to exercise freedom of movement.

2.1 Accessibility to Labour:

Within the EU Charter of Fundamental Rights, Article 15 identifies the right to work as applicable to anyone within EU territory and that anyone has the right to work in their preferred job. However, EU Member States are allowed to restrict access to specific individuals for reasons of labour market policy and choose to prioritise nationals of the EU and European Economic Area (EEA) or legally residing third-country nationals (ECRE, 2024). The reality that

different individuals are discriminated against due to their inherent vulnerabilities shows that the specific directives to combat inequality and discrimination in labour in the EU workforce are not being successfully employed by EU Member States as is their positive obligation to do so. It is legally granted that these directives and legal conventions vary depending on non-EU citizens' protection. In other words, **individuals who are not legal EU citizens are less protected against discrimination than legal EU citizens.** However, to what extent is this legal backfield ethical, and to what extent does this surpass the international conventions of human rights over merely the regional conventions of human rights?

Each migrant worker group (migrant workers, refugees, and undocumented migrants) has inherent vulnerabilities that create relevant inequality or labour inaccessibility, causing denial or exploitation. **Although every individual has labour rights per se, without the proper government regulations and the appropriate recognition of rights, one cannot access a healthy entrance into the workforce with their rights protected.**

Inaccessibility to labour has to be differentiated from forced labour, although both infringe on the human right to work. Inaccessibility to labour can be due to various reasons, such as lack of skill, language barriers, or being undocumented. Exploitation through forced labour as defined by ILO Convention 29, Article 2(i): "*all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself [or herself] voluntarily.*" This can often affect the most vulnerable groups who succumb to forced labour to protect their right to life itself. **Refugee women and children, unskilled migrants, and illegal foreign residents are the most likely groups to fall prey to this.** The job sectors that are most susceptible to employing migrants illegally, regardless of their residence permits, are "labour-intensive, low-skilled jobs at the bottom of the labour market" or sectors "where the demand for flexible labour is high" (Berntsen et al., 2018, p216). These mainly include: "construction, retail, the catering industry, temporary employment agencies, agriculture and horticulture, the metal industry, cleaning (with a specific focus on fast-food restaurants and hotels), transportation and logistics" (Berntsen et al., 2018, p216). It is essential to understand and analyse trends through labour inspections to recognise where vulnerable workers tend to be exploited by employers.

Although one cannot target a social group as a whole and deny the entirety of the social group specific rights, the government can enforce regulations that make it more

susceptible for individuals in certain groups to be targeted than other groups. If being able to migrate is a recognised human right, sustaining oneself and accessing the rest of the human rights and fundamental freedoms after migrating is also part of the state's positive obligations. However, the lack of access to labour and access to the workforce, or the potential of exploitation, represents a limitation on the potential of migration. Therefore, this lack of state protection from exploitative labour or access to labour rights protection can be interpreted as anti-migration. **Existing restrictions in employment opportunities for migrated communities also effectively restrict migration** (Oberman, 2013, p18).

2.2 The Case for Open Borders:

In *Aliens and Citizens: The Case for Open Borders* (1987), Joseph Carens posits a view encouraging the realisation of mobility, a cross-border labour force, and an end to exclusionary nation-state boundaries as a response to these current crises affecting marginalised migrant workers. Although greatly challenged as he posits a view of the nation-state without its defining characteristic of a border, his view of the world is still politically relevant. It introduces a question over which - or whose - human rights are to be encouraged to flourish. The nation-state's right to association is granted in a world of territorial limits. Still, the rights of those persecuted and the rights of those seeking better living standards are denied. This is arguably his view of our world today. Practising the view of the contrary - a characteristically egalitarian view - where open borders allow people to migrate freely is necessary to remind us of the protection of universal values and how it requires contextual flexibility and practical changes.

Today's political standing of international powers operates mainly as nation-states with a necessary reciprocation of recognising the independent sovereignty of each state. **"The power to admit or exclude aliens" is inherently linked to the "sovereignty" of the modern nation-state "and essential for any political community"** (Carens, 1987, p251). Nation-states establish the recognition of their sovereignty also by attributing citizenship. In Western liberal democracies, typically more affluent communities, citizenship acts as " the modern equivalent of feudal privilege - an inherited status that greatly enhances one's life chances." (Carens, 1987, p252). The arbitrariness of one's citizenship, as one legally receives it by either birthplace,

descent, or marriage (Blake, 2005, p226; Cohen, 2022, p139), makes it difficult to justify how citizenship may be used as an "assumption about the equal moral worth of individuals" (Carens, 1987, p252).

If the "state has no right to do anything other than enforce the rights which individuals already enjoy in the state of nature" (Carens, 1987, p253) and all individuals in a pure state of nature have intrinsic rights (this is also recognised in Article 1 of the Universal Declaration of Human Rights, 1948) then arbitrariness of citizenship providing certain rights to people is utterly contrary to the "assumption about moral equality that underlies" the school of thought of egalitarianism and universal human rights. **No one should be able to claim to have more or less natural rights based on distinct citizenship.**

However, a state protecting the rights of those within its territory is the "sole task" that justifies a state's sovereignty (Carens, 1987, p253). In other words, the state is "obliged to protect the rights of citizens and noncitizens equally because it enjoys a *de facto* monopoly over the enforcement of rights within its territory with other individuals" (Carens, 1987, p253). The state cannot intervene with individuals living as they choose in their personal lives as long as they do not violate other people's rights. This is also recognised as 'negative liberty:' freedom from intervention to allow one to fulfil their human rights (as coined by Isaiah Berlin), an intrinsic element of liberal democratic states today.

To reinforce this claim for liberal egalitarianism intrinsic to the modern state, Carens utilises John Rawls' Original Position to be applied globally (Carens, 1987, p256). Under the veil of ignorance, all social constructs are nullified and become "arbitrary from a moral point of view" (Carens 1987, p256). Therefore, as sex, race, and social class are nullified, so are differences between citizenships or if one is "an alien who wishes to become a citizen" (Carens, 1987, p256). Carens acknowledges the caveat of extending Rawls' Original Position to a global practice in that it requires a "particular understanding of moral personality," which is "characteristic of modern democratic societies but may not be shared by other societies" and that it is a *culturally specific* egalitarian moral view that "all people are free and equally moral persons" (Carens, 1987, p256).

However, in practising the Original Position on a global scale, one can derive similarities between the moral legitimacy of state sovereignty being constrained by such principles of justice, which seem universally applicable in modern democratic states. This is considered the

‘international difference principle,’ such as claims that the state cannot restrict religious freedom (Carens, 1987, p258). The ‘difference principles’ also provide that even if one lives in ‘different positions,’ their view of justice as morally equal individuals should be the same. In other words, people of different opinions may coexist in the same society as long as they accept everyone is entitled to their own opinion.

However, under the veil of ignorance, economic inequalities among states or citizens are reduced. In the ‘real world,’ such differences may be a valid reason for individuals to seek to migrate and find economic or labour opportunities elsewhere. Likewise, if one were to search for cultural opportunities that are only available in other societies, under the veil of ignorance, one would “wish to ensure the right to migrate as it may be essential for one’s life plan.” (Carens, 1987, p258) Even if the veil is lifted and one no longer requires the freedom of movement to express fulfilment in life, it still stands that it is a just requirement to allow that opportunity. Therefore, **Carens claims there is a basic agreement for “those in the original position to permit no restrictions on migration (whether emigration or immigration)”** (Carens, 1987, p258).

To counteract claims of chaos arising due to the liberal migration that may ensue, which may lead everyone to be “worse off in terms of their basic liberties” - perhaps overcrowding in certain areas or lack of workers and development in other societies - the original position would still be able to “endorse restrictions on immigration in such circumstances” (Carens, 1987, p259). **It may be necessary to restrict some extremes of liberties to ensure fundamental rights for all.** However, this should not be interpreted as an “excuse for restrictions on liberty undertaken for *other* reasons” such as discriminatory reasons (italics added, Carens, 1987, p259).

This may be considered a very common excuse in migration rhetoric in recent decades where the hypotheticality of threats to security, public disorder, unemployment, or terrorism allows governments to restrict freedom of movement. These restrictions are primarily based on xenophobic, nationalistic tropes and not under a reasonable understanding of how migration would affect public order. **Under the original position, it must be assumed that people would try to act justly, so basing restrictions on liberties on unjust speculations is unfair and untrue to the position of liberal egalitarianism that democratic nation-states assume to reflect.**

However, the real-life conditions of our world - the threat of armed invasion, economic inequalities, disagreements about justice, and deprivation of fundamental rights - do strengthen the case for state sovereignty controlling the entry of people to preserve the foundations of the nation-state. **It is crucial to maintain distinctions between "reasonable expectations and hypothetical speculations"** (Carens, 1987, p260). Arguments claiming relevant danger arising if migrants from societies where democratic or liberal values are weak or not present are a legitimate threat are lessons that have not been learned from past judgments. Carens quotes examples of such arguments being used in the 19th century against "Catholics and Jews from Europe and against all Asians and Africans." (Carens, 1987, p260) If we have learned how those arguments used in the past are morally wrong, "not to say ignorant and bigoted," then we must be "wary of resurrecting them in another guise" in today's migrant rhetoric (Carens, 1987, p260).

Instead, real-life scenarios that may be a legitimate concern would be the sheer volume of potential demand for entry into a nation-state. **According to the International Organisation for Migration (IOM), there are an estimated 281 million international migrants worldwide** (Mcauliffe, 2024, p xii). Numbers generally trend upward due to "economic disparities, demographic pressures, political oppression, Europe's human rights culture, the self-perpetuating chain migration arising from kin and family contacts…" (Coleman, 2009, p5). Under such expectations, restrictions on migration to prevent public disorder may be justified.

However, it must also be considered that **70 percent of refugees and protection seekers are hosted in "countries neighbouring their countries of origin"** (Mcauliffe, 2024, p44). The primary host nations are neighbouring countries, which tend to be low- to middle-income economies. This is exemplified by Turkiye being the "largest host country in the world" for the seventh consecutive year, hosting 3.6 million refugees - primarily of Syrian origin (Mcauliffe, 2024, p44). Pakistan and the Islamic Republic of Iran are also among the top ten refugee-hosting countries, mainly hosting refugees from Afghanistan (the second-largest country of origin) (Mcauliffe, 2024, P44). Also, UNHCR claims that "the least developed countries hosted a large number of refugees," with one in five of all international refugees being hosted in sub-Saharan Africa, and 90 percent in Asia and the Pacific primarily in the Islamic Republic of Iran (3.4 million), Pakistan (1.7 million) and Bangladesh (952,400) (Mcauliffe, 2024, p44).

According to IOM, high-income countries' population growth between 2000 and 2020 was mostly attributed to international migration (net inflow of 80.5 million), which "exceeded

the balance of births over deaths (66.2 million)" (Mcauliffe, 2024, p24). **IOM predicts that in upcoming decades, with the decrease of birth rates in high-income countries, "migration will be the sole driver of population growth in high-income countries"** (Mcauliffe, 2024, p24) - which most EU Member States are. In fact, migration has often been manipulated as a tool employed by countries in Western Europe, Northern America, and Australia "to reduce the economic and social effects of declining birth rates and ageing populations" (Mcauliffe, 2024, p82). Therefore, restrictive policies to limit migration in the EU or the UK do not tend to reflect legitimate concerns for public disorder. Instead, they seem to require it due to their lagging birth rates. This demonstrates a necessity for migration to *preserve* public order - a functioning society with workers contributing to the administrations of the state.

To practise a perspective where the national citizen of a host country would be in the relevant worst-off position, in order to argue against migration on claims of public disorder, "it would be necessary to show that immigration would reduce the economic well-being of current citizens below the level the potential immigrants would enjoy if they were not permitted to immigrate" (Carens, 1987, p262). However, general trends depict that **economies tend to increase with the intake of new migrant workers due to the generation of new market flow.** Free mobility of capital and labour is considered essential to "the maximisation of overall economic gains," according to classical and neoclassical economists (Carens, 1987, p263). **To achieve a maximisation of labour and economic gains, free mobility requires open borders, and the economic costs - rather, the economic fears - of current citizens do not hold in a utilitarian framework to justify restrictions.**

Concerning culture being a viable reason to restrict migration to preserve citizens' basic liberties, it is discredited on the premises of the 'principle of perfectionism.' Only in states where social institutions are "arranged to maximise the achievement of human excellence in art, science, or culture regardless of the effect of such arrangements on equality and freedom" (Carens, 1987, p262) would the restrictions on migration quantify as a viable option. However, Carens believes in the original position, "no one would accept the 'perfectionist principle' for the fear of being the one needing to sacrifice a right for the sake of cultural preservation" (Carens, 1987, p262).

Additionally, it is a valid question to ask if all cultures are worth saving. For instance, a culture that encourages racism, sadism, or practices that are harmful to others' fundamental

rights. It does not stand in an egalitarian mindset, which grounds the majority of UN conventions, that a culture that limits the fundamental rights of others - even people who are not state nationals - could be justified. Human rights laws on non-discrimination posit such limitations on nations legally expressing such 'cultures.'

Carens claims, "Under current conditions when so many millions of poor and oppressed people feel they have so much to gain from migration to the advanced industrial states, it seems hard to believe that a utilitarian calculus which took the interests of aliens seriously would justify significantly greater limits on immigration" (Carens, 1987, p264). It is also essential to acknowledge **the skeleton of today's globalised economy of transnational corporations is rooted in colonial histories.** Therefore, the economic luxuries of the few who live in former colonial states and high-income countries share such liberties with citizens of formerly colonised states, who are currently still oppressed by generational poverty due to the infringements imposed by colonisation, are morally reprehensible.

Carens' examples of threats of public disorder, economic inequality, and cultural preservation to attempt to provide grounds for restrictions on migration do not hold strong enough when adopting the view of the original position. Although, liberalism is indeed **"not designed to deal with questions about aliens" due to its "assumed (...) context of the sovereign state," and aliens are intrinsic elements outside the state's sovereignty** (Carens, 1987, p265). Regardless, liberalism's shortcomings do not seem sufficient to ground normative reasoning into oppressive migration restrictions today due to the greater moral weight of the global distributive justice principle. It imposes "an obligation to provide aid to others who are in dire need, even if we have no established bonds with them" (Carens, 1987, p266) - a sentiment reflected in the drafting of the UN Refugee Convention of 1951.

Carens concludes by claiming that in other societies of a different moral tradition, there may be more sufficient grounds to justify restrictions on migration. However, as "*we* are products of a liberal culture," we cannot explain a normative logic that allows for moral distinctiveness between citizens and non-citizens. Indeed, it is challenging to claim that any liberal modern nation-state today derives from a singular ethnic, religious, racial, or territorial origin. The idea of a "permanent 'guest-worker'" conflicts with exclusionary self-determined communities, as over time, people naturally experience naturalisation, acquire residence, and become active members of the local economy (Carens, 1987, p266). The growing international

human rights law bodies and the mainstreaming of universalist principles in national and regional constitutions also exemplify this. Carens ends by claiming that **to "commit ourselves to open borders would not be to abandon the idea of communal character but to reaffirm it," as it would demonstrate an "affirmation of the liberal character of the community and its commitment to principles of justice"** (Carens, 1987, p271).

Chapter 3: The Right to Exclude

From a purely normative perspective, every human should have access to healthy and safe labour rights and safe migration. However, ascertaining the same standard of human rights for all people is constantly challenged by limited or contested resources and competitive economies. This tends to increase states' habit of prioritising their own citizens' needs before attempting to ascertain other people's rights.

What legitimisation do nations have to be able to not provide or guarantee labour rights to foreigners? Perspectives seem to be shifting from a nation's normative obligations to its legal obligations in terms of labour rights to migrants, refugees, asylum seekers, and undocumented communities. Under what grounds are states morally allowed to disregard their obligations to people who are not citizens and instead only focus on the political community originating from the same nation-state? Christopher H. Wellman, in his work *Immigration and Freedom of Association* (2008), proposes the primary argument that states have the right to exclude foreigners in their exercise of freedom of association and right to self-determination.

3.1 The Right of Association:

Christopher H. Wellman's *Immigration and Freedom of Association* claims that a state has the right to control migration over its territorial borders (Wellman, 2008, p109). However, this should not deny that wealthy states still have "extremely demanding duties of global distributive justice" (Wellman, 2008, p109). This claim is based on the context of liberal Western democracies and the notion of a nation-state where matters of citizenship are relevant political and identificatory factors. In liberal and Western democracies, the freedom of association is "widely thought to be important" and includes the right *not* to associate (Wellman, 2008, p109). We see this with human rights laws protecting people from forced marriage, having the freedom to choose who they would like to marry and have a family, and the freedom to associate with whichever religion one chooses (Wellman, 2008, p110). He claims that "among our most firmly settled convictions is the belief that each of us enjoys a morally privileged position of dominion over our self-regarding affairs (...) which entitles us to freedom of association in marital and religious realms" (Wellman, 2008, p110).

The freedom to refuse association is a vital element of the right to associate because it allows the group of people that identify under a uniform association to make it *their* association of a specific kind. Therefore, this "right to exclude" is crucial to the freedom of association (White, 1997, p373).

Wellman argues that this right of an individual "to determine whom (if anyone) he or she would like to marry" should extend to the right of a group of fellow citizens "to determine whom (if anyone) it would like to invite into its political community" (Wellman, 2008, pg 110-111). However, this does not perfectly follow through, as the political community of a state is not necessarily directly aligned with the authority of the state. **How one becomes a citizen of a state is not necessarily as voluntary as the choice of a marriage or joining a religion** (citizenship is arbitrary). Therefore, to defend a state's right to self-determination, the freedom of association for a state is challenged.

Wellman concedes that self-determination and freedom of association are challenged to establish a state's authority. However, he uses the bilateral costs that citizens of a group owe each other in the form of responsibilities and duties to claim that the state also has duties and responsibilities to the citizens as a group. As citizens' obligations to one another translate into obligations towards the state in taxes, public care, etc., the state therefore also has duties towards the citizens in the form of security, providing public services, etc. Wellman identifies relationships within the political community, between citizens and the state, in the conception of 'costs' that one affords to others or must share with others.

Wellman uses the differentiation between *immigration* and *emigration* to demonstrate this, claiming that "one may unilaterally emigrate because one is never forced to associate with others, but one may not unilaterally immigrate because neither are others required to associate with you" (Wellman, 2008, p136). Migration is more essential to be discussed because "it can involve costs to those who must include you as an equal in their political community" (Wellman, 2008, p136). Morally, there is a requirement under a state that must functionally "coerce all within their territorial borders" to be an "effective political society" (Wellman, 2008, p131) and **once someone is a new member of the political community, all the fellow citizens must extend the costs of the benefits of political membership - which can be "substantial"** (Wellman, 2008, p134). This requires potentially sacrificing a portion of your liberties to make space for someone else in your community, and **if there are a significant amount of**

‘newcomers’ then “it is only appropriate that the group as a whole should decide with whom the benefits of membership should be shared” (Wellman, 2008, p134).

However, Wellman also considers that due to the “history of colonisation, as well as the current levels of international trade (among other things), it is simply not the case that the world’s wealthy and poor are unconnected and unaware of each other” (Wellman, 2008, p124). Therefore, excluding individuals from a poorer community from membership to a wealthy community is morally objectionable. He claims that **it is a “natural duty to assist others when they are sufficiently imperilled and one can help them at no unreasonable cost to oneself”** (Wellman, 2008, p124).

In the context of this research, this provides positive differentiation for refugees and asylum seekers to utilise their fragile and internationally protected recognition to request membership in the wealthier community. In the case of migrant workers, Wellman does consider that other relationships of inequality should not be forced, such as Germany's agreement with Turkiye for ‘guest workers’ (Wellman, 2008, p126). German business owners are not obliged to hire and train these guest workers. However, they must not be treated as “political subordinates” (Wellman, 2008, p126) - whatever this means. Although the legal notion of a guest worker implies temporary residence and an eventual return to the country of origin (just as is reflected in the legal conventions regarding the reception and hosting of refugees), “a democratic state is not entitled permanently to withhold citizenship status from those residing (for indefinite periods) within its territory” (Fine, 2010, p344). The right of a citizen to associate, or the collective’s freedom to associate (or refuse to associate), does not automatically extend towards the state’s permission to exclude “long-term residents of the state from the political community” (Fine, 2010, p344). A state, therefore, also has a positive duty to ensure the inclusion of long-term residents in the political community is expressly enacted. **If a country allows guest workers to arrive but does not encourage programs for their naturalisation in the labour force or to become active participants in the economy; therefore, it does not encourage local businesses to hire them. This “omission of action” hinders and harms non-citizens** (Fine, 2010, p347), nullifying Wellman’s comparison to German business owners not being obliged to hire Turkish guest workers under the state’s agreement.

Wellman also translates the natural duty of global redistribution as not necessarily requiring a wealthy state to share wealth with outsiders by opening political borders. Wellman

suggests a state may merely "transfer the required level of funds abroad" (Wellman, 2008, p127). This separates the duties of a political community to new members and maintains the society's right to freedom of association/exclusion. Therefore, Wellman confirms that "even if legitimate states have no duty to open their borders to the world's poor," this is differentiated from slamming one's doors to "people desperately fleeing unjust regimes." (Wellman, 2008, p128)

However, there is also the proposal to radicalise this claim further that even moral duties towards refugees and asylum seekers, "as implausible as it might initially seem…a state is not required to take them in" (Wellmann, 2008, p128). He claims that affluent societies have a "disjunctive duty:" where "global poverty requires wealthy states to either export aid or import unfortunate people, the presence of those desperately seeking political asylum renders those of us in just political communities duty bound either to grant asylum *or to ensure that these refugees no longer need to fear their domestic regimes*" (emphasis added, Wellman, 2008, p129). Therefore, exporting justice may also be in the form of a third party intervening *on behalf of* constituents left vulnerable due to an illegitimate government or a government unwilling or unable to provide fundamental human rights (Wellman, 2008, p129).

However, **in the case of war, political instability, or in the case of natural disasters, exporting assistance may not be sufficient in providing legitimate safety to refugees and asylum seekers.** It diminishes the problem and confuses sharing membership benefits with merely exported financial or occupational strategies (Fine, 2010, p352). It also does not consider the case for refugees or asylum seekers who will be persecuted regardless of these foreign interventions because of reasons of the society itself being persecutory to the individual requiring safety in a society that is more accepting of their identity. Just as it makes sense for an individual to want to migrate to be closer to a community that practises the same religion as they do, it should also make sense that a person may wish to migrate to live in a community that practises the same identity, social or political practices as them - and that is not necessarily found in the territory of the place they are trying to leave. Additionally, the impact of third-party humanitarian intervention is beyond the scope of this research, however, it has been greatly criticised throughout the decades and often leaves situations worse-off for the native populations.

Furthermore, although Wellman initially claimed that global distributive justice, based upon colonial history and international trade, is immoral for any wealthy or affluent state to deny having, the means for resolving this duty seem fickle. **The case for migrant workers,**

individuals that may come from globally poorer states or more economically unstable states, are not here considered to be legitimate enough 'protection seekers' to knock on the doors of a wealthier society. International trade may be considered a means of resolving this distributive justice, 'exporting' one's financial aid by making capitalist relations. Yet, this would sustain an unequal global relationship and cement the neocolonial patterns in global markets today, where formerly colonised countries primarily *work for* former colonial countries and generally receive less revenue and affluence. We may see this in the minor forms of trade and labour agreements, such as the aforementioned 'guest workers' agreement between Germany and Turkiye. Turkish workers provide cheap labour for Germany, which can profit from this labour significantly more than the Turkish workers. Additionally, they must return home before they 'overstay their VISA.'

We can also see this in EU labour practices that prioritise the nationals of Member States. This can be performed either in the form of requiring a separate work permit, a labour market test, or a sectoral limitation, which all impact seasonal workers or workers in fields with recruitment difficulties and work sectors that do not require certified skills a disproportionate challenge compared to nationals of that Member State (ECRE, 2024, p5).

Under human rights law, **labour market policies that practise selectivity with foreign or migrant workers can extend to violate and segregate the diverse individuals within the political community already.** In other words, creating selective labour market policies that eliminate or segregate the presence of a given group from the political community is "insulting to the members of that group already present" (Wellman, 2008, p140). It can be claimed that a state is not required to enforce laws nor provide liberal rights to people outside of its jurisdiction (Silva, 2015, p226). Still, by minimum requirement, the state is obliged to treat all of its subjects as equal citizens and make these rights legitimate.

Furthermore, Michael Blake claims that even if a "hypothetical pure society could close the borders to preserve itself," having a migration policy based on racial segregation could not be achieved without "implicitly treating some individuals already present within the society as second-class citizens" because of how diverse, and interconnected, modern multi-ethnic democracies are (Wellman, 2008, p140). For further illustration, take into consideration the criticisms of the White Australia Migration scheme (Wellman, 2008, p138).

It is opportune to reflect on the state's relationship to its territory. **If not for the creation and fortification of demarcated borders, the state's relationship to its territory is not one of ownership,** like how one can decide the conditions of who enters and exits one's private property. What grants states their territorial rights? Wellman's argument attempts to hold onto the necessity of the state exercising territorial control to guarantee "the benefits of political stability" (Fine, 2010, p355). However, the principle of freedom of association fails to convince the reader of what grants states their territorial rights—also, considering that it does not follow that all citizens share the same view of who is allowed to enter and who is not (Fine, 2010, p350, p354).

The case for open borders, the case for restriction of migration, and the limitations of liberalism in the nation-state international complex the EU is positioned in, are to be defined to counterpose issues arising from the dynamic economic model that the culture and community of the nation-state is attempting to preserve. Although this sounds rather harsh, it intends to demonstrate how transnational corporations, with working factories across the globe and selling points in every state, cannot allow for these businesses while claiming to prefer an isolationist and pure culture within their community. The economic character of each individual takes precedence in a world where dynamic economies are the primary reasons we like what we do or consume. Arbitrary factors such as borders are not accurately representative of cultures.

Even with opposing views, both Carens and Wellman agree on the moral responsibility of nation-states tending to global distributive justice. Whether this is in the form of allowing free reign for communities to seek residence and labour wherever they please, as Carens recommends, as long as migration policies are solely focused on ensuring no market gaps or overcrowding are leading to public instability. Otherwise, as Wellman suggests, in the form of exporting justice, even if it is not appropriate in all scenarios that cause people to migrate. The current migration policies in the EU attempt to incorporate both approaches. **Perhaps it is for this moral conflict between attempting to provide universal human rights of movement and labour to all nationals and foreigners alike while also pertaining to a cultural and economic trend of wanting to provide national resources to their communities *first,* exemplified by the role of EU external borders of demarcating diverse communities.**

3.2 The Right to Have Preferences?

Within the EU Charter of Fundamental Rights, Article 15 identifies the right to work as applicable to anyone within EU territory and that anyone has the right to work in their preferred job. However, EU Member States are given the possibility to restrict labour access to specific individuals for reasons of labour market policy and choose to give priority to nationals of the EU, EEA or legally residing third-country nationals (ECRE, 2024, p3).

Enshrined in EU labour rhetoric, it is evident that a nation-state prioritises its nationals and individuals who have committed to its bureaucratic sovereignty. In regions of high unemployment or fears of brain drain, a European state may focus on alleviating these issues for its citizens before attempting to quell the labour rights of others. **The most common fear in regions of high local unemployment or of high average age in the work sector (declining population), the most common rhetoric is that an influx of migration "may result in lower wages and unemployment for local workers in the sector"** (Kelley, 2022, p256).

As a nation can legally limit the access of labour to foreigners or restrict them by law from "engaging in business" (Kelley, 2022, p256), this encourages dangerous additional obstacles that can further detriment the local community. Suppose a refugee, migrant worker, or undocumented worker cannot open a bank account, receive or transfer money, or benefit from loans. In that case, they cannot apply for work permits or engage in legal work. **In a context where a nation does not provide adequate avenues for refugees, migrant workers, or undocumented people to access safe and legal labour, the conditions may drive individuals to "cope in ways that are harmful to themselves and to others"** (Kelley, 2022, p255). This may resemble survival sex, child labour, forced marriage, or working in the informal sector, which can include the drug trade or other illegal trades. **This is where the competition of foreign workers more strikingly affects local workers, generally in the low-skilled work sector.**

The "less educated and female workers" (Kelley, 2022, p255) of the native community are disproportionately affected when non-natives are not given adequate access to labour and must infiltrate these 'more accessible' informal, illegal avenues to receive a wage. However, even in these situations where migrant workers, refugees, and undocumented workers have a more direct effect on workers in local informal sectors, the conditions are often "more exploitative" for foreigners than for nationals (Kelley, 2022, p256).

In the case of refugees specifically, where states impose restrictions on legal labour and impose conditions whereby refugees must live and sustain themselves within the confines of a reception centre, ensuring that these camps are for "civilians only and weapons-free" is of ultimate interest to ensure risks of crimes remains low and unassociated with people seeking legitimate protection" (Kelley, 2022, p256). However, host governments have appeared instead "unwilling or unable to meet" such safety conditions in reception centres (Kelley, 2022, p256), once more pushing people to avoid these reception centres and search for other structures or avenues that can support their livelihood.

There is also the belief that providing appropriate measures to improve life quality and social and economic security for migrant workers, refugees, or undocumented workers will "inevitably reduce their readiness to return home" (Kelley, 2022, 256). In the case of migrant workers, this would seemingly encourage them to choose to stay and attempt to integrate and become a local worker. In the case of refugees, this may mean they decide to prolong their displacement. For the case of undocumented workers, this could mean they persevere in refraining from naturalising legally. Although these factors may be legitimate in some cases, it is reasonable that **even hostile living conditions in a host state will not necessarily drive one to return home if the conditions in their nation of origin are still unsafe, unstable, or worse off than the host state.** This is the most typical dynamic between migrants affected by unfavourable labour conditions in the EU - they tend to arrive from countries of significantly lower income than the average EU Member State (not to mention general political and social stability for most of the European population in the last few decades).

However, it is also necessary to note that **the EU, primarily a high-income region, accepts low amounts of refugees and migrant workers compared to low- or middle-income countries.** As of 2022, approximately only 17 percent of refugees are located in high-income countries (Kelley, 2022, p261). **This also gives them a "greater capacity to absorb them"** (Kelley, 2022, p261). Such high-income regions as the EU generally have "lower rates of unemployment, more effective labour market regulations, better working conditions, favourable business, and investment climates" and access to legal jobs or the ability to "move where they are more likely to find employment" are more common (Kelley, 2022, p261).

For example, in the case of Germany, after Alan Kurdi's image surfaced on everybody's television screens, Germany vowed to welcome 800,000 refugees a year (Mavelli, 2017, p810;

Georgi, 2019, p98). It re-introduced its *Willkommenskultur* and positioned itself as a humanitarian nation with a "friendly face in response to emergency situations" (Georgi, 2019, p98). However, it does not seem as selfless an act when considering Germany's population is declining steadily, expected to fall from 81.3 million to 70.8 million in 2060 (Mavelli, 2017, p829). According to a report by the Centre for European Economic Research, to provide for its non-working older citizens, Germany must rely on an annual net of incoming migration of more than 200,000 skilled/semi-skilled individuals (Mavelli, 2017, p829).

The influx of refugees and asylum seekers to Germany between 2015 and 2016 "has not had much of a displacement effect on native workers" (Gehrsitz, 2017, 23). There also has not been found any direct statistical or economically relevant relation between "local unemployment rates and migrant inflows (...) nor have the presence or the capacities of a reception centre any influence on the overall unemployment rate" (Gehrsitz, 2017, p14-15). Although, it does stand that in the short term, "not everybody who was granted asylum intends to become part of the labour force" (Gehrsitz, 2017, p16). This may be for cultural difficulties, psychological or physical traumas, or language impediments. In the example of Syrian women - Syria being one of the primary nationalities that arrived in Germany - "around two-thirds… are neither in employment nor looking for work" two years after arrival (Gehrsitz, 2017, p16), and additionally, minors are more likely to join school rather than work. **Groups of women who do not work and minors who prefer to complete their education show up in unemployment statistics but must be considered within their specific cultural, gender and age context**. The unemployment rates of non-Germans can be attributed to the difficulties of the German labour market in absorbing large influxes of workers, and "these difficulties tend to be more pronounced in countries that received larger refugee inflows" (Gehrsitz, 2017, p16).

However, short-term labour supply shock can eventually be smoothed through. Throughout the year, of the newcomers, "approximately half have reportedly found work, around 50,000 were doing apprenticeships, over 10,000 enrolled in university, and three-quarters of the arrivals lived in their own accommodation and felt welcome in Germany" (Kelley, 2020, p260). Although many refugees may be working with jobs below their skill level, and women are underrepresented in employment statistics because they may come from traditions where work outside the home is discouraged, Germany has been considered a case of labour integration success (Hasselbach, 2020). When considering the rise in popularity of the AfD German political

party, with anti-migration rhetoric likewise on the rise, refugee inflows may potentially have allowed it to achieve “larger electoral success” (Gehrsitz, 2017, p19). However, such results do not necessarily correlate between counties with “larger inflows than in those with smaller inflows of migrants” (Gehrsitz, 2017, p19). Exposure to migrants at work or refugee communities has been shown to “neither increase nor decrease a country’s constituents’ propensity to cast their votes for the AfD party” (Gehrsitz, 2017, p19). Therefore, although public political rhetoric may illustrate one version of a reality, labour statistics depict another. It is on these we must form our opinions on the benefits of labour integration of newcomers and migrant workers.

Chapter 4: Matters of Control - Employers

In the labour market, it becomes clear that when nation-states although they claim they cannot control economic fluxes or the state of banks and global economies, they can still control their labour force's shape and size (and perhaps colour). **Migrant labour fills the gaps where the EU believes it requires more labour force. This creates an identity for people who are solely conscribed to being a worker, and their personhood is limited to only their usefulness for the state they are seeking asylum in - whether this is political asylum or economic asylum.** This creates a constant state of dependence where, once more, **worse-off global communities are left vulnerable due to arbitrary characteristics, left to prove themselves against the impositions of a global north that exploits and inflicts such an inherent vulnerability -** in other words, the need to work to survive.

In this following section, various modes of control present in the intersection of labour and migration policies in the EU will be highlighted. Primarily, diverse ways of implementing employer's control and state control over the socioeconomic conditions of migrant workers.

As the states may hand a portion of their responsibilities to ensure workers are not exploited and are legally employed to the employers and businesses themselves, this impacts the quality of labour migrants may be subject to. On the other hand, the state may control migration policies that constantly open and close or apply different filters on nationality, class, gender, age, and race, impacting the type of workers that businesses and employers may hire. These state-imposed filters in migration policy reflect the worker 'preferences' a state has and often align directly with the specific needs of the host nation-state at that time. **Employers' control and state controls in labour and migration are intrinsically linked and affect one another, sometimes working to benefit the economy and sometimes benefiting the state but rarely benefiting the workers.**

Furthermore, in the case of historical colonialism that has today created links to a globalised economy, it is essential to note the effects of control that a dynamic capitalist global economy imposes on migration and labour and the EU's efforts to relate to it. Although this is not necessarily a means of the EU controlling foreign labour, it is still **an attempt for the EU to maintain and maximise the benefits that it may receive from such an economy that it has**

arguably spearheaded thanks to its exportation and institutionalisation of neocolonial markets that are the primary driving forces of its affluence.

Lastly, such means of control in labour and migration policies will be posited against the efforts to combat exploitation and forced labour. Pondering matters of control without reflecting on exploitation as a universally acclaimed issue of moral (physical and financial) violation would be short-sighted. The fight to end exploitation may alleviate the severity of other poor working conditions and unsatisfied labour rights, however, this section will primarily focus on how the *concept* of exploitation is used to control other sectors of labour where workers, both foreign and local, are left to struggle.

Such methods of control strictly limit and control the accessibility of the human right to movement and the human right to work, particularly for people who are third-country nationals. The crux of the argument is to understand why **controlling and disproportionately restricting the freedom of movement and labour rights of third-country nationals is of primary importance to the EU beyond ascertaining equal human rights across the global spectrum**.

4.1 Employer's control

- *Impact of migration status on permissibility and type of labour possibilities (illegal work permit but legal residence, illegal work permit and illegal residence, or limited work permit in the case of refugees/asylum seekers).*
- *EU Directive on Employer Sanctions makes it the employer's responsibility to check the migration documents of the people they employ; there is a lack of resources to ensure this is done correctly.*
- *Trends of targeting ethnic entrepreneurs and shadow economies.*
- *Collaboration of migration services and labour authorities, but lack of a 'firewall.'*

The relationship between employment and migration is a matter of life or death for many migrant workers. **The legislative procedures that place the chance to work and earn a wage for migrant workers in the hands of employers lessens the weight of the state's responsibility to ensure that migrant workers receive their human rights.**

In the case of migrant work permits, many government schemes hand employers "additional means of control" (Anderson, 2010, p310). **In employer-sponsorship work permits, an employer can, for any reason, terminate a worker's contract and put in "jeopardy" not only their job but also their residency** (Anderson, 2010, p310). This makes migrant workers feel they are "unable to challenge employers"(Anderson, 2010, p310).

Additionally, employers can also take advantage of the interlinked relationship between labour and migration status of migrant workers by "forbidding union membership" or obliging the workers to comply with antisocial work hours and unsafe and unfair working conditions for fear of losing their residence (Anderson, 2010, p310). Such an employer-dependent work permit system gives employers "powers of labour retention without jeopardising their ability to fire" (Anderson, 2010, p310), where migrant workers comply with harsh conditions because of their extreme vulnerability to migration and residence status.

The use of sponsored work permits has "received particular criticism because of their impact on retention" (Anderson, 2010, p310). Many "advantages" in the eyes of the employer, such as the "reliability, honesty, and work ethic" of migrant workers, have been racialised, as they suffer compromised work/life balances due to the dependence of their residence on their work (Anderson, 2010, p310). **Prioritising the advantages employers perceive that are directly linked to the inherent vulnerability that employer-sponsored work permits impose on migrant workers is a direct violation of labour security and fair working conditions for migrants, as other nationals would not fear losing their residence if their employer decided it is the case.** This discriminatory work relationship rests on the potential of exploitation and the benefits that the employer and the host state receive from 'hard-working' migrant workers.

Not only are sponsored work permits a means of giving the employer more control, but sanctioning exploitative employers through fines also has the same impact. The Employer's Sanctions Directive 2009/52/EC (henceforth, ESD) provides minimum standards on sanctions and measures against employers that employ illegally or employ people with illegal residence permits.[6]

In Preamble 2 of the directive, the text quotes, "*A key pull factor for illegal immigration into the EU is the possibility of obtaining work in the EU without the required legal status.*

[6] In the case of child workers who are working in exploitative conditions and have illegal residence, Article 13 provides that they are due "temporary residence permit to facilitate the lodging of complaints against their employers" (FRA, 2020, p87).

Action against illegal immigration and illegal stay should, therefore, include measures to counter that pull factor" (Berntsen et al., 2018, p208). It is also justified by the intention to protect local businesses and workers by deterring exploitative employers that hire migrant workers illegally (Bloch et al., 2015, p135). The ESN's intent to "prohibit the employment of irregular migrants from outside the EU by punishing employers through fines, or even criminal sanctions in the most serious of cases" (FRA, 2020, p260) is, therefore, a further means of controlling migration by limiting labour accessibility for specific groups.

An additional reason why the illegal employment of migrants must be controlled is that it may result in the exclusion of one's right as a migrant worker to be employed legally, which would "push them into exploitative working arrangements" (Berntsen, et al., 2018, p209) and to ensure national workers are not denied labour access by "unfair competition from cheap labour" (Berntsen et al., 2018, p 210). This directive legally binds all EU Member States except Ireland and Denmark (Bloch et al., 2015, p136). Employer sanctions are also reinforced in the Treaty on the Functioning of the EU in Article 79, obliging the EU to develop measures to prevent and combat illegal migration. It provides basic protection for the employees hired illegally and a small degree of (financial) protection from abusive employers. However, it is primarily a tool used to fine employers, which has been widely criticised as a policy instrument (Berntsen et al., 2018, p 208).

The ESD requires the EU employer to check that the third-country national they are hiring is "authorised to stay" and to "notify the relevant national authority if they are not" as per Article 4 (FRA, 2020, p260). This directive also applies to "private individuals as employers" since many third-country nationals or migrants work in "irregular situations" in private households as well (FRA, 2020, p 260)[7]. This requires employers to check the residence and work permits of the migrant worker they want to employ and to keep copies of these documents for the duration of the employment (at least) (Berntsen et al., 2018, p211).

Article 5 provides that if employers have hired a person to work for them without checking residence papers and official permits, they are liable to financial penalties and "the cost of returning irregularly staying third-country nationals to their home countries"

[7] There are additional details for cases where the employer is a subcontractor, or the worker is employed through an agency. National law can also provide for a chain of liability if there are a chain of subcontractors responsible. In such cases, the subcontractor, or the agency is liable to pay the financial sanctions and outstanding remuneration to the migrant worker.

(FRA, 2020, p260). The directive also requires employers to pay outstanding wages, taxes, and social security contributions (FRA, 2020, p260). **Such financial sanctions can also increase according to the severity of the case.** For instance, not only considering the length of time the employee was working illegally but also depending on if they were employed illegally but had a legal residence permit or if they were employed illegally and had an illegal residence. If the employer has committed "repeated infringements, the illegal employment of children or the employment of significant numbers of migrants in an irregular situation," then they are liable to "criminal penalties" (FRA, 2020, p260). **The severity of the sanctions under this directive also varies considerably according to each Member State, which, referencing the European Commission on the evaluation of the implementation of the directive, "raises concerns whether sanctions can always be effective"** (Berntsen et al., 2018, p 208/9).

The (limited) way the directive protects migrants is by operating clauses for the employees to request payment of any outstanding remuneration from their employer (Article 13). The 'outstanding remuneration' should also include "the difference between what they were paid and the legal minimum wage" (Berntsen et al., 2018, p212). It requires the state to provide access to "support from third parties, such as trade unions and NGOs" (FRA, 2020, p260). However, t**he directive does not impose a financial sanction on employers who are discovered for "undercutting the minimum wage…or failing to meet tax obligations" since that "would go beyond the scope of migration control"** (Berntsen et al., 2018, p212). Once more, it highlights how **the interests of migration control supersede the interests of providing fair working conditions.**

The directive also allows residence permits to be issued to victims of "particularly exploitative working conditions who collaborate with the justice system" - this is reinforced by Articles 9,10, and 14 (FRA, 2020, p260). However, according to the Platform for International Cooperation on Undocumented Migrants (PICUM), **there is a lack of implementation of "the right to available, accessible and effective complaints mechanisms" of the ESD** (Keith, 2022, p63). Without such an effective tool, the ESD cannot be fully implemented, as many workers in exploitative conditions are fearful of making complaints against their employer in fear of being deported.

Furthermore, the ESN, as sponsored work permits do, puts a lot of responsibility away from the state and into the employer's hands. A case study on the Netherlands by Berntsen and

de Lange in 2018 analysed the role of how the ESN was executed and the degree of its success in achieving "labour market regulation over irregular migration control" (2018, p208). In their report, they highlight that from their research analysing 1179 labour inspector reports in 2014, "little is known about the effectiveness of employer sanctions as measures of migration controls to deter, expose, and curb irregular migration; to protect local businesses and workers from unfair competition, and to fight exploitation of workers" (Berntsen et al., 2018, p208).

Additionally, **when it comes to providing rights for those illegally employed - such as the fair remuneration of outstanding wage - it is "hardly ever met in actual practice"** (Berntsen et al., 2018, p 209). In 20 percent of the labour inspectorate reports, there was "no information…on the length of time the migrant had been working at the specific workplace" (Bernsten et al., 2018, p217). Additionally, 17 percent of migrant workers "states that it was their first day working there" or that they had been working "for one week or less," leading one to assume that the information provided by the migrants themselves on the duration of employment is "probably not always reliable" (Bernsten et al., 2018, p217).

Bernsten and de Lange's report also explains why labour inspectors were called to a business to control if the workers were legally employed. In eight cases, the reason was "a statement to the labour inspector that someone with a foreign (non-European) appearance has been observed working" (Bernsten et al., 2018, p219). This is not necessarily a reason to assume working conditions are in peril, nor a reason to assume labour exploitation is occurring. For the labour insepctor to take it as a reason to investigate illegal employment in a workplace may be associated with discriminatory prejudice. The Dutch Council of State also "ruled that gathering evidence during a workplace inspection that was held based on the foreign appearance of the worker resulted in unlawfully gathered evidence" and is a clear "violation of the nondiscrimination clause in the Dutch constitution" (Bernsten et al., 2018, p219).

This highlights the relationship between ethnic eceonomy prejudice and small business establishments within the shadow economy. The shadow economy of the EU is a prominent issue. On average, **the shadow economy comprises 17.42% of GDP in the EU as of 2021**[8] (Schneider, 2022, p11). On average, southern European countries have "considerably higher shadow economies" than central and western Europe (Schneider, 2022, p13). The type of work that is most prevalent in the shadow economy is usually "labour intensive" and "low-skilled,"

[8]The impact of the coronavirus pandemic affected both formal and informal labour globally.

where the "demand for flexible labour is high" (Berntsen et al., 2018, p216). This includes construction, retail, catering, temporary employment agencies, agriculture and horticulture, the metal industry, cleaning, transportation, and logistics (Bernsten et al., 2018, p216). These sectors coincide almost fully with the majority of jobs that most third-country national migrant workers end up being engaged in.

In 60 percent of the labour inspectorate reports in the Netherlands, the "migrant is the only person at the workplace found…to be employed without a work permit", and in more than 80 percent of the cases, "only one or two are found" (Bernsten et al., 2018, p219). In 40 percent of the cases, the employer is a Dutch national; in 25 percent of cases, the employer is not a Dutch national, with the majority having a non-EU nationality (Bernsten et al., 2018, p219-220). The conclusions show that "more than half of Turkish, Moroccan, and Egyptian migrants are employed in the ethnic economy" and "small migrant entrepreneurs are frequently subject to inspections." (Bernsten et al., 2018, p220) If they have violated the ESN protocols by illegally hiring migrant workers, they are "frequently fined" (Bernsten et al., 2018, p220).

Although having to bear the responsibility for not carrying out the appropriate measures as required by the ESN protocols and the national law requirements to ensure all workers are employed legally, the case study of the Netherlands depicts a trend of "targeting ethnic entrepreneurs" (Bernsten et al., 2018, p220). It might also be argued that it is "logical, given the inspectorate's policy of concentrating its resources where the chance of discovering violations is the greatest" (Bernsten et al., 2018, p220). However, **it disproportionately results in "employer sanctions regulating small ethnic markets" or rather, and more importantly, "not the *labour* market as a whole"** (Bernsten et al., 2018, p220). This forces many small ethnic economy businesses into bankruptcy or closure.

Ultimately, **sanctions against employers "has not led to a noticeable decrease in the number of irregular migrants"** (Berntsen et al., 2018, p 208). Additionally, it has not led to a significant decrease in employers hiring undocumented migrant workers, "partly because of the need for flexible labour and partly because of skills' shortages" (Bloch et al., 2015, p144). It has only led to a change in "tactics" for undocumented migrants to leave jobs when they seem too risky, and employers hiring "fewer undocumented migrants and for shorter periods of time" (Bloch et al., 2015, p144). Critics claim that the "current legal basis" is not the "most appropriate one" since employer sanctions seem to be focusing on the goal of tackling illegal migration

instead of "employment and working conditions" (Carrera et al., 2007, p140). This shifts attention away from the bare minimum requirements of proper working conditions for all workers, regardless of residence.

Additionally, **it has also signified a "governance shift" of responsibility "from the public to the private sphere"** (Berntsen et al., 2018, p 211). Individuals in private services with personal prejudices or interests (such as cheaper business opportunities, easily achieved through illegal employment or ensuring employee loyalty by worker-dependence) are now liable for checking people's migration status. Small businesses might not "invest in acquiring knowledge or tools to identify falsified documents" (Bernsten et al., 2018, p223). These administrative obligations, however, may impose a relatively higher cost on small businesses and private individuals that they cannot afford. This can lead to two scenarios: **either a " tendency not to hire migrants at all - those staying legally and illegally alike"** (Bernsten et al., 2018, p224), **or it may lead to illegal employment going even further underground,** with an increase of forged documents or employers not bothering to ask for documentation at all. The use of forged documents has also become standard practice, and the Dutch Council of State has authorised that employers "could not be held liable for the illegal employment of a migrant using a forged document that was not recognisable as such" (Bernsten et al., 2018, p223).

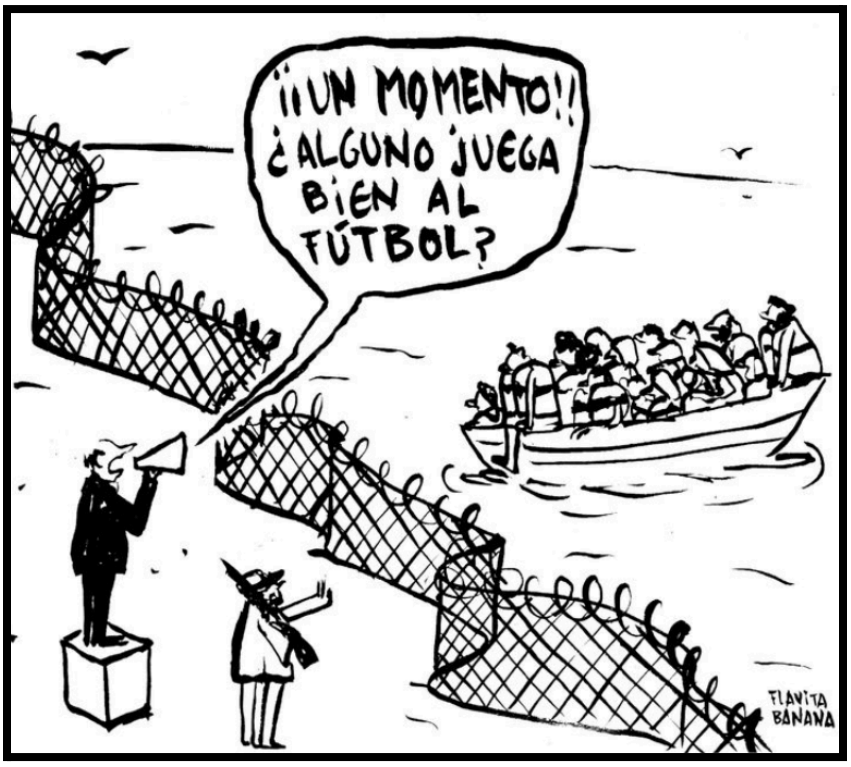
Additionally, there needs to be more separation between labour inspectorates and migration enforcement during such workplace inspections. If migrant workers are present during an inspection and unable to show their identification documents, the labour inspectors notify the police and migration authorities to arrange deportation or detention (Bernsten et al., 2018, p221). **For labour inspectorates to be legally required to "report illegally staying third-country nationals" to migration services "may infringe on migrants' access to their fundamental and workers' rights"** (de Sancho Alonso, 2007, p140). Once again, this identifies how the effect of sanctions in limiting employers from illegally hiring people leads the more vulnerable workers to bear more grave consequences than the employers themselves. It also highlights the state's priorities: illegal residence seems to carry more importance and interest to the state that practises these protocols than proper labour conditions.

Additionally, even if the ESN requires all outstanding wages to be fully recuperated to the migrant worker that has been illegally employed, migration lawyers may not necessarily be knowledgeable about their labour rights, "just as labour law practitioners may not be aware of

this legal instrument hidden away in a migration law" (Bernsten et al., 2018, p225). In 80 percent of the labour inspectorate reports in 2014, "there was no information included on remuneration or the hours worked by the migrant" (Bernsten et al., 2018, p225), highlighting the bifurcation of the two sectors of migration and labour rights in public service practitioners.

Workers have been the primary bearers of the consequences of enforcing employer sanctions tactics to curb migration and illegal work rather than the employers themselves (Berntsen et al., 2018, p 209; Bacon, 2008, p 6). EU Member States must ensure that undocumented migrant workers, or legally resident migrant workers, have better access to complaint mechanisms and assurance in being able to access their rightful outstanding remuneration. The Platform for International Cooperation on Undocumented Workers has been advocating for a greater and more effective 'firewall' between labour inspectors and migration police. This has also been identified in the statement at the Political Declaration on the Implementation of the United Nations Global Plan of Action to Combat Trafficking in Persons, adopted by the UN General Assembly on 22 and 23 November 2021, insisting on the need "to establish firewalls between immigration checks and inspections" but also to "ensure that labour inspections are conducted in a way that does not put potential victims of trafficking in fear of immigration authorities or offences" (para. 28). **Being extradited has been identified as the "greatest fear" of undocumented workers beyond being found in a situation of illegal employment or risk of exploitation** (Keith, 2022, p42). Without better control over the risks of deportation or losing one's residence due to their employer's change of heart, migrant workers will always find themselves accepting more precarious and unjust work conditions to "maximise the now" (Anderson, 2010, p312): to battle each day for a chance of paid work and/or residence continuity.

Chapter 5: Matters of Control - State



"One moment! Does anyone know how to play football well?"
Cartoon by Flavita Banana, 23/05/2023, El País

- *Guest-worker schemes, seasonal-worker schemes, and skill-tier schemes affect the type of migrant allowed to come in and the type of work they can access. This leads to the solidification of networks showing trends between 'type' of migrant, legal status, and work/skill sector.*
- *Low-wage sectors provide work schemes with less overall rights provisions than high-skilled work permits, such as family reunification, residence permits, and protection from gender discrimination.*
- *Rhetorics in contemporary anti-migration politics resemble long-standing narratives of colonial and imperial traditions.*

The international system of recognition of nation-state sovereignty is fundamentally dependent on identifying territories and political communities demarcated by borders and social

contracts in the form of bureaucratic administration and identity and citizenship documents. These liberal societies have their "roots in a social contract that guarantees people both political and economic freedom" (Davidson, 2010, p245) and a promise that the government will purport its best to ensure and protect this political and economic freedom. The reason a state may consider it a necessity to have a firm migration policy is to be able to regulate the form of labour and workers within its domain, as well as to ensure the protection of the already existing political community. This is often in the form of safeguarding resources and property. The political community, marked by legal documents and identification, is thus set out by the "boundaries of shared liability to a political state," in which the state can tax, punish, coerce, and "in the limit cases even execute" the citizens within their sphere of authority (Blake, 2005, p228) in exchange for the protection of their resources and property. **Migration policy is, therefore, a tool to ensure that the political communities *within* and belonging to states feel protected from external threats that may come and damage the harmony between citizens mutually agreeing to the social contract of the nation-state.** However, whether the 'threat' is real or imaginary is highly contested by human rights groups and challenges the legitimacy of the state's migration policy.

Migration policy can also be affected by factors such as "labour market, macroeconomic, welfare, foreign, military, colonial, and aid policies" (Czaika et al., 2013, p489). Therefore, there is no single way to analyse the effectiveness of migration policy other than viewing the amalgam of "rules (i.e., laws, regulations, and measures) that nation-states define and implement with the (often only implicitly stated) objective of affecting the volume, origin, direction, and internal composition of immigration flows." (Czaika, et al., 2013, p489).

Article 15(1) of the EU Charter identifies the "*right to engage in work and pursue a freely chosen or accepted occupation.*" However, this right is circumscribed by national law, including national laws regulating the right of foreigners to work" (FRA, 2020, p251). There is no clear way to identify how migration flows, and labour forces interact in nation-states. Still, there are trends that show **"more flexible labour market policies and the neoliberal globalisation" that is currently defining the relationship between migration groups and workers have "boosted the demand for both high- and low-skilled migrant labour, which could explain increasing migration despite the political desire to curb migration"** (Czaika et

al., 2013, p489), evident in the rising popularity of nationalist political parties and mainstreaming of anti-migration rhetoric.

Migration control is, therefore, a means of control for states to maintain their sovereign powers and fulfil their obligations to the political community within their demarcated territory. A state's ability to control who arrives at its borders is dependent on five characteristics: "the power and autonomy of the state bureaucracy; the number of immigrants; the degree to which political rights of citizens and noncitizens are constitutionally protected; the relative independence of the judiciary; and the existence of an immigration tradition" (Czaika et al., 2013, p496). Furthermore, **an essential element of migration policies is their ability to control the "behaviour of a target population (i.e., potential migrants) in an intended direction"** (Czaika et al., 2013, p489). States may do so by imposing specific worker schemes according to their present gaps in work sectors, imposing easier or more difficult access to refugee settlement schemes such as bureaucratic barriers or controlling the price for such documents, and creating group-specific entry schemes for migrants of a specific nationality. Therefore, migration policies and labour admission policies in each nation-state independently qualify and classify "educational attainment," "professional skills," "age," "biological gender," or "nationality" and code these qualities into being either "advantageous for (or indeed detrimental to) [one's] entry and residence in country X" (Paul, 2018, p62).

Additionally, legal status and documentation not only heighten people's risks of being victims of exploitation and forced labour, but can also be viewed as "a measure to control immigration" (Hernes, 2018, p1310). **Prescribing a matter of value to such arbitrary characteristics not only creates a bureaucratic barrier to many groups of migrants but, more importantly, it depicts a state's "relative authority to impose semantic visions and divisions of the world onto others."** (Paul, 2018, p62) Such policies that select migrants according to characteristics classified according to background "can be an indirect and covert measure to influence the national, ethnic, and religious origins of migrants" (Czaika et al., 2013, p490).

This is also **a reflection of the greater monopoly that 'attractive' states such as the EU Member States have over legitimising such "symbolic violence" in their "collectively binding legislation" present in their migration and labour policies** (Paul, 2018, p62). Migration trends, therefore, remind one of the everpresent colonial legacy, where the

accessibility to rights is granted from those with more power - in this case, power is a safe and stable state with a high-income economy - towards those seeking protection, seeking relief from their persecution, attempting to migrate to absolve the issues they face in their country of origin. This section will primarily focus on the role of nationality in conditioning one's access to free mobility and legal and fair labour rights; skill sets, which include career and education recognition; and gender in migration policies and labour provision trends.

While many bureaucratic and administrative tools are used to impose filters or obstacles for groups of foreign workers, the most visible one is constantly fortifying the EU's external border. The influx of 'foreign groups' has been associated with a potential threat of crime and danger entering a state. The use of militarisation and securitisation has recently become emblematic of the EU and the antithesis of freedom of movement. **Where the group inside may access through their 'special' citizenship the right to move in a border-free zone, the group on the outside is faced with an increase of racist and xenophobic rhetoric, police and border violence, and the criminalisation of their intentions to seek asylum. This pushes many individuals who are not given access to viable legal pathways to migrate and work toward further endangerment, illegality, and exploitation.**

5.1 Migration policy filters: Nationalities

Nationality "reflects a linkage between the state and the individual" based on birth on the territory, descent, or marriage (UNHCR, 2014, p21; Cohen, 2022, p139). In the EU, people holding EU citizenship are granted national benefits and regional rights if their state is part of the Schengen border agreement and European economic alliances. This translates to full labour and mobility access between all Member States, creating a "transnational citizenship… that complements the lacunae that arise where overlapping national citizenship and immigration regimes are all that is on offer" (Shaw, 2018, p164). However, for third-country nationals, EU law dictates that each Member State has the "permission" to "restrict the extent to which third-country nationals have access to the labour market, depending on which 'category' they belong to" (FRA, 2020, p246). Multiple examples of work sectors are characterised by intersectional shared qualities, such as certain nationality groups working primarily in restaurant businesses, construction or cleaning businesses, etc. These are the consequences of such policies.

How nationality can be used as a filter to grant benefits to certain migrants needs to be analysed to demonstrate the double standards currently at work and to understand why and with what legitimacy such double standards are permitted. Many directives correlate work and residence permits directly to nationality. Article 45(4) of the Treaty of the Functioning of the EU allows Member States to "*reserve employment in the public service for their own nationals.*" However, the Court of Justice of the EU has not allowed Member States to reserve access to certain positions for nationals only (FRA, 2020 p251-252). Still, certain trends in social and economic policies in practice show a dissonance between the Court of Justice's statement and Article 45 of the Treaty of the Functioning of the EU as certain nationalities receive different treatment.

Nationalities from "free-mobility regimes are favoured" (Caika et al., 2013, p490), **or at least migrants from pre-established labour relationships.** For instance, for the third-country national family members of an EU citizen, under the Free Movement Directive 2004/38/EC, Article 2 (2) "regulates the situation of their family members of whatever nationality" (FRA, 2020, p 246) allowing them privileged access to request residence and work in the EU. Additionally, the Ankara Agreement of 1963 privileges Turkish nationals and grants them enlarged labour and movement rights in the EU (in fact, they are the largest non-EU nationality within the EU).

However, the "degree of access to the labour market" for other nationalities or people who are asylum seekers, refugees, or "long-term residents" is regulated by other, more specific directives (FRA, 2020, p 247). **The Single Permit Directive 2011/98/EU is one such procedure that allows third-country nationals to file a single application to request to work and reside in the EU.** Although in theory efficient, in practice, it is impacted by various other factors. Firstly, **bureaucratic lags,** but secondly, **the influence of national policies varies from Member State to Member State.** This is notable in the case of *Martinez Silva* in Italy in 2017, where discrimination remains a reality for foreign workers, notwithstanding the equal treatment clauses in many regional labour directives (FRA, 2020, p247).

With the plethora of specific directives for specific categories of 'workers' and 'migrant' classifications, national legislation often falls behind and lags in updating its national attitude and apprehension of such clauses. Some loopholes, ev-en in regional EU law, permit these lags to continue. This may be noted in the Racial Equality Directive 2000/43/EC, where "discrimination

on the basis of race or ethnicity in the context of employment and when accessing goods and services" is prohibited in all EU Member States. However, Article 3(2) "*does not cover the difference of treatment based on nationality*" or "*to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned*" (FRA, 2020, p 247). **If the exception for discrimination based on nationality was intended for reasons of legal clarification, it is short-sighted and outweighed by the fact that nationality-based discrimination is often heavily correlated with discrimination towards race, ethnicity, culture, and religion.**

CJEU, C-449/16, *Kerly del Rosario Martinez Silva v. Istituto Nazionale della Previdenza Sociale (INPS)* and *il Comune di Genova,* 21/06/2017: Martinez Silva, a third-country national, was denied a family benefit on the basis that Italian law does not allow that benefit to be granted to non-EU nationals holding a single work permit. However, the CJEU concluded that it is not permitted for national legislation to exclude a single permit holder from being denied a family benefit due to the equal treatment clause in the Single Permit Directive.

Furthermore, there is a clear exemption that puts undocumented workers or stateless people at active risk of mistreatment and exploitation. Again, often in the EU, people who are perhaps stateless or undocumented may come from backgrounds that are not of European origins. Therefore, they are also just as susceptible to racial discrimination when it comes to attempts at accessing services in the welfare and social security systems. Allowing Article 3 to withhold this differentiation allows once more the state to control and actively limit and influence the safety of undocumented or stateless people in work and further reinforces the common fears of such people to make complaints of exploitative employers.

Regarding refugees, the right to work must be accorded the "*most favourable foreigner*" standard as pet Article 6 of the Refugee Convention of 1951. Not only is this language a clear preference for certain types of nationality over others, but in practice, we may suppose it means that all refugees must be granted the "same work right as EU citizens (in EU Member States) or nationals of any such states who enjoy special rights under bilateral or regional agreements" (Costello, 2021, p960). However, in practice, this is typically not seen as the reality as many refugees from more culturally distant nationalities did not receive the approach of the 'most favourable stranger.' Nationality bias often negatively affects one's chances, as is noted during the Syrian refugee intake, where Syrian nationalities were prioritised as refugees, and many people attempted to destroy their documents to pass as Syrians, not to risk being denied asylum. Likewise, during the Ukrainian influx of refugees to Europe, many facilities and administrative

resources were provided to allow Ukrainian refugees an easy entry and asylum procedure, while refugees from Afghanistan, Sudan, and Syria were still amongst the highest in need of asylum but not granted the same legal pathways and 'favourability' in the EU and UK.

Additionally, in many cases, refugees or asylum seekers become stateless persons and have lost their nationality. They are, therefore, almost nameless in a nation-state world. The issue of where they may apply for recognition seems impossible. This may be compared to situations where nationality may be acquired through bad faith (sham marriages or falsified documents) or even bought (In 2020, 25,000 people are estimated to have acquired citizenship through investment programs (Cohen, 2022, p143)). **If citizenship has now become an arbitrary concept that one may even buy, it seems that having the possibility to access certain rights and not others based on nationality biases and preferences is not associated with cultural or linguistic differences or nationality at all - but rather on investment and financial promises**. Does one who may invest in a nation have more right to access free-mobility schemes than someone stateless, a refugee from political, economic, or climate endangerment? It seems the liberal democratic provisions of a specific type of citizenship compared to another ultimately highlight the benefits the state may receive from the type of person that holds their passport instead of vice versa. Is the state allowed such preferences if UN human rights conventions are intended to protect and be legitimate for all humans and nomads, regardless of the red tape? It seems ethically not righteous, but legally so.

5.2 Migration Policy Filters: Skills[9]

The stratification of the labour market into different groups not only divides "EU free movers" with "workers from outside the EU" (Paul, 2018, p58) but also differentiates high-skilled workers from low-skilled workers. **There have been increasing work restrictions on low-skilled labour migrants, which have developed alongside the encouragement of high-skilled migrants and international students** (Czaika et al., 2013, p490). This leaves low-skilled migrant workers in more precarious conditions with less recognition of their rightful and economically useful role in the welfare of regional and national economies. Dividing the

[9] In this context, low-skilled jobs are considered primarily manual labour and low-wage jobs; whereas high-skilled jobs are considered jobs that require higher education and selective training. This terminology is specific to reflect language of tiered migration admission schemes. The author would like to make note that this terminology does not reflect her own belief of skills being classified as low or high in such ways.

labour market into these strata "belittles" the mutually necessary role of all labourers to provide a well-oiled economic machine and also ignores the role of governments in imposing these "schisms" and complex relationships between diverse skill recognition, formal and informal markets, and wage biases (Paul, 2018, p58).

The impact of imposing skill preferences through more selective work permits and less accessibility to formal employment for low-skilled migrants objectively reduces migration from "poor or culturally distinct countries" (Czaika et al., 2013, p490). This is represented in both populist right-wing politics, which have been increasing in European governments in the past two decades, where declarations of lessening migrants from 'culturally distinct' countries have the same objective as mainstream liberal parties that declare an intention to "decrease low-skilled immigration" (Czaika, et al., 2013, p490). One is xenophobic, and the other is classist. The outcomes of both overlap to restrict migration and labour access from similar nationalities and groups of workers.

In practice, these regulations and distinctions between workers are practised through an insufficient universal recognition of education certificates and professional certificates as well as tiered skill-selective work permits. For newcomers, the lack of access to language and provisional skill training impedes their chances to "improve their employment prospect" (Kelley, 2022, p256). For refugees and asylum seekers, it is expected that the host state must provide language courses and such provisional training to allow the refugee or asylum seeker to be prepared to join the labour market after 9-12 months (depending on national legislation) of applying for asylum. Additionally, most international refugees reside in low- to middle-income countries with a relatively large informal sector. **If a state does not fulfil its duty to provide appropriate provisional training to refugees and asylum seekers, many may find work in the informal sector where there could be easier connections found with the immigrant diaspora that has already been established through the recent decades of these persisting issues** (Kelley, 2022, p275).

In high-income countries, such as those in Europe, "context disparity" could pose a more significant obstacle, where a person may have skills "useful in rural areas but has migrated to urban areas" where their skills would not be as relevant (Kelley, 2022, p255). In such circumstances, many migrants tend to follow the diaspora networks, establishing further links with specific migrant communities in particular work sectors. However, the use of skill-selective

work permits is then manipulated to use migrant labour as an "answer to so-called skill gaps" recognised in the "demographic decline in domestic labour markets" (Paul, 2018, p65).

The classification of different migrant workers between high-skilled and low-skilled then divides and constrains the rights of these groups. For instance, through the Seasonal Workers Directive 2014/26/EU, a low-skilled migrant worker is unable "to bring their spouses to live with them," which is a direct limitation of the fulfilment of their rights "attached to their classification as 'low-skilled' migrant workers" (Paul, 2018, p66). **It is arguably through this practice of providing selective and limited rights to low-skilled workers compared to high-skilled workers that encourage classist biases that low-skilled workers are less valuable to economic growth than high-skilled workers** (Paul, 2018, p66), **and more gravely, that they are less entitled to human rights resources.** Therefore, state regulation on skill-selective work permits "powerfully shapes the socioeconomic and political position" of the migrant worker in the EU country (Paul, 2018, p63).

Ultimately, states must provide appropriate skills training and social protection programmes for refugees and asylum seekers as part of their process of receiving asylum grants. Such projects must be "integrated into national poverty-reduction strategies and supported internationally as a meaningful form of burden-sharing" (Kelley, 2022, p275). It has been recognised that "migration for work in low waged labour markets" (therefore, low-skilled) is an "economic phenomenon and a social process" that has "long been recognised as related to wider global changes" (Anderson, 2010, p3030).

Otherwise, the same patterns of migrants with unrecognised skills or limited work permits will remain in restrictive labour conditions, either turning to precarious and informal employment and shadow economies or never being able to engage in legal and formal employment that can mutually benefit the local and national economy of the host state. Without these procedures established, migrant workers will never be able to integrate within the labour market fully and will always remain in precarious conditions bordering exploitative potentials.

Additionally, prioritising high-skilled migrant workers as economically desirable by encouraging post-study jobs, intra-company exchanges, more accessible residence permit routes for skilled workers, compared to the limited or difficult lower-skilled routes reinforces the impact of labour admission regimes depicting low-skilled workers as "economically undesirable" (Paul, 2018, p67). **The normative defect of classifying migrant labour between high- and**

low-skilled - or rather, economically desirable and not - is "shaped by the selective assumption that national economies compete desperately" for high-skilled workers due to the "globalist knowledge-based economy" that is based on competitiveness as means of growth (Paul, 2018, p68). Such a belief and focus on "innovation-induced growth and competitiveness in contemporary capitalist economies" is thus reflected in skill-selective migration schemes (Paul, 2018, p69).

However, when considering the moral responsibility for wealthy states to take their part in ameliorating global distributive justice, policies that separate labourers depending on skill set only "make worse-off the globally worst-off for the benefit of others," such as the wealthy receiving states" (Higgins, 2015, p158). Indeed, migration policies that favour one skilled group over the other "whether by overtly assigning them preference in admission or by eliminating formal barriers to immigration" are "unjust in their own right" (Higgins, 2015, p159). On the other hand, this belief is also accompanied by the assumption that low-skilled workers are in abundant supply (Paul, 2018, p71).

With the limited migration admission schemes for low-skilled migrants, many are forced to enter either as undocumented workers, as refugees and asylum seekers, or through other schemes that may be more limiting. The lack of recognition of these workers' high economic utility leads to a sustained practice of informal, cheap migrant labour, causing marginalised workers to be unsupported by appropriately safeguarding work admission schemes. **This "malign neglect" and gap in migrant worker schemes through "restrictive policy-making" has the effect of "serving hidden policy objectives of practically increasing the utility of cheap labour"** (Paul, 2018, p69). Such low-wage labour sectors include hospitality, construction, agriculture, private households, and even sex work, with hyperflexible work hours, diverse sets of employment arrangements (if any), with threats of undercutting wages and instability (Anderson, 2010, p300). Therefore, such limited migration admission schemes for low-skilled workers "contribute(s) to the 'fashioning' of exploitable labour market positions" and "might also lend these disadvantaged legal positions to strategies of victimisation" (Paul, 2018, p73). To ensure greater equality between low-skilled and high-skilled workers, labour admission regimes would need to provide greater mobility security by issuing secure residence statuses and family reunification programs.

We are left to question if it is truly necessary to use evidence of economic utility, moral decency, and the potential of harmful labour exploitation as a "means to change such approaches to migration admissions" (Paul, 2018, p70). The classification of low-skilled migrants as not economically desirable or as disposable grants them fewer opportunities to legally join the formal economy. However, they still exist in a "structural environment where they are economically utile *(and potentially more so with a less secure legal status)*" (emphasis added, Paul, 2018, p73). **Imposing such a classification that structurally forces marginalised workers to live in more precarious situations is, therefore, a *choice* by governments enforced through regulation.** This marginalisation is discriminatory, and unjust, and heightens the disparities of labour rights between EU citizens and non-EU citizens within the EU. This reality is, therefore, not a necessary reality, and it encourages the continuance of labour exploitation of migrant workers and their human rights violations.

5.3 Migration Policy Filters: Gender

While the common perception of 'vulnerable' refugees and migrants tends to be depicted as women and children, the primary demographic of migrant workers tends to be perceived as male. **The role of gender, and more specifically the figure of the 'migrant-woman,' have both been underdeveloped in terms of labour rights and over-used in rhetoric encouraging a greater clampdown on the exploitation of 'victims' and viewing migrants and refugees as 'vulnerable' and requiring humanitarian protection.**

The informal sector, where "underregulated and exploitative" work prevails, has been criticised for "reflecting gendered and racialised hierarchies" - however, so does formal work (Costello et al., 2021, p954). In formal work, refugees and migrant labourers "perceived a number of risks to their proposed mode of labour market inclusion," with either the power remaining with employers or time-bound and conditional work permits (Costello et al., 2021, p968-969). Additionally, women refugees and migrant workers are typically "underrepresented in employment because many come from traditions where work outside the home is discouraged" (Kelley, 2022, p260). This has led to women migrant labourers being misrepresented, if not completely marginalised.

The role of gender in labour and migration has both led to enforcing tighter migration policies while simultaneously being discarded and left without proper safeguarding policies. In

certain cultures outside the EU, the role of women's rights in labour is particularly gendered in a way that differs from the interpretation of gender representation in labour policies within the EU. For instance, in many cultures, care-work, and homemaking are considered particularly gendered work (Costello et al., 2021, p969); however, "EU law does not recognise caring as 'work'" in its free movement policies (Shaw, 2018, p157). In the case of refugees and asylum seekers, there is gender bias for women who have been granted asylum applications but are illegible for family reunification schemes because their roles in homemaking and care are not recognised as jobs in the EU, in addition to the "income-based rules" that apply to such schemes (Shaw, 2018, p157). Such discrimination also extends to bureaucratic and administrative barriers for women in requiring birth certificates and identity documents to acquire a nationality they may not have access to.

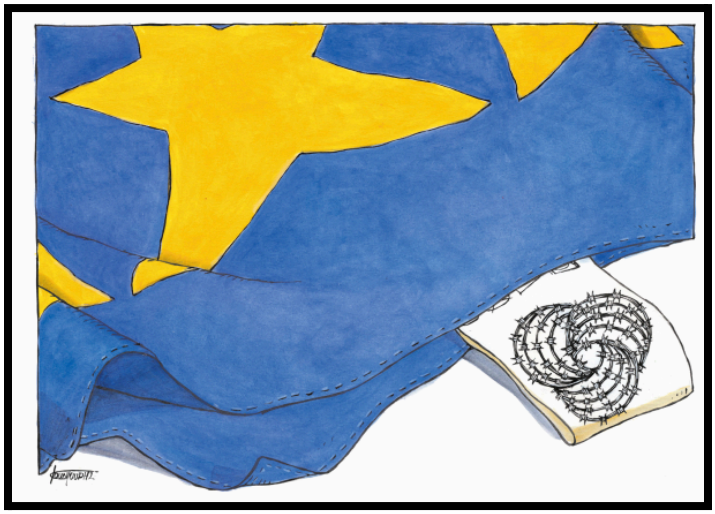
The image of the 'trafficking victim,' and more hauntingly, the "trafficked sex slave," has also been a common trope used to enforce stricter policies on migration and "tighter border controls" to salvage one from the harms of "prostitution" and targeted "gender and sexuality" abuses (Davidson, 2010, p244). On the other hand, protection from violence laws in international labour laws, such as in ILO convention C190/R206 or TFEU Article 153[10], may include a special mention of migrant workers being particular victims of harassment in the workplace but do not include specific provisions for the gendered context. **This 'lacking' attention is also noticed in how many migrant-labour deals "only leverage better rights for one particular group…ignoring others" and failing to uphold non-discrimination clauses** (Costello et al., 2021, p969). These attitudes reflect the interest of courts and governments in focusing on "a minimum protection against destitution, rather than protecting the right to work *per se"* (Costello et al., 2021, p966), which would require a more context-specific, gender-specific, and culture-specific understanding of migrant workers' needs. This is evident in the EU-Turkiye Deal of March 2016.

In the EU-Turkiye Deal of 2016, many Syrian refugees with temporary protection did not have access to exercise their right to work. In collaboration with the EU, attempting to minimise

[10] Article 153 of the Treaty of the Functioning of the EU: "The EU will support Member State's activities in working environment and condition improvements, social security and protection of workers (...) representation and defence of interests of workers, employment conditions for third-party nationals, integration of persons excluded from the labour market, equality in the labour market between men and women, combating social exclusion, and modernising social protection systems. To achieve this, *the EU may adopt* Directives to implement these activities." (emphasis added to highlight the vague promises of future progressive realisation.)

the migration fluxes that could come to knock on its doors, Turkiye opened its labour market to Syrians under temporary protection status. However, work permits were costly and heavily restrictive, requiring one to reside in satellite cities, and power was held by the employer (Costello et al., 2021, p967). In practice, “less than 1 percent” of Syrians in Turkiye accepted to be employed under these conditions, “with the gender breakdown 10:1 men to women” (Costello et al., 2021, p967). **This protocol demonstrates not only nationality discrimination by being specific to Syrian temporary protection-holders but also a lack of awareness of the need for appropriate and safe working conditions for the different gender groups.**

Chapter 6: Borders and Security



Pure Wool European Flag
Cartoon by Michael Kountouris, 21/02/2016, Greece

- *Borders as a fundamental element for the existence and functioning of the contemporary nation-state, providing a visualisation of 'outsiders' compared to those belonging within the nation-state.*
- *Securitisation and the fortification of borders represent the self-interests, the right of association and the right of exclusion, and policies of protecting communal resources of the political community.*
- *Narratives between security concerns and migration are profoundly interlinked and manipulated; the basis for public concern is justifying gatekeeping access to human resources, capital, and the exercise of freedom of movement.*
- *Misuse of borders has led to an increase in deaths, inaccessibility to safety for those persecuted, and rising human rights violations in Europe.*

The normative conditions that a nation-state or a collective population may exercise in terms of their borders and labour integration can help guide perspective onto the conditions of today's realities in the EU. Where it is clear that a liberal mentality formed the basis of human rights practice in the EU and the Global North, the reactionary practices towards large groups of

migrants approaching the borders of nation-states have proved that the methods of dealing with such a phenomenon somehow could not hold the same liberal ideal at an international level. The fortification of borders, intrinsic to the identity of the nation-state and imposing a specific territoriality over the sovereignty of the government, aids in laying claim to which communities and identities are 'ours' and which ones are 'others.' **The mere existence of borders impinges on the freedom of movement, where a wall erected acts as an obstacle and actively imposes a challenge for anyone to exercise this right - unless they are fortunate to be born in a position of class and citizenship where they may afford the papers and passports to dissolve this obstacle.** The dependence on such arbitrary factors limits human rights for all.

The impact of border security and militarisation not only "allows for tropes of terrorism and national security" to accentuate xenophobia and "jingoism of nation-states" but also "marks a conceptual shift in thinking about current responses to cross-border traffic and immigration" (Silva, 2015, p223). The association of threats, security, and increase of crime with the image of the refugee and the migrant worker who is merely attempting to consolidate a reliable and sustainable future for themselves needs to be acknowledged every time a conversation on 21st-century migration is had. The walls of the nation-state have been constructed as a reaction to "the idea of *protection* against threats, generally pictured as 'invasions,' material or immaterial" (Balibar, 2017, p26), which is now language used to define migration fluxes as well. **The border has helped produce and visualise a narrative that has turned the 'outsider,' the 'foreigner' into an 'alien' and a potential danger to the liberal democratic values that are supposedly inside the borders** (Silva, 2015, p223). This narrative, however, is inherently prejudiced and unjust.

Within legal sovereign states, territorial limits are enforceable through the physicality of the border - deemed the "champion of liberty" and barriers "against unwanted obligations" (Silva, 2015, p220). Whence a political community exercises its right of association and, therefore, right of exclusion, it may express preferences over with whom it shares communal resources. The right to exclude "stems from the right to not accrue additional rights-claimants" in a shared political community or "to be placed under unwanted obligations" (Carens, 1987, p227). Therefore, alongside the conception of national identity also comes the "creation of alien citizens" that are "inherent to the structure of the nation-state" (Silva, 2015, p223).

In its primal form, the border allows for the association of collective national identity to be protected from people "whose goal is the overthrow of just institutions" (Carens, 1987, p260). States are, therefore, "clearly entitled" under the Rawlsian idea to restrict the liberties of some and prevent the entry of such threats for the sake of protecting the greater freedom of the community (Carens, 1987, p260). **Borders have become an "essential institution of the modern state" even if they posit as the "*undemocratic condition of democracy itself*"** (Balibar, 2017, p29). This lies in the claim that "migrants from societies where liberal democratic values are weak or absent" would pose a threat to "just public order" (Carens, 1987, p260).

However, the "hypotheticality of a threat to public order is not enough" (Carens, 1987, p259). There needs to be reasonable evidence to enforce such restrictions; otherwise, borders for defensive purposes become offensive (Balibar, 2017, p27). **The existence of territorial limitations and the existence of borders as intrinsic protectors and necessary inhibitors denies the "historical relations between existing states" that have mainly been founded upon "conditions that led to influxes in immigration from poorer states"** (Silva, 2015, p224). In other words, "almost every border in existence is the remnant of colonial/imperial projects of war" (Silva, 2015, p224), and therefore, the militarisation project of border states is an unsurprising continuation of the violent relations between political communities internationally. Borders are therefore "bolstered by such things as racial, ethnic, or religious differences, even when such differences are the product of national imaginaries" (Silva, 2015, p223). Such a militarisation of borders extends relations of conflict between "racial, ethnic, or linguistic differences between peoples" (Silva, 2015, p223) and these permeate and affect the community already within the borders.

This is exemplified in the quickly evolving dynamics and approaches towards migrant workers in the EU. In 2015, EU asylum policy radically shifted overnight, opening its borders from Germany to Greece, the West Balkans, and Austria - "Europe's borders were open like never before since the fall of the Iron Curtain in 1989/1990" (Georgi, 2019, p98). However, this period of "euphoric solidarity with refugees" lasted only very little, as by November of the same year, "terrorist attacks in Paris enabled right-wing forces to associate refugees with 'Islamic terrorism,'" further fueling discriminatory rhetorics and conservative ideas of public security (Georgi, 2019, p99). The EU-Turkiye Deal permitted the Balkan route to be officially blocked,

and deaths in the Mediterranean exponentially increased compared to pre-2015 levels (Georgi, 2019, p99).

This also recalls the Mohamed Gattoussi v Stadt Rüsselsheim, case C-97/05 in 2006. The Tunisian national was working under the Euro-Mediterranean Agreement Association. However, upon marrying an EU German national, Germany refused to extend the Tunisian national's residence permits that provided more extensive rights than those previously received through the temporary EU-Mediterranean Agreement work permit. The state used reasons of "protection of a legitimate national interest," "public security," and "public health" as legitimate examples for curtailing the Gattoussi's residence permit (FRA, 2015, p184).

Where public security and borders are intended to safeguard legitimate threats, they are often used as excuses to discriminate against members of the labour force who are foreign from fully joining the political community, highlighting discriminatory and xenophobic tendencies. Securitisation arguably reveals the "deepest roots of the crisis of sovereignty" through this domineering and excessive form of "spectacular violence" displayed in the forms of wall construction, bureaucratic and administrative barriers, deportations, and political rhetoric (Balibar, 2017, p36). **There needs to be urgent and greater attention given to the "distinction between reasonable expectations" of public disorder and threat to public security and merely "hypothetical speculation"** (Carens, 1987, p260) **or xenophobic mindsets.** This urgency is necessary to address the current issues and prevent further discrimination and injustice.

However, if the existence of an international system composed of open borders is still a distant utopia, we can at least encourage an outlook on labour integration as a means for developing more peaceful and porous communities where security is controlled whilst freedom of movement and right of asylum are not curtailed en masse. There can also exist a new way of thinking about migration and labour integration as a means for decreasing the state of violence that sets the precedence for the relations of workers from migrant communities and workers from host-state communities in Europe.

It is clear that regardless of the repressive EU border policies and the exponentially increasing budget for EU border control (Frontex's 2024 budget is set to be amassing to a total of €922 074 136),[11] "walls do not stop migrants, they just make them more difficult, more

[11] According to the Frontex European Border and Coast Guard Agency, Budget 2024 VOBU.

dangerous, more costly" with thousands of lives dying in the Mediterranean each year (Balibar, 2017, p25, p37). Balibar recommends **migration policies should instead shift focus from attempts to "suppress migration" and rather "regulate" it as one would regulate a global labour force into various categories** (Balibar, 2017, p37). In the "composition of the labour force" of neo-liberal globalised capitalism, diverse "technical and political" characteristics are necessary for its maximum utility in a transformative capitalist economy (Balibar, 2017, p37).

As nomadism "always precedes the regulation and the repression" of nation-states (Balibar, 2017, p37), such material instruments that aim to regulate biopolitical existences through the use of walls and checkpoints "foster(ed) by ethnic hatred, *fantasmatic* representations of the alien" are unsuitable as "ideological instruments" (Balibar, 2017, p37). If borders allow the international arena to be trapped in ideas of thinking of the world in "territorial terms," they not only "limit the movement of things, money, and people, but they also *limit* the exercise of intellect, imagination, and political will" (Silva, 2015, p228). **There needs to be a necessary shift from seeing migrating communities as potentials of threats en masse and instead focusing on their value as "human 'bearers of the labour-power"** (Balibar, 2017, p37). This would require a "global transformation in the circulation and the composition of the labour power" where "'work' represents all sorts of activities that can become productive from the point of view of capitalism," and therefore, workers in all sectors are deemed economically valuable (Balibar, 2017, p38). **This entails a necessary shift from prioritising only a knowledge-based economy and high-skilled migrants to a more egalitarian view that all sectors of work are necessary and crucial for the development of a state.** This would also be able to evolve alongside the "permanent contest between the intrinsic mobility of labour and the regulatory techniques of capitalism" (Balibar, 2017, p38).

Viewing the 'alien' under new terms located within utility and labour can allow a state to valorise the migrant worker within the community, enhancing "a condition of development and existence" for the foreigner in a new "moral dimension of politics" not based on inclusion/exclusion and decreasing the number of lives lost to the violence of securitisation (Balibar, 2017, p41). The state and its exclusionary instruments, such as walls and borders and labels categorising workers as "criminal *in potentia,"* submit them to "repression and discriminatory treatments" that permeate even beyond the work-sphere (Balibar, 2017, p39). It is

through these instruments that racism, xenophobia, and nationalism reproduce itself and permeate further into European identity.

Chapter 7: Exploitation

- *Universal moral condemnation of exploitation, forced labour, and trafficking has been utilised to impose more restrictive migration policies and border control.*
- *Residential dependence on labour opportunities heightens the vulnerability of marginalised workers.*
- *Current legal labour opportunities for migrant workers are very limited, pushing wage earners further into underground labour agreements.*
- *Undocumented workers, and minors, are at increased risk of turning to exploitative conditions in order to remain in the host nation, and to earn wages (even if minimal).*
- *Current policies target exploitative employers but lack sufficient safeguards for the exploited employees.*

Migration policies in the EU are increasingly enforced through rhetoric that is equally aimed at protecting the national labour force whilst simultaneously attempting to protect vulnerable migrants, refugees, and undocumented workers from exploitation, trafficking, and forced labour (Anderson, 2010, p301). Therefore, migration, trafficking, and smuggling are "separate by interrelated issues" that, in conjunction, may shed light on how policies regarding one issue affect the other (Kaye, 2003, p3; van Nierop et al., 2021, p2). **Given the restrictions on work permits for migrant workers and refugees, the precarious situation of undocumented workers surviving in-between legal gaps, and the conditions forcing marginalised workers to choose between deportation or exploitative work environments—while local workers struggle to secure jobs as employers prefer to utilise cheap(er) migrant labour—one must question whether it truly fulfils either of its claims.**

For migrant workers, the labour policies that make them "grossly over-dependent on their employer" and the threats of deportation increase the predisposition to precarious labour and accepting exploitative conditions (Anderson, 2010, p311). On the other hand, refugees attempting to recover the massive costs of their migration and attempts to begin gaining wages in the host state tend to be "overqualified" yet willing to accept "low waged and insecure work, at least for a short time… as a stepping ladder to the next more stable reality" (Anderson, 2010, p311).

For undocumented workers, the lack of protection and the classification of their "illegality" makes their working conditions "highly vulnerable to exploitation and abuse as employers can use their lack of legal status to threaten and control them" (Anderson, 2010, p311). **Work permits not being centred around the worker's control "may increase workers' vulnerability and push them into more exploitative working arrangements"** (Berntsen, 2018, p209).

Additionally, state-sponsored deportation is "truly the threat of those working illegally" and aids in producing "*certain types of labour"* of which exploitation and forced labour are part (Anderson, 2010, p311). Exploitation and trafficking include a variety of labour markets and practices such as prostitution, marriage, benefit fraud, organ trading, child adoption, independent child migration, physical and manual labour, or low-skilled labour sectors (Davidson, 2010, p249). Indeed, smuggling itself, legally defined by the UN Convention on Transnational Organized Crime as a voluntary experience committed in full consent (Davidson, 2010, p248), "in which life itself is at stake" in order to "graduate to illegal residency and work" (Nobil Ahmad, 2008, p307), depicts exploitive work conditions as the only possibility for certain types of workers. **There is a large overlap between sectors where exploitation and trafficking have occurred, as well as the labour sectors where migrant workers, undocumented workers, refugees, and asylum seekers tend to gain employment.**

The representation of trafficking and exploitation and its connection with migration all impinge upon the "imagined line between 'freedom' and 'restriction'" (Davidson, 2010, p245). The liberal democratic values of freedom, to be necessarily protected by the nation-state, coexist alongside the equally universal understanding that slavery, exploitation, and trafficking are to be morally condemned (Davidson, 2010, p245). There is clear rhetoric differentiating "slavery as wrong, and individual autonomy as good and right" (Brace, 2005, p160-161). Exploitation and forced labour are identified as situations of coercion, confinement, and unlawful ownership. Such situations of exploitation can be caused by economic or other impersonal forces (Davidson, 2010, p251) where one is forced to choose between "death, torture, endless confinement on the one hand or back-breaking physical labour on the other" (Steinfeld, 2001, p14).

However, in cases where even if there was 'free choice' to choose the lesser evil, in both cases, the worker "may be said to have been coerced" into such exploitative work conditions (Steinfeld, 2001, p15). In fact, even in cases where a worker has moved "through perfectly legal

channels to work legally in the formal economy," they may be "subject to extensive rights violations" such as identity documentation being withheld by the employer or state officials (whilst awaiting status), non-payment of wages, and threats or physical violence (Davidson, 2010, p249). **In work permits where the employer is in control, and a foreign worker is in fear of their vulnerable residence status with the risk of deportation being a constant reality, even fully law-abiding migrant workers with legal status may be victims of exploitation.**

Currently, certain regional human rights law includes an understanding of the freedom from exploitation, slavery, and forced labour as a universal right (such as Article 4 of the European Covenant of Human Rights). There are also a series of EU directives that aim to counteract potentials of exploitation in the Member States directly relating to marginalised groups of workers, such as the Young People at Work Directive 94/33/EC; Residence Permits Directive 2004/81/EC; Anti-Trafficking Directive 2011/36/EC; Employer's Insolvency Directive 2008/94/EC.[12] The primary obligations of such regional instruments are for signatory Member States to ensure their national policies reflect these provisions and for minimum core obligations to be fulfilled immediately, as other provisions may be progressively realised with the issuance of appropriate resources. Therefore, such conventions require "positive duties on states to take action" to prevent these wrongs, including an "obligation to work transnationally" (Costello, 2022, p964). **Currently, there is a lack of actions in the positive obligations to focus on fighting trafficking and exploitation through a lens specific to the vulnerabilities of migrant workers, refugees and asylum seekers, and undocumented workers.**

In the case Siliadin v France 7(3316/01) at the European Court of Human Rights in July 2005, the applicant was an undocumented child that was left unprotected by the law as the "French criminal code's definitions of prohibiting labour and living conditions 'incompatible with human dignity' did not explicitly relate to Article 4 of the ECHR" (FRA, 2015, p46). Therefore, the court found that the state had "failed to fulfil its positive obligations," leaving the

[12] *Young People at Work Directive 94/33/EC* protects minors against economic exploitation and against any work likely to harm their safety, health or psychical, mental, moral or social development or jeopardise their education. *Residence Permits Directive 2004/81/EC* grants conditions for short-term residence permits to third-country nationals who are (adult) victims of human trafficking. *Anti-Trafficking Directive 2011/36/EU* grants rights to trafficked persons. *Employer's Insolvency Directive 2008/94/EC* guarantees rights to employees in the case of employer insolvency; the CJEU has ruled undocumented workers are included (Tümer C-311/13, 2014).

undocumented child unprotected, vulnerable, and unable to seek the host nation's legal protection (FRA, 2015, p46). Additionally, the applicant had characteristics that heightened their vulnerability: being undocumented and being an unaccompanied minor. This leads to greater action required from states to actively investigate the potential threats to people identified as more vulnerable to such risks.

As per the conclusions by the European Court of Human Rights of the Chowdury v Greece 21884/15 case claims, **the obligation to investigate should not depend on a formal complaint of a victim - especially considering increasing awareness that migrant victims of exploitation tend to not make complaints to the host-state of their exploitation for fear of deportation and lack of a firewall** (para. 99)**.** For instance, conditions of "underpayment, nonpayment, under-the-table payments in general, and excessive working hours" are all signs of labour exploitation that labour inspectors need to be aware of in connection to migrant workers (Berntsen, 2018, p225). Therefore, a state's failure to protect such groups of workers from labour exploitation is a "*prima facie* breach of the 'minimum core' requirements" of regional human rights instruments (Costello et al., 2022, p958).

ECtHR 21884/15 *Chowdury and Others v Greece,* 30/03/2017: The case found 42 Bangladeshi nationals with undocumented status working on a strawberry farm in Greece. They were underpaid, worked extensively long hours, lived without access to running water and sanitation services, and worked under the supervision of armed guards. When their pay was withheld, they were shot at by the armed guards, requiring hospitalisation. Conclusions of the court implied that the Greek state authorities, once aware of potential trafficking, should have taken appropriate measures specified by the Council of Europe Anti-Trafficking Convention (para. 110) (if the operational measures mandated by the Convention do not impose a "disproportionate burden.")

Forced labour, and the potential of becoming a victim of exploitation "often emerge when migration status limits the free choice of employment" (Costello et al., 2022, p964). Strict state controls on employment practices have not had "beneficial effect(s)" but rather "tend to drive informal opportunities further underground," where work for undocumented workers is exponentially worse compared to legal migrants/refugees (Berntsen, 2018, p22).

Therefore, the limitations of labour rights for migrant workers, refugees and asylum seekers, and undocumented workers enacted by the state encourage workers to either have to make the choice of exploitative work to survive or either accentuates the vulnerabilities that make them more easily victims of trafficking and abuse. **It is clear that the "threshold of victimhood" for these groups of workers in the EU is "set extremely high,"** which, instead of "their suffering disqualifying them as political subjects" (Davidson, 2010, p256), **should inspire**

better regional and national support for a very real accountability problem and underdeveloped legal issue.

To improve current conditions, states need a drastic reformation of migration status policies and protection of workers, both legal and illegal, where migrant workers have their autonomy better represented and welcomed by the state, and shifting drastically the control out of the employer's hands. These are the primary steps to ensure positive obligations to reduce (and exterminate) the risk of labour exploitation can be in the future of the EU's migrant workers. **If the state does not enact policies that better protect migrant workers from having to accept exploitative situations in fears of being forcibly deported "from one territory to another" or being detained against their will, then the state itself will be enacting violence against the very victims it is claiming to protect** (Davidson, 2010, p255). Policies against "organised crime and violent people" are routinely threatening migrants, or "at least those who are poor, or who belong to a category of 'suspected person'" (Davidson, 2010, p255). The increase of coercive pressures on migrants by states, even if it is in the name of protecting them from exploitation, only results in the state enacting the very same violence it claims to protect victims from.

Conclusions:

The findings in this research have shown that:

- *The juxtaposing normative approaches of open borders to guarantee labour mobility for European nationalities, compared to the case for the right of exclusion, highlight the historically discriminatory approaches to the non-EU migrant labour force.*
- *The contemporary European labour and migration policies, based on claims of moral condemnation for exploitation and trafficking, threats of public disorder, security breaches, and concerns for protecting the national labour force, are instrumental in further restricting access to safe and legal work for migrant workers.*
- *Employer's control, state control, and policies that accentuate the dependence of residence security on work keep migrant workers lacking independence, and long-term security, unlike the native workforce. This makes migrant workers more prone to accepting exploitative conditions.*
- *The securitisation and fortification of borders, albeit within the fundamental instruments of the nation-state, only further increase the number of undocumented migrants arriving in the EU as restrictive migration controls do not alleviate the needs for which people migrate.*
- *Keeping migrant workers in low-wage sectors provides a flexible mobile labour force that benefits the host state as it is relatively cheap and selective. Low-wage sectors are afforded less overall human rights accessibility than the relatively few high-skilled migrant workers who move to the EU. This solidifies intersectional discrimination as the majority of migrant communities remain mostly in low-income classes. Gender roles are misrepresented in host-nation labour policies due to cultural differences.*

It can be concluded that the protocols for migrant workers' protection in labour and migration policies are lacking, outdated, insufficient and often harmful. Improving such conditions is necessary considering the increasing number of migrant communities establishing themselves in the EU and their vital role in the EU economy. Both normative condemnation and legal assessment are necessary to understand how policies can be more

effective in protecting marginalised workers and all skill sectors fundamental to the functioning of the EU.

The potential explanations for these lacking protocols and ineffective policies may have been (consciously) neglected due to the economic benefits reaped from being able to control the mobile workforce and dominating the *type* of work migrant communities are allowed to access. The benefits reaped from enforcing such policies accentuate the vulnerabilities of these diverse groups of migrant workers, increasing employer dependency, fear of deportation, and minimisation of rights access. The double standard of these policies, which disproportionately target non-EU citizens, also accentuates racist, xenophobic, and ethnically discriminatory behaviours within European nations.

The "racist essentialisation and hierarchisation of socially constructed differences" based on arbitrary characteristics are given symbolic value through labour market classifications of citizenship/nationality, gender, skillset, and legal status (Georgi, 2019, p100). These classifications are not merely the "result of explicit discourses, thought-out ideologues or conscious intentions," but rather racist ideologies that "emerge and reproduce to justify practices of oppression that have psychological, social and/or economic benefits for the privileged groups" (Georgi, 2019, p100-101). **The rise of populist, conservative, anti-migrant rhetoric follows similar architecture, as one may claim that historically, "racial ideology did not precede racist practices" (Georgi, 2019, p101) but rather, racist practices have encouraged and enhanced the presence of racist political rhetoric today. In the EU, we may see this in the restrictive migration policies mutually reinforcing restrictive labour possibilities for migrant workers.**

Additionally, the innovation-oriented and knowledge-based capitalist economy that the EU is currently practising also encourages a classist view on the diverse labour sectors, claiming some to be more useful than others. Such classism is notable when comparing the case study of post-Brexit migration, affecting a sizeable influx of middle-income people between the EU and the UK. The susceptibilities of a dynamic economy impact not only third-country nationals from areas of low- to middle-income countries migrating towards high-income countries, but also the impact of such fluctuating economies on migrants from high-income countries moving to other countries of relatively (lower, but still) high-income across Europe.

However, there is a stark difference in 'welcome culture' for workers from these backgrounds and classifications compared to the ones assessed in this research. UK nationals migrating to the EU to maintain their class position, or EU citizens applying for pre-settled or settled status in the UK to safeguard their freedom of movement between both regions, were not considered 'economic migrants,' or placed in the same political rhetoric as other groups of migrants assessed in this research. **Accessibility to rights provisions, therefore, seems to follow a classist line of reasoning, where those who have access to higher-skilled and higher-paying jobs are provided with more accessible legal migration routes, and more welcoming social and political rhetoric, than individuals fleeing persecution or detrimental poverty.**

Furthermore, not only does the convergence of third-country national migrant workers being primarily depicted in low-wage sectors also enforce this intersectional discrimination, but where policies limit the possibility for (undocumented or legal) migrant workers to access legal low-wage employment, they are pushed into informal sectors. This is where "[migrant workers] tend to compete with already vulnerable groups among the host population - low-skilled, poorly educated and female workers" (Sarzin, 2021, p33). Restrictive labour and migration policies therefore do not only affect the 'outsider,' but also the most vulnerable of the national workforce that nationalist economic policies claim to protect. However, issues on the impact of migrant workers on the native workforce may once more merely distract from the real issues of "job quality, job security, and low pay" (Anderson, 2010, p314) that affect all workers, regardless of origin.

Studies have shown that "the long-term economic benefits" from migration flows "lead to increased productivity, structural transformation, innovation, and long-term economic growth" (Sarzin, 2021, p33). Adverse impacts on the native population and migrant workers are often due to the historical practice of restrictive and dangerous policies that have withheld networks of exploitation, fears of security, and discriminatory rhetoric throughout the decades. **Future policies must firstly allow greater access to the formal labour market for migrant workers by recognising qualifications, eliminating restrictions on work in specific sectors (especially for refugees and asylum seekers), to allow for a greater dispersal of positive innovation across all labour and skill sectors** (Sarzin, 2021, p33). This also means ensuring greater access

to legal protection, ensuring separation between labour and residence vulnerability, and protection beyond legal status discrimination.

Viewing migration policies as a means of garnering the benefits of a mobile labour force, and viewing the labour force as beneficiary and useful across all sectors (low- and high-skilled equally), will allow historically discriminatory tendencies towards migrant workers to hopefully (finally) subside. For economic interests, appropriately integrating migrant workers has been proven to "contribute to firm growth by filling important labour shortages or by contributing to innovation," which may trigger "an increase in labour demand that raise the native wage level" (Dorn et al., 2021, p65-66). This is only if labour rights become heterogeneous between different work sectors. Further, "a complete removal of all mobility barriers" may, in theory, lead "to factor price equalisation" (Dorn et al., 2021, p60). However, this is only if *all* workers are treated fairly and states take accountability in providing safe and secure labour opportunities for all. **Safe, accessible and fair work should not be treated as a privilege, it is a human right.** Safe, accessible and fair work is also essential to be able to access and ensure most other human rights as well.

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