

Employing refugees in special economic zones: A pragmatic solution to a complex situation or an infringement of refugees' fundamental rights?

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List of Abbreviations

ARIO	–	International Law Commission’s Articles on Responsibility of International Organisations
ARSIWA	–	International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts
CESCR	–	Committee on Economic, Social and Cultural Rights
CIREFCA	–	International Conference on Refugees in Central America
ECtHR	–	European Court of Human Rights
EHHR	–	European Human Rights Reports
EVW	–	European Volunteer Worker
GRSC	–	Greek Refugee Settlement Council
ICARA	–	International Conferences on Assistance to Refugees in Africa
ICCPR	–	International Covenant on Civil and Political Rights
ICESCR	–	International Covenant on Economic, Social and Cultural Rights
IGPAR	–	Income-Generating Project for Afghan Refugees
HRC	–	United Nations Human Rights Committee
I-ACtHR	–	Inter-American Court of Human Rights
ILO	–	International Labour Organisation
KFC	–	Kentucky Fried Chicken
KHBTDA	–	King Hussein Bin Talal Development Area
MOU	–	Memorandum of Understanding
NAP	–	National Action Plan
NGO	–	Non-governmental Organisation
OHCHR	–	Office of the United Nations High Commissioner for Human Rights
UDHR	–	Universal Declaration of Human Rights
UK	–	United Kingdom
UN	–	United Nations
UNDP	–	United Nations Development Programme
UNGP	–	United Nations Guiding Principles on Business and Human Rights
UNHCR	–	United Nations High Commissioner for Refugees
VCLT	–	Vienna Convention on the Law of Treaties

1 Introduction

With the Syrian war dragging into its fifth year and creating a continuous flow of displaced persons, European countries are demonstrating an increasing unwillingness to accept refugees, with many countries severely restricting their immigration and asylum policies. Meanwhile, neighbouring countries that are by far hosting the largest share of Syrian refugees, such as Jordan, Lebanon and Turkey, struggle to provide for the basic needs of the vast number of displaced persons residing there. The Jordanian government, for example, estimates that it is currently hosting close to one million Syrians, giving rise to an economic and security nightmare for the country.¹ With growing unemployment rates and poverty amongst the local population, an increasing resentment towards the refugees is emerging.² In light of the current situation, the need for a new approach to international refugee assistance seems evident.

One such innovative approach can be found in Alexander Betts and Paul Collier's article in *Foreign Affairs*, "Help Refugees Help Themselves."³ The authors, two highly respected professors within the fields of forced migration studies and economics and public policy, map out a potentially pragmatic solution to refugees' lack of livelihoods and employment on the one hand, and the economic burden of countries hosting vast amounts of refugees on the other. Through reconceiving refugee camps in Jordan as special economic zones for the employment, training and education of encamped Syrians, Betts and Collier suggest that refugees could be granted the right to work without competing with Jordanian citizens for existing jobs. Thus, rather than depending on foreign aid and humanitarian relief, such an approach could enable refugees to become self-sufficient and autonomous by being provided the opportunity to maintain their own livelihoods through formal employment, which in turn could benefit their local communities. Special economic zones are demarcated geographic areas where rules on investment conditions, international trade, customs and taxation are more liberal and favourable than conditions that prevail in the national territory.⁴ This beneficial investment environment could incentivize and attract investments from international corpora-

¹ Betts, A. and Collier, P. (2015) "Help Refugees Help Themselves," *Foreign Affairs* (November-December 2015), p. 3.

² Francis, A. (2015) "Jordan's Refugee Crisis," *Carnegie Endowment for International Peace* (September 2015), p. 4.

³ *Supra* note 1.

⁴ Farole, T. (2001) *Special Economic Zones in Africa: Comparing Performance and Learning from Global Experiences*, Washington, DC, World Bank, p. 23.

tions and targeted development assistance from the international community, which in turn could facilitate the economic development of the region.

For instance, refugees residing in the Za'atari camp in northern Jordan, the world's second-largest refugee camp, could be employed in a massive and almost empty industrial zone nearby. This industrial zone, called the King Hussein Bin Talal Development Area (KHBTD), is located around ten miles from the Za'atari camp and lacks both local labour and Jordanian businesses willing to invest there.⁵ With the right incentives, international firms that used to do business in Syria, such as KFC and Royal Dutch Shell, as well as Syrian companies unable to operate in their country of origin, could relocate to Jordan and set up in the industrial zone, where they could employ the displaced. Moreover, businesses that are already donating labour and supplies to refugee agencies, such as Ikea and Hewlett-Packard, could be encouraged to additionally employ encamped refugees. According to Betts and Collier, international firms could hire Syrian refugees and Jordanians alike, while Syrian firms unable to operate in their home country could exclusively employ refugees. In the event of peace, the latter could relocate to their country of origin.⁶

The benefits of such an approach seem obvious; it is a cost-effective way of supporting refugees in protracted situations, offering a favourable solution for host communities, donor states and refugees alike. However, while applying a developmental approach to refugee assistance might seem like a self-evidently good idea, a number of legal issues regarding refugees' fundamental human rights arise. Refugee camps are often established and maintained in violation of international law, jeopardizing encamped refugees' civil, political and socio-economic rights and exposing them to severe security risks.⁷ Building special economic zones on these structures, even for the benefits that come with formal employment, may thus further compromise the encamped population's legal protection. Refugees' limited freedom of movement in the camps often endangers a wide range of other human rights.⁸ As such, separating refugees in camps and employing them in special work zones rather than integrating them into their local communities, seems legally problematic in regards to the fundamental objective of

⁵ *Ibid.* p. 88.

⁶ *Ibid.* p. 86.

⁷ Janmyr, M. (2012) *Protecting Civilians in Refugee Camps: Unable and Unwilling States, UNHCR and International Responsibility*, Martinus Nijhoff Publishers, p. 116.

⁸ *Ibid.* p. 116.

local integration and the right to equality and non-discrimination. Moreover, human rights activists have generally been critical towards special economic zones, as these often enable the exploitation of low-wage workers.⁹ Betts and Collier's proposal also raises issues in regards to which actors could be held accountable for potential human rights violations in the zones. Based on these considerations, this thesis will provide a legal analysis of the proposal under international human rights and labour law.

1.1 Background: Lessons learned from previous experiences with developmental approaches to refugee assistance

Betts and Collier's developmental approach towards refugee assistance is not a completely unprecedented one. In the 1920s, for instance, the League of Nations supported the Greek government with assistance and loans in order to employ refugees fleeing Turkey in the economic transformation of underdeveloped regions of the country. Old farming practices were substituted with modern ones and agricultural output quickly rose, which in turn had dramatic effects on the Greek economy.¹⁰ Easton-Calabria notes that this success was largely due to the refugees' participatory rights in the Greek Refugee Settlement Commission (GRSC) and the variety of rural and urban settlements.¹¹

A few decades later, through the European Voluntary Worker (EVW) programme (1947-1951), the UK recruited several thousands of Central and Eastern European refugees from camps in continental Europe, in order to fill gaps in key industries such as mining, agriculture and domestic work.¹² These refugees were explicitly recruited as labour migrants based on their skills, which created a hierarchy of desirability amongst the most wanted refugees, commonly referred to as "ideal immigrants."¹³ Though refugees filled the gaps in Britain's workforce, they were largely deprived of their freedom of movement. Confined to special

⁹ See, for instance, Gaertner, W. (2008) "Individual Rights versus Economic Growth," *Journal of Human Development*, Vol. 9 No. 3, 389-400; and Ananthanarayanan, S. (2008) "New Mechanisms of Imperialism in India: Special Economic Zones," *Socialism and Democracy*, Vol. 22, No. 1, pp. 35-60.

¹⁰ *Supra* note 4, p. 90.

¹¹ Easton-Calabria, E. E. (2015) "From Bottom-Up to Top-Down: The 'Pre-History' of Refugee Livelihoods Assistance from 1919 to 1979," *Journal of Refugee Studies*, Vol. 28, No. 3, Oxford, pp. 418-419.

¹² Long, K. (2013) "When Refugees stopped being Migrants: Movement, labour and humanitarian protection," *Migration Studies*, Vol. 1, No. 1, 2013, p. 14.

¹³ Kay, D. and Miles, R. (1988) "Refugees or Migrant Workers? The Case of European Volunteers Workers in Britain (1946-1951)," *Journal of Refugee Studies*, Vol. 1, 1998.

locations, they were unable to relocate to other parts of the country. This instrumentalist approach to refugee migration was criticized for constituting “capitalist exploitation of cheap workforce” and for treating refugee workers as “slave labour.”¹⁴ Indeed, such an approach would have been legally problematic under the present-day human rights regime. Throughout the 1960s, the international community introduced a new approach to refugee assistance, known as “integrated zonal development.” This strategy consisted of three main steps; first, refugees would be given relief aid and be transferred to camps; secondly, the refugees would be provided with land, tools, seeds and primary education. Finally, aid would be withdrawn and by this point the refugees were expected to be self-sufficient and integrated into their local communities.¹⁵ In practice, however, very limited effort was made in order to implement this approach, and the few attempts that were made had limited success.¹⁶

During the 1980s, the United Nations High Commissioner for Refugees (UNHCR) promoted the “refugee aid and development” strategy, which formed the basis for the International Conferences on Assistance to Refugees in Africa (ICARA I and II) in 1981 and 1984 and the International Conference on Refugees in Central America (CIREFCA) in 1989. This approach focused on sustainable development and durable solutions enabling refugees to rapidly achieve self-sufficiency, rather than depending on open-ended relief.¹⁷ Although ICARA ultimately failed, due to donors’ and host states’ limited commitment, a successful example of this strategy can be found in the 1980s’ Income-Generating Project for Afghan Refugees (IGPAR) in Pakistan, which was jointly funded by the Pakistani government, UNHCR and the World Bank. This programme provided Afghan refugees in Pakistan with employment mainly within construction, irrigation, flood protection and road repair. Through the completion of 300 separate projects from 1984 to 1994, Pakistan’s infrastructure significantly improved. Emphasis was focused on training the refugees, providing them with the experience and skills necessary to rebuild their own country upon return.¹⁸ Similarly, under the CIREFCA programme, jointly managed by the UNHCR and the United Nations Development Programme (UNDP), Guatemalan refugees in Mexico’s Yucatan Peninsula received assistance to promote

¹⁴ *Supra* note 11, p. 15.

¹⁵ Harrel-Bond, B. (1985) *Imposing Aid: Emergency Assistance to Refugees*, Oxford University Press, p. 10.

¹⁶ Crisp, J. (2001) “Mind the Gap! UNHCR, Humanitarian Assistance and the Development Process,” *International Migration Review*, Vol. 35, No. 1 (Spring 2001), p. 169.

¹⁷ Betts, A. (2009) “Development Assistance and Refugees: Towards a North-South Grand Bargain?” *Forced Migration Policy Briefing 2*, Refugee Studies Centre, University of Oxford, June 2009, p. 7.

¹⁸ *Supra* note 16.

self-sufficiency and local integration, benefitting both the refugees and their areas of exile.¹⁹ Although there was limited comprehensive evaluation of this project, the Guatemalan refugees seemingly benefited from their relative freedom of movement and livelihood opportunities, while Mexico profited from the refugees' efforts and targeted development assistance from the international community.²⁰

Nevertheless, at a global level, the refugee aid and development approach had limited success. According to Jeffrey Crisp, the flaws of the approach were largely a result of the ambiguous nature of the different actors' objectives.²¹ While states hosting refugees were primarily interested in a temporary solution for international burden sharing and increased compensation for the cost of accommodating the refugees, the donor community's intention was to find durable solutions and to reduce the number of refugees dependant on external assistance.²² These conflicting interests largely obstructed the objective of the development approach. An example of this tendency can be found in Kaiser's examination of Uganda's Self-Reliance Strategy (SRS) of the late 1990s, where the developmental approach towards refugee assistance largely failed due to the Ugandan government's exploitation of the programme, using it to its own advantage and as a means of attracting foreign aid and investment.²³ Refugees were denied freedom of movement and the right to consultation and participation in decision-making, which in turn undermined their socio-economic development. Consequently, the intended objective of fulfilling the material needs of the refugee population came at the expense of the protection of their legal and political rights. This political exclusion made it virtually impossible for refugees to integrate into Ugandan society. Kaiser argues that although a development oriented approach to refugee management is not in itself undesirable or unfeasible, such a strategy requires the inclusion of a remedial component to redress any disadvantages that the refugees may experience. Moreover, she notes that developmental programming of this kind needs the incorporation of an explicit focus on the refugees' legal protection.²⁴

¹⁹ *Supra* note 17, p. 7.

²⁰ *Ibid.* p. 7.

²¹ Crisp, J. (2001), p. 169.

²² *Ibid.* p. 172.

²³ Kaiser, T. (2005) "Participating in Development? Refugee protection, politics and developmental approaches to refugee management in Uganda," *Third World Quarterly*, Vol. 26, No. 2, p. 364.

²⁴ *Ibid.* p. 364.

In sum, previous experiences with developmental approaches to refugee assistance have, at best, had mixed results. The predominant legal issues that have arisen are related to refugees' limited freedom of movement, participatory rights and the exclusion, rather than integration, of refugees into local communities, raising potential issues of discrimination. As the EVW programme in the UK demonstrated, there is a fine line between the employment of refugees on the one hand, and forced labour and exploitation of low-wage workers on the other. Moreover, the Self-Reliance Strategy in Uganda revealed that the lack of a remedial component severely compromised refugees' legal protection. The few programmes that proved to be successful, such as the GRSC and IGPAP, largely succeeded precisely due to the refugees' right to consultation and participation in decision-making and their relative liberty of movement. In order for developmental approaches to refugee assistance to be effective, then, such minimum rights arguably need to be in place.

1.2 Research question and legal issues

The thesis will address the following research question:

Whether the proposed establishment of special economic zones for the employment of Syrian refugees in Jordan would be in accordance with the right to work, the right to freedom of movement and the right to equality and non-discrimination under international human rights and labour law.

In addressing the research question, the following legal issues will be analysed:

- I. Whether the proposed establishment of special economic zones for the employment of Syrian refugees in Jordan would be in accordance with the right to work.
- II. Whether the proposed establishment of special economic zones for the employment of Syrian refugees in Jordan would be in accordance with the right to freedom of movement.
- III. Whether the proposed establishment of special economic zones for the employment of Syrian refugees in Jordan would be in accordance with the right to equality and non-discrimination.

IV. Whether the respective actors in the special economic zones could be held accountable under international law for potential human rights violations in the zones.

1.3 Scope and limitations of thesis

The thesis will be limited to addressing the four abovementioned legal issues, applying a human rights and labour law perspective. As such, a discussion of trade law issues relevant to Betts and Collier's proposal goes beyond the scope of this thesis.²⁵ Moreover, the analysis will be of a legal character and will thus not go into detail about economic, political and social aspects of the proposal.²⁶

1.4 Structure of thesis

After providing an introduction to the research topic, Chapter 1 offers a conceptualization of the development approach to refugee assistance, an examination of Betts and Collier's proposed establishment of special economic zones in Jordan and an overview of previous experiences with similar approaches to refugee assistance. Thereafter, the research question and subsequent legal issues are discussed, followed by an examination of methodological issues and the relevant legal framework. The subsequent chapters will analyse some of the key legal issues arising in relation to the proposal; Chapter 2 will discuss whether Betts and Collier's proposal would be in accordance with refugees' right to work, freedom of movement and equality and non-discrimination; and Chapter 3 will explore issues in relation to legal accountability in the zones. Finally, Chapter 4 will conclude by highlighting key findings and presenting a number of policy recommendations.

²⁵ For a discussion of trade law implications of special economic zones, see Creskoff, S. and Walkenhorst, P. (2009) "Implications of WTO Disciplines on Special Economic Zones in Developing Countries," *Policy Research Working Paper*, World Bank, April 2009.

²⁶ For an examination of economic aspects of the special economic zone model see, for instance, Wang, J. (2013) "The economic impact of Special Economic Zones: Evidence from Chinese municipalities," *Journal of Development Economics*, Vol. 101 (2013), pp. 133-147.

1.5 Methodology

Using Betts and Collier's article "Help Refugees Help Themselves" as a point of departure, the thesis will provide a *de lege lata* analysis of the current international human rights and labour law framework and evaluate whether the proposal for employing Syrian refugees in special economic zones in Jordan would be in accordance with this legal regime. The policy recommendations provided in the final section of the thesis go beyond this *de lege lata* discussion, and seek to establish how the proposal could be implemented in order to be compatible with international human rights and labour law.

The international legal framework that has been applied throughout the course of the thesis is a combination of so-called hard law and soft law instruments. "Hard law" is used to describe obligations that are legally binding upon ratifying parties, whereas "soft law" consists of declarations, guidelines and other aspirational frameworks that are not legally binding.²⁷ Article 38 of the Statute of the International Court of Justice (ICJ) sets out the generally recognized sources of international law. Primary sources include international conventions, customary international law and general principles of law, while judicial decisions and legal teachings are considered subsidiary sources.²⁸ The international conventions that are analysed throughout the thesis will be interpreted in accordance with the general principles for interpretation set out in the 1969 Vienna Convention on the Law of Treaties (VCLT) Article 31.²⁹ According to Article 31(1), "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in its context and in light of its object and purpose." Customary international law, consisting of international practice and *opinio juris*, has also been applied throughout the thesis. The former element entails an established, widespread and consistent practice on the part of states, whereas the latter involves a psychological element demonstrating a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. A rule of customary international law is binding on all states, notwithstanding their participation in the practice from which it formed.³⁰

²⁷ Boyle, A. (2010) "Soft Law in International Law-making," in Evans, M. D. (ed.) *International Law*, Oxford, p. 118.

²⁸ United Nations, Statute of the International Court of Justice, 18 April 1946, Article 38.

²⁹ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, Vol. 1155, p. 331.

³⁰ Thirlway, H. (2010) "The Sources of International Law," in Evans, M. D. (2010) *International Law*, Oxford University Press, pp. 97-98.

Throughout the course of the thesis, the main methodological challenge has been to legally analyse a proposal that has yet to be clearly defined. For instance, Betts and Collier do not specify which rights refugees would be granted in the special economic zones, whether the zones would be open or closed and which actors would be responsible in the event of human rights violations in the zones. Consequently, in certain sections of the thesis it has not been possible to derive at clear legal conclusions as to whether a specific right would be violated if one were to implement the proposal. To circumvent this issue, a number of the discussions have been carried out under clearly specified assumptions.

1.6 Legal framework and the status of refugees in Jordan

Despite hosting one of the world's largest refugee populations, Jordan is not a party to the 1951 Convention Relating to the Status of Refugees³¹ (hereafter the Refugee Convention) and its 1967 Protocol³² and does not have any national legislation specifically addressing the rights of refugees. In fact, the Jordanian government merely refers to Syrians in the country as “visitors” or “guests,” which has no legal meaning under its national legislation.³³ Consequently, the term “refugee” as defined in Article 1(a)(2) of the Refugee Convention, meaning 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, unwilling to avail himself of the protection of that country; or [...] to return to it,”³⁴ has no legal implications under Jordan's national legislation.³⁵ However, although Jordan is not a party to the Convention, it is bound by customary international law to provide refugees with a number of minimum rights. This includes the right to *non-refoulement*, that is, the right of a refugee not to be returned to frontiers or territories where his or her life or freedom would be threatened on account of his or

³¹ United Nations General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, Vol. 198, p. 137.

³² United Nations General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, Vol. 606, p. 267.

³³ International Labour Organisation (2015) “Access to work for Syrian refugees in Jordan: A discussion paper on labour and refugee laws and policies,” ILO Regional Office for Arab States, Beirut, p. 12.

³⁴ *Supra* note 31, Article 1(a)(2).

³⁵ *Supra* note 30, Article 1(a)(2).

her race, religion, nationality, membership of particular social group or political opinion.³⁶ Moreover, the fundamental right not to be subject to torture or cruel, inhuman or degrading treatment or punishment follows from customary international law.³⁷ Additionally, a Memorandum of Understanding (MOU) between the UNHCR and Jordan provides a framework for the government's cooperation with the UNHCR. Although the document contains the major protection principles set out in the Refugee Convention, it does not provide refugees with any legal rights, such as the right to employment, freedom of movement, housing and public education.³⁸ Furthermore, it is not legally binding.³⁹

Accordingly, even though Jordan is not a party to the Refugee Convention, most Syrians in the country would be considered refugees under customary international law, which provides them with certain fundamental rights. As these minimum rights do not entail the rights relevant to the legal analysis of this thesis – the right to work, freedom of movement and equality and non-discrimination – this study will apply an international human rights and labour law perspective. As such, by virtue of being human beings, refugees are entitled a range of rights under international human rights law. In this respect, a largely debated issue is whether refugees should indeed be entitled “full-fledged” human rights to the same extent as citizens of the state they find themselves in. In practice, this is certainly not the case. Indeed, scholars such as Larking argue that the idea that all human beings, including refugees, are born free and equal and are entitled the same basic rights is a myth.⁴⁰ A *de lege ferenda* discussion of such issues, however, goes beyond the scope of this thesis.

The primary sources for the study include treaties such as the International Covenant on Civil and Political Rights (ICCPR),⁴¹ the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁴² the ILO Convention Concerning Forced and Compulsory Labour,⁴³ the

³⁶ See, for instance, UNHCR Executive Committee Conclusion, “General Conclusion on International Protection,” No. 25, para. (b), 20 October 1982.

³⁷ Goodwin-Gill, G. and McAdam, J. (2007) *The Refugee in International Law*, Oxford, pp. 346-348.

³⁸ United Nations High Commissioner for Refugees, Memorandum of Understanding between the government of Jordan and UNHCR, 5 April 1998.

³⁹ Francis, A. (2015), p. 6.

⁴⁰ Larking, E. (2014) *Refugees and the Myth of Human Rights: Life Outside the Pale of the Law*, Ashgate.

⁴¹ United Nations General Assembly, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, United Nations, Treaty Series, Vol. 999, p. 171.

⁴² United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, United Nations, Treaty Series, Vol. 993, p. 3.

ILO Convention Concerning the Abolition of Forced Labour⁴⁴ and the ILO Convention Concerning Discrimination in Respect of Employment and Occupation.⁴⁵ As Jordan has signed and ratified the said instruments, it is legally bound by these under the principle of *pacta sunt servanda* in VCLT Article 26. Other primary sources include Jordan's national legislation. In Article 16 of its National Charter, Jordan commits to protect human rights and to adhere by the Universal Declaration of Human Rights (UDHR).⁴⁶ Finally, customary international law has constituted a primary source for the thesis.

Secondary sources for the study include soft law instruments such as the Universal Declaration of Human Rights (UDHR),⁴⁷ General Comments from the United Nations Human Rights Committee (HRC)⁴⁸ and the UNHCR, the Memorandum of Understanding (MOU) between the UNHCR and Jordan,⁴⁹ and the UN Guiding Principles on Business and Human Rights (UNGPR).⁵⁰ Although initially implemented as a soft law instrument, the substantial provisions of the UDHR are now considered customary international law.⁵¹ The remaining soft law instruments are not legally binding but have provided useful guidance in the interpretation of the primary sources; indicating trends and developments in international law and *opinio juris*. Additional secondary sources include jurisprudence from the International Court of Justice (ICJ), the European Court of Human Rights (ECtHR) and domestic courts. Furthermore, literature on the subject, including books, articles and research papers, has constituted a supplementary source.

⁴³ ILO, Convention Concerning Forced and Compulsory Labour, No. 29, 1930.

⁴⁴ ILO, Convention Concerning the Abolition of Forced Labour, No. 105, 1957.

⁴⁵ ILO, Convention Concerning Discrimination in Respect of Employment and Occupation, No. 111, 1958.

⁴⁶ National Charter of the Hashemite Kingdom of Jordan, 1991, Art. 16.

⁴⁷ United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

⁴⁸ United Nations Human Rights Committee (1999) "General Comment No. 27: Freedom of movement," UN. Doc. HRI/GEN/1/Rev. 7, May 12 2004.

⁴⁹ *Supra* note 37.

⁵⁰ United Nations Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, Doc. A/HRC/17/31, 16 June 2011.

⁵¹ Rehman, J. (2010) *International Human Rights Law*, Second edition, Pearson, p. 80.

2 Analysis of legal issues

2.1 Whether the proposed establishment of special economic zones for the employment of Syrian refugees in Jordan would be in accordance with the right to work

Jordan's 1952 Constitution proclaims that the right to work is exclusively reserved for Jordanian citizens, and hence Syrians cannot legally work in the country.⁵² In 2014, the ILO estimated that 160,000 Syrians were employed in Jordan's informal job sector and practically all Syrian refugee workers in the country (99%) are currently working outside official labour regulations.⁵³ Meanwhile, 96% of the Jordanian population believes that Syrians are taking their jobs.⁵⁴ Considering the present lack of work rights in the country for Syrians, formal employment in special economic zones could be a welcome change, offering refugees the benefits that come with official employment and self-reliance. The question, however, is whether employment in such zones would be compatible with the refugees' right to work under international human rights and labour law.

2.1.1 The right to work under international human rights law

The key international treaty protecting the right to work is the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 6(1) of the Covenant provides that the right to work includes "the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts." Interpreted in accordance with the ordinary meaning of the wording, "everyone" implies that the right applies to all human beings, citizens and aliens alike.⁵⁵ The UN Committee on Economic, Social and Cultural Rights (CESCR) has confirmed this interpretation, stating that the right applies to "everyone including non-nationals, such as refugees, asylum seekers, stateless persons, migrant workers [...] regardless of legal status and documentation."⁵⁶ Consequently, the right to work under ICESCR must extend to

⁵² Constitution of the Hashmite Kingdom of Jordan, 1 January 1952 Article 23. Available at: <http://www.refworld.org/docid/3ae6b53310.html>

⁵³ Stave, S. E. and Hillesund, S. (2015) "Impact of Syrian refugees on the Jordanian Labour market," ILO / Fafo publication, p. 65.

⁵⁴ Francis, A. (2015), p. 12.

⁵⁵ VCLT, Article 31(1).

⁵⁶ UN Committee on Economic, Social and Cultural Rights, General Comment 20, UN Doc. E/C.12/GC/20 (2009), para. 30.

displaced Syrians in Jordan. A natural understanding of “freely choose or accept work” under ICESCR Article 6(1) would suggest a right not to be forced to work, but the specific content of the provision is unclear. In this regard, the Commission on Economic, Social and Cultural Rights (CESCR) has interpreted Article 6(1) as a prohibition of forced labour and child labour.⁵⁷ Furthermore, ICESCR Article 7 stipulates the right to just and favourable conditions of work. *Litra a-d* specifies that this particularly includes the right to fair wages, a decent living, reasonable working hours and safe and healthy working conditions.⁵⁸ The wording of the provision suggests that the list is non-exhaustive. Moreover, in the UNHCR’s comments on the draft General Comments on the Right to just and favourable conditions at work, it is pointed out that “[t]here is no justification for differential treatment in conditions of employment for asylum seekers, refugees or stateless persons.”⁵⁹ Though not legally binding, the comments offer an authoritative interpretation of refugees and asylum seekers’ right to work emanating from the ICESCR. Similarly, the right to freely choose and accept work and the right to just and favourable working conditions are encompassed in the Universal Declaration of Human Rights (UDHR) Article 23(1). Though the UDHR was initially implemented as a soft law instrument, the substantial provisions of the Declaration are now considered binding customary international law.⁶⁰

Despite its broad protection under ICESCR Articles 6 and 7, the right to work is limited by Article 2(1), proclaiming that states are obliged only to “take steps” to realize the rights in the Covenant, to the extent possible within the limits of their resources. This implies that states do not have an absolute obligation to implement the ICESCR. Indeed, Hathaway notes that Article 6 “imposes only a duty of progressive, non-discriminatory implementation, not immediate result.”⁶¹ The protection space is further limited by ICESCR Article 2(3), permitting developing countries to determine to what extent they will guarantee the economic rights in the Covenant to non-nationals, with due regard to human rights and their national economy.⁶² Jordan, therefore, being a developing country with high unemployment rates and limited resources,

⁵⁷ UN Committee on Economic, Social and Cultural Rights, General Comment 18, para. 23.

⁵⁸ ICESCR, Article 7.

⁵⁹ UNHCR’s comments on the draft General Comments on the Right to just and favourable conditions at work (Article 7 of the ICESCR), available at: <http://www.refworld.org/pdfid/55509dc14.pdf>

⁶⁰ Rehman, J. (2010), p. 80.

⁶¹ Hathaway, J. (2005) *The Rights of Refugees under International Law*, Cambridge, p. 740.

⁶² ICESCR, Article 2(3).

has a certain margin of appreciation regarding its obligation to facilitate Syrian refugees in the country with the right to work.

In sum, then, though having a certain margin of appreciation, Jordan has a binding obligation under the ICESCR to protect refugees' right to work and to just and favorable conditions of work, regardless of legal status and documentation. Accordingly, if Syrian refugees were to be employed in Betts and Collier's proposed special economic zones in Jordan, it is crucial that employment would be non-compulsory and provide just and favorable working conditions. These requirements are further elaborated upon in an array of ILO instruments, a number of which are to be examined in the following section.

2.1.2 Labour rights under selected ILO conventions

Although there is no ILO convention specifically addressing refugees' right to work, the ILO instruments that Jordan has ratified stipulate Syrian refugees' labour rights in the country. As a general starting point, the ILO Convention Concerning Forced or Compulsory Labour (hereafter the Forced Labour Convention) Article 1(1) provides that all ratifying parties undertake to "suppress the use of forced or compulsory labour in all its forms."⁶³ A legal definition of "forced or compulsory labour" can be found in Article 2(1), meaning "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 *voluntarily*" (emphasis added).⁶⁴ In regards to the proposed work zones in Jordan, employment would thus need to be non-coercive and based on consent.

Furthermore, under the ILO Convention Concerning the Abolition of Forced Labour Article 1(b) (hereafter the Abolition of Forced Labour Convention), state parties commit to suppress and not make use of any forms of forced or compulsory labour "as a method of mobilising and using labour for purposes of economic development."⁶⁵ This provision is particularly relevant in the case at hand, where part of the objective for establishing work zones is precisely to accommodate economic development in the host country. Again, a crucial issue when analysing the legality of employing Syrian refugees in special economic zones in Jordan is

⁶³ ILO, Convention Concerning Forced or Compulsory Labour, Article 1(1).

⁶⁴ *Ibid.* Article 2(1).

⁶⁵ ILO, Convention Concerning the Abolition of Forced Labour, Article 1(b).

whether this would amount to forced or compulsory labour. This issue will be discussed shortly.

2.1.3 The notion of consent and non-coercion: Refugees' *de facto* choice regarding employment in the zones

The human rights and labour law instruments that have been discussed in the above sections all emphasize the fundamental requirement of employment being non-coercive and voluntary. The question thus arises as to whether employment in the proposed special economic zones in Jordan would indeed be based on *consent* and *non-coercion*. Notwithstanding the terminological ambiguity, within the field of social philosophy, the notion of consent is commonly studied in light of consent theory, premised on the idea that individuals primarily make choices as free agents entering into consensus with other free agents.⁶⁶ Westen, for instance, refers to consent as “a state of mind of acquiescence [...] a felt willingness to agree with - or to choose - what another person seeks or proposes.”⁶⁷ Hurd defines consent as “an act of will - a subjective mental state akin to other morally and legally significant mens rea.”⁶⁸ An essential element of this theory is thus that consent constitutes a subjective mental state based on free will. In the context of the right to work, consent has been interpreted as meaning that employment should, *inter alia*, be based on the free will of the worker and on a voluntary offer. Regarding the latter, the ILO supervisory bodies have emphasized the form and subject matter of consent; the role of external constraints or indirect coercion; and the possibility of revoking freely given consent.⁶⁹ *Coercion*, in this context, may include the withholding and non-payment of wages, the retention of passports or other identity documents, threats of dismissal in order to force employees to work overtime and severe restrictions on workers' freedom of movement.⁷⁰ Moreover, deceptive or coercive recruitment, recruitment by abuse of vulnerability and exploitative conditions of work are considered indicators of forced labour.⁷¹ Accordingly, in order to be lawful under ICESCR Article 6(1) and the Forced Labour Convention Article

⁶⁶ See, for instance, Kleinig, J. (2010) “The Nature of Consent,” in Miller, F. and Wertheimer, A. (eds.) *The Ethics of Consent: Theory and Practice*, Oxford University Press.

⁶⁷ Westen, P. (2003) *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defence to Criminal Conduct*, Aldershot: Ashgate, p. 5.

⁶⁸ Hurd, H. M. (1996) “The Moral Magic of Consent,” *Legal Theory*, Vol. 2, Issue 2, p. 121.

⁶⁹ ILO (2009) “The cost of coercion,” International Labour Conference, 98th session 2009, p. 6 para. 25.

⁷⁰ ILO (2015) “Combating Forced Labour: A Handbook for Employers & Business,” 2nd ed. Geneva: ILO, p. 5.

⁷¹ *Ibid.*

1(1), employment in the proposed work zones in Jordan would need to be based on the free will and voluntary consent of the workers and be non-coercive and non-exploitative.

A subsequent question related to the legality of the proposed establishment of work zones in Jordan is how one can distinguish between forced labour camps and other camps. Throughout history, there are various examples of forced labour camps where coercion and the threat of penalty have constituted essential elements. The forcible placement of Jews in work camps (*Arbeitslager*) under the Nazi regime, the Chinese Communist Party's numerous labour camps and imperial Russia's remote Siberian forced labour camps only constitute a few instances.⁷² The common denominator of these camps is the involuntary, coercive and forcible recruitment of workers under the threat of penalty. However, the line between forced and free labour is often blurred and, in practice, voluntary and coercive recruitment often merge. Between 1983 and 1990, for instance, German authorities conditioned the material support of asylum seekers on the acceptance of jobs, effectively forcing the asylum seekers to work. This provoked adamant condemnation by the ILO as it effectively amounted to an *indirect* form of forced labour.⁷³ Accordingly, even presuming that employment in the proposed development zones in Jordan would be voluntary, one would need to ensure that refugee workers would in effect have other options. In sum, forced labour camps, as opposed to other camps, are based on coercive recruitment, direct or indirect compulsion and the threat of penalty, as set out in definition of "forced or compulsory labour" in Article 2(1) of the Forced Labour Convention.

In "Help Refugees Help Themselves," Betts and Collier emphasize that employment in the proposed work zones should not be coercive. Rather, it should provide legal opportunities for employment and be based on the desire of most refugees for autonomy.⁷⁴ A critical point in regards to the lawfulness of the work zones is therefore how refugee workers would be recruited; whether acceptance of employment would be voluntary and based on free will; whether there would be elements of external constraints or indirect coercion; and whether employees would effectively have a choice. Accordingly, one may ask whether only skilled workers would be offered employment in the zones; whether employment would be based on qualifications and merits; whether training would be provided for non-skilled workers; wheth-

⁷² See, for instance, Herbert, U. (2009) "Forced Laborers in the Third Reich: An Overview (Part I)," *International Labor and Working Class History*, Vol. 58, October 2000, pp. 192-218.

⁷³ Liebig, T. (2007) "The Labour Market Integration of Immigrants in Germany," OECD Social, Employment and Migration Working Papers, No. 47, p.15.

⁷⁴ Betts, A. and Collier, P. (2015), p. 88.

er refugees not working in the zones would have other options; and whether refugee relief would be premised upon employment in the zones. If employment in the zones would indeed be voluntary and non-coercive, it would be in accordance with the right to freely choose and accept employment. In conclusion, assuming that employment in the zones would be non-coercive and based on consent, Betts and Collier's proposal for the establishment of special economic zones would be in accordance with the right to freely choose and accept work under ICESCR Article 6(1), the Forced Labour Convention Article 1(1) and the Abolition of Forced Labour Convention Article 1(b).

2.1.4 Refugees' right to just and favourable working conditions in the special economic zones

As has been pointed out previously, ICESCR Article 7 provides that the right to work includes the right to "just and favourable conditions of work." Article 7 *litra* a-d specifies that this entails, *inter alia*, the right to fair wages, a decent living, reasonable working hours and safe and healthy working conditions.⁷⁵ The question thus arises as to whether workers in the proposed zones would be provided with these minimum standards. In "Help Refugees Help Themselves," Betts and Collier acknowledge that human rights activists have generally been sceptical towards special economic zones, as these often enable the exploitation of low-wage workers. Indeed, employing vulnerable and desperate refugees fleeing war and persecution in work camps in order for international corporations to profit economically and host countries to develop seems worrisome in this regard. In Betts and Collier's words, however, "there is no reason why the development of such zones cannot be consistent with ethical labour practices."⁷⁶ Accordingly, the proposed special economic zones' legality in regards to just and favourable working conditions would largely depend on clearly specifying how the zones would be implemented in practice. As the proposal does not provide specific details apart from that the zones should be "consistent with ethical labour practices,"⁷⁷ this thesis will proceed under the assumption that the zones would indeed ensure the said conditions set out under ICESCR Article 7.

⁷⁵ ICESCR, Article 7.

⁷⁶ Betts, A. and Collier, P. (2015), p. 88.

⁷⁷ *Ibid.*

In sum, then, presuming that the proposed special economic zones would provide refugee workers with fair wages, a decent living, reasonable working hours and safe and healthy working conditions, the zones would be in accordance with the just and favourable working conditions under ICESCR Article 7.

2.1.5 Conclusion

Based on the above considerations, the answer to the legal question this section has sought to address, whether the proposed establishment of special economic zones for the employment of Syrian refugees in Jordan would be compatible with the right to work, largely depends on clarifying the specific structures of the zones. This would entail specifying recruitment procedures, the voluntary and non-coercive nature of employment and the specific conditions at the workplace. By way of comparison, two different scenarios should be considered.

In the first hypothetical scenario, refugees would be recruited on a voluntary and non-coercive basis, free to choose and accept employment offered in the zones. This would ensure respect for ICESCR Article 6 and the Forced Labour Convention Article 1(1). Furthermore, companies investing in the zones would need to guarantee just and favourable working conditions under ICESCR Article 7. Such an approach, founded on consent and non-coercive structures, ensuring ethical labour conditions, would be in accordance with refugees' right to work under the said instruments. A second hypothetical scenario, however, where refugees could only work in the proposed zones in order to make a living, is legally problematic. As has been argued, conditioning aid upon employment would constitute an indirect form of forced labour and would not be lawful under the ICESCR and the Forced Labour Convention. Even presuming that employment in the zones would formally be voluntary, refugees would effectively not have a choice due to not having any other options.

In sum, provided that employment in the zones would be non-compulsory, based on consent and meet the discussed requirements for just and favourable working conditions, Betts and Collier's proposed establishment of special economic zones in Jordan would be in accordance with the right to work under the ICESCR, the Forced Labour Convention and the Abolition of Forced Labour Convention.

2.2 Whether the proposed establishment of special economic zones for the employment of Syrian refugees in Jordan would be in accordance with the right to freedom of movement

2.2.1 The fundamental nature of the right to freedom of movement

The right to freedom of movement is commonly perceived as one of the most fundamental human rights and a prerequisite for the enjoyment of all other rights.⁷⁸ As noted by the United Nations Human Rights Committee (HRC) in General Comment No. 27, the liberty of movement is “an indispensable condition for the free development of a person.”⁷⁹ Article 12(1) of the International Covenant on Civil Political Rights (ICCPR) provides that “[e]veryone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.” Interpreted in accordance with the ordinary meaning of the terms, all persons legally within the territory of a state have the right to freely move around and to choose where to reside. Although the lawfulness of an alien’s presence within a state will depend on that particular state’s national legislation, ICCPR Article 12(1) implies that any movement restrictions must cease after regularization. Similarly, the right to freedom of movement is encompassed in Article 13 of the UDHR. Although the Declaration was initially implemented as a soft law instrument, the right to freedom of movement under Article 13 is now considered a binding norm of customary international law.⁸⁰

According to ICCPR Article 12(3), the only legitimate restrictions on freedom of movement are “those which are permitted by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.”⁸¹ Although the provision suggests that states have a wide range of legitimate grounds for restriction, the Human Rights Committee (HRC) in General Comment No. 27 specified that restrictions on freedom of movement must be *necessary* and *proportionate*: “Article 12(3) clearly indicates that not only must the restrictions serve one of the permissible purposes; they must also be necessary in order to pro-

⁷⁸ Hovil, L. and Okello, M. C. (2008) “The Right to Freedom of Movement for Refugees in Uganda,” in Hollenbach, D. (ed.) *Refugee Rights: Ethics, Advocacy, and Africa*, Georgetown University Press, p. 81.

⁷⁹ *Supra* note 46, p. 173, para. 13.

⁸⁰ *Supra* note 75, p. 80.

⁸¹ ICCPR, Article 12(3).

tect them.”⁸² Moreover, the restrictions “must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.”⁸³ This implies a high threshold under ICCPR Article 12(3).

It has now been established that the right to freedom of movement under ICCPR Article 12 applies to all human beings lawfully within the state, including refugees, and that this right may only lawfully be restricted for the permissible purposes specified in Article 12(3) if such restrictions are proportionate and necessary, permitted by law and are consistent with the other rights in the Covenant.

2.2.2 Present movement restrictions in Jordanian refugee camps

Before applying the discussed legal standards to the case at hand, a brief overview of current movement restrictions in Jordanian refugee camps will be provided. As Betts and Collier propose to reconceive refugee camps as industrial incubator zones, the legality of the latter would largely depend on the lawfulness of the camps these zones would be building upon.⁸⁴

The majority of today’s refugee camps are considered *closed camps*, in the sense that refugees’ freedom of movement is either physically or bureaucratically restricted. Even camps that are not *per se* closed are often located in remote and inhospitable areas, making movement away from these regions practically impossible; thus effectively restricting the refugees to these areas.⁸⁵ The notion that some camps are open is often largely faulty, as assistance to the refugees frequently is conditioned upon encampment, effectively confining refugees to these sites.⁸⁶ According to Alexandra Francis, this is essentially the *de facto* situation in present-day Jordanian refugee camps. Jordan has become increasingly wary of its growing Syrian population and has significantly restricted the protection space for refugees by closing border crossings and limiting refugees’ freedom of movement.⁸⁷ Although the largest share of refu-

⁸² *Supra* note 76, para. 3.

⁸³ *Ibid.* para. 14-15.

⁸⁴ Betts, A. and Collier, P. (2015), p. 86.

⁸⁵ Janmyr, M. (2012), p. 113.

⁸⁶ *Ibid.* p. 113.

⁸⁷ Francis, A. (2015), p. 21.

gees reside in urban areas, the Jordanian government has recently attempted to confine more refugees to camps. In 2014 the authorities began forcibly returning Syrians to refugee camps from urban areas, restricting their freedom of movement and limiting their access to healthcare outside the camps. As a result, many Syrian refugees now refuse to regularize or renew their status with the authorities, consequently jeopardizing their access to service provision.⁸⁸ Moreover, a bailout policy requires Syrian refugees to obtain a sponsorship from a Jordanian citizen and to pay a fee in order to leave the camps.⁸⁹ Refugees that leave the camps without obtaining bailout, face increasing restrictions in the acquisition of service cards and possible relocation to the camps. Furthermore, the Jordanian government has requested the UNHCR not to grant asylum seeker certificates to refugees who have left the camps without acquiring bailout after July 2014. This has effectively generated a situation where refugees are not permitted to leave the camps.⁹⁰ Due to these bureaucratic movement barriers, Jordanian refugee camps are *de facto* closed.

2.2.3 Justifying limitations on freedom of movement in closed refugee camps

Several scholars argue that refugee camps, by virtue of keeping refugees in a limited area of space, are fundamentally illegal.⁹¹ Janmyr, for instance, notes the vast majority of today's closed refugee camps are kept in violation of international law and that the severe restrictions on refugees' freedom of movement are generally not in line with the legitimate restriction grounds in ICCPR Article 12(3).⁹² The issue to be examined in the following section is whether the prevailing limitations on freedom of movement in Jordanian refugee camps can be justified based on the legitimate restriction grounds in ICCPR Article 12(3), which would be a prerequisite for lawfully building special economic zones on these camp structures. The first question that must be asked is whether the confinement of Syrian refugees to closed camps where their freedom of movement is physically or bureaucratically restricted is necessary in order to protect Jordan's national security.

⁸⁸ *Ibid.* p. 23.

⁸⁹ *Ibid.* and *supra* note 33, p. 15.

⁹⁰ *Ibid.* p. 23.

⁹¹ See, for instance, Verdirame, G. (2011) *The UN and Human Rights - Who are the Guards and the Guardians?* Cambridge, pp. 240-241.

⁹² Janmyr, M. (2012), p. 116.

Although an ordinary interpretation of “national security” under ICCPR Article 12(3) would suggest the protection of the essential interests of the state, the concrete meaning of the term is unclear. According to Hathaway, “national security” entails measures necessary to avoid an “objectively reasonable, real possibility of directly or indirectly inflicting harm to the host state’s most basic interests, including the risk of an armed attack [...] or the destruction of its democratic institutions.”⁹³ This implies a high threshold. Although the wording of Article 12(3) may suggest that states have considerable discretion as to what constitutes a threat to national security, the UN Commission on Human Rights has noted that Article 12(3) requires the threat to the state to be “particularly serious.”⁹⁴ For instance, in the aftermath of 9/11, the UNHCR reminded the international community that both detention and other restrictions on the movement of asylum seekers may only be applied on national security grounds “if necessary in circumstances prescribed by law and subject to due process safeguards.”⁹⁵

Applied to the case of Jordan, the large influx of refugees has certainly placed an economic burden on the country and negatively affected the labour market.⁹⁶ Indeed, together with the lack of adequate resources, security concerns are host governments’ most common justification for the encampment of refugees. Host states often claim that refugee camps protect both the local population and the encamped refugees and offer the government a sense of control.⁹⁷ However, it is dubious whether there is an objectively, reasonable and real possibility that Syrian refugees would inflict harm to the Jordanian state’s most basic interests or that Syrians in the country constitute a particularly serious threat to Jordan’s national security. Moreover, it is dubious whether the confinement of refugees to closed camps would be *necessary* and *proportionate*, cf. the Human Rights Committee’s General Comment No. 27.⁹⁸ The necessity requirement makes it especially difficult to establish the lawfulness of closed refugee camps. In Hathaway’s words, “[u]nless it can be shown that only the absolute denial of freedom of movement would suffice to meet the approved objective – that is, that an open camp, or a camp from which absences of even limited time and purpose would be allowed, could not

⁹³ Hathaway, J. (2005), p. 715.

⁹⁴ ICCPR, Article 12(3). See also UN Commission on Human Rights, “Report of the Special Rapporteur on the Rights of Non-Citizens,” UN Doc.no.E/CN.4/Sub.2/2001/20 (2001).

⁹⁵ UNHCR (2001) “Addressing Security Concerns without Undermining Refugee Protection,” Department of Refugee Protection, UNHCR, November 2001, Section D, para. 10.

⁹⁶ *Supra* note 33.

⁹⁷ Janmyr, M. (2012), p. 117.

⁹⁸ *Supra* note 46, p. 173, para. 3.

meet the state's legitimate goals – then the necessity requirement is not satisfied.”⁹⁹ Consequently, as other options exist, such as settlements in local communities or camps with open structures, the confinement of refugees to closed camps does not constitute the least intrusive instrument to protect Jordan's national security. Furthermore, encampment and the restrictions it imposes on refugees' freedom of movement would need to be *proportionate* in relation to the objective of national security. Again, recalling the fundamental nature of the right to freedom of movement, it is dubious whether severe infringements in this right through confinement to closed camps could be considered appropriate to achieve the protective function of national security. In sum, then, physically or bureaucratically restricting Syrian refugees' freedom of movement through confinement to closed camps is not necessary to protect Jordan's “national security,” cf. ICCPR Article 12(3).

A subsequent legal question is whether the placement of displaced Syrians in closed camps is necessary to protect public order in Jordan, cf. ICCPR Article 12(3). Although the ordinary meaning of “public order” suggests a notion of general stability and the absence of unrest, implying a lower threshold than that of “national security,” the concrete meaning of the term is unclear. In this respect, Hathaway notes that “public order” includes the prevention of crime and the promotion of general democratic standards of conduct.¹⁰⁰ Again, restrictions on freedom of movement would need to be *necessary* and *proportionate* in relation to this objective.¹⁰¹ The question is thus ultimately whether the confinement of Syrian refugees to closed camps in Jordan is the least intrusive instrument to ensure the prevention of crime and general democratic standards of conduct and whether encampment is proportionate in regards to this aim. On the one hand, the severe influx of desperate refugees may indeed be challenging in relation to the general stability in Jordan. Keeping refugees in a controlled area of space may thus arguably be *necessary* in this respect. However, it is dubious whether the confinement of refugees to closed camps would be the least intrusive instrument to secure this aim. Again, other less invasive measures, such as camps with open structures or local resettlement, must be considered. Bearing in mind the severe infringements in refugees' freedom of movement confinement to closed camps constitutes, such encampment would arguably not be proportionate or necessary in regards to protecting public order. Therefore, placing refugees in

⁹⁹ Hathaway, J. (2005), p. 717.

¹⁰⁰ *Ibid.* p. 715.

¹⁰¹ *Supra* note 96, p. 173, para. 3.

closed camps in Jordan would not be necessary to protect public order under ICCPR Article 12(3).

Finally, the question arises as to whether Syrian refugees in Jordan may be confined to closed camps in order to protect “public health, morals and the rights and freedoms of others,” under ICCPR Article 12(3). While the alternatives of public health and morals do not apply to the case at hand, an example of the latter would be where the only way to avoid compromising Jordanian citizens’ right to education, employment or health care would be to restrict refugees to closed camps. On the one hand, such restrictions effectively hindering refugees from accessing the formal labour market, may arguably be necessary in order to avoid Syrians from accelerating current unemployment rates and taking local Jordanians’ jobs. However, even assuming that refugees negatively affect the rights and freedoms of the Jordanian population, the severe infringements in the right to freedom of movement that placement in closed camps constitutes, would not be *necessary* and *proportionate* to secure this aim. Consequently, confining Syrian refugees to closed camps in Jordan is not necessary in order to protect public health, morals or the rights and freedoms of others under ICCPR Article 12(3).

Based on the above analysis, the confinement of refugees to closed camps in Jordan is not “necessary” to protect Jordan’s “national security, public order, public health and morals or the rights and freedoms of others” under ICCPR Article 12(3). Subsequently, having established that the permissible restriction grounds do not apply to the case at hand, the settling of refugees in closed camps in Jordan is neither “permitted by law” or “consistent with the other rights recognized in the ICCPR,” cf. Article 12(3). Consequently, building on these closed camp structures in order to establish Betts and Collier’s proposed special economic zones would not be in accordance with the right to freedom of movement as set out in ICCPR Article 12.

A subsequent legal issue is whether the confinement of refugees to closed camps amounts to “arbitrary detention,” under ICCPR Article 9. Article 9(1) provides, *inter alia*, that “[n]o one shall be subjected to arbitrary arrest or detention” and “[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by

law.”¹⁰² The wording “shall” indicates that this is an absolute prohibition and “no one” implies that it applies to all human beings. In its Deliberation No. 9,¹⁰³ the Working Group on Arbitrary Detention found that the prohibition of all forms of arbitrary deprivation of liberty represents a norm of customary international law and constitutes a *jus cogens* norm.¹⁰⁴ The specific meaning of “detention” is not obvious but has been interpreted by the UNHCR in its Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers as “confinement within a narrowly bounded or restricted location, including prisons, *closed camps*, detention facilities or airport zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory” (emphasis added).¹⁰⁵ In regards to refugee camps, the UNHCR refers to “detention” as incorporating, *inter alia*, “arrest and detention when leaving closed camps without permission [and] the often detention-like conditions of closed camps (*de facto* detention).”¹⁰⁶ This arguably resembles the previously discussed bailout policies in Jordanian refugee camps, making it virtually impossible for refugees to lawfully leave the camps.

By way of comparison, in the case of *Guzzardi v. Italy* the European Court of Human Rights (ECtHR) held that keeping the applicant on a small remote island (2.5 square kilometres) off Sardinia for 16 months, free to move around but with a curfew and an obligation to report twice daily, constituted arbitrary detention.¹⁰⁷ The Court stated that the distinction between restrictions upon freedom of movement and arbitrary detention is “merely one of degree or intensity and not one of nature or substance.”¹⁰⁸ In *Ashingdane v. UK* the ECtHR found that the compulsory restriction of a mentally ill person in a mental hospital under a detention order constituted arbitrary detention, even though the patient was in an unlocked ward and was allowed to leave the hospital unaccompanied during the day and over the weekend.¹⁰⁹ These

¹⁰² ICCPR, Article 9.

¹⁰³ United Nations Human Rights Council, Working Group on Arbitrary Detention (2012) “Report of the Working Group on Arbitrary Detention,” Deliberation No. 9 Concerning the Definition and scope of Arbitrary Deprivation of Liberty under Customary International Law, A/HRC/22/44, 24 December 2012.

¹⁰⁴ A *jus cogens* norm or peremptory norm is a norm accepted by the international community as a whole, from which no derogation is permitted and which can be amended only by a new general norm of international law of the same value, cf. VCLT Article 53.

¹⁰⁵ UNHCR, “Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers,” 1999, p. 3.

¹⁰⁶ UNHCR, “Operational Protection in Camps and Settlements,” Geneva, 2006, p. 51.

¹⁰⁷ *Guzzardi v. Italy*, ECtHR, 6 November 1980, EHRR, Vol. 3 (1981), p. 333.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ashingdane v. UK*, 28 May 1985, EHRR, Vol. 7, p. 528, para. 41.

judgments offer a certain indication of the threshold of arbitrary detention and hence some parallels may be drawn to the movement restrictions in Jordanian refugee camps. Although ICCPR Article 9 protects individuals against arbitrary deprivation of liberty and Article 12 applies to restrictions on movement short of deprivation of liberty, the UN Human Rights Committee (HRC) has pointed out that severe movement restrictions may amount to deprivation of liberty under Article 9(1).¹¹⁰ Indeed, the line between arbitrary detention and other restrictions on freedom of movement seems blurred. In sum, then, the confinement of refugees to closed camps where freedom of movement is severely restricted may amount to “detention” under ICCPR Article 9(1). Whether such detention is “arbitrary” will depend on whether it is prescribed by law and whether detainees are allowed judicial review.

In their article in *Foreign Affairs*, Betts and Collier do not specify whether the special economic zones would be open or closed and whether refugees employed in the zones would have *de facto* freedom of movement. However, as has been established in previous sections, freedom of movement in Jordanian refugee camps is currently severely limited, both physically and bureaucratically. Considering that movement restrictions and bailout policies in Jordanian camps are neither prescribed by law, nor subject to judicial review, the confinement of Syrian refugees to closed camps may indeed amount to “arbitrary detention” under ICCPR Article 9(1). Building on these camp sites, then, for the establishment of special economic zones would thus risk reinforcing this violation. Accordingly, the answer to the legal question this section has sought to address, whether the proposed establishment of special economic zones for the employment of Syrian refugees in Jordan would be in accordance with the right to freedom of movement, would ultimately depend on whether the work zones would be open or closed. This leaves us with two possible scenarios.

In the first hypothetical scenario, camps would be open and refugees would not be forcefully detained and transported back and forth between the camps and the work zones. Rather, refugees would be permitted to freely move around and have the opportunity to accept employment in the development zones. In such a scenario, Betts and Collier’s proposal would be in accordance with the right to freedom of movement under ICCPR. In a second scenario, however, refugees would be confined to closed camps, legally prohibited from leaving the camps

¹¹⁰ See e.g. *Celepi v. Sweden*, Human Rights Committee (HRC), Case No. 456/1991 and *Karker v. France*, HRC, Case No. 833/1998.

without bailout. This is essentially the current situation in Jordan's Za'atari camp.¹¹¹ The establishment of work zones building upon such structures would reinforce the violation of the encamped refugees' right to freedom of movement and would thus not be in accordance with ICCPR Article 12.

2.2.4 Conclusion

Based on the discussion in the above sections, current movement restrictions in Jordanian refugee camps are in violation of refugees' fundamental right to freedom of movement. Therefore, building on these closed camp sites in order to establish special economic zones for the employing Syrian refugees, even for the benefits that come with the right to work, would not be in accordance ICCPR Article 12.

2.3 Whether the proposed establishment of special economic zones for the employment of Syrian refugees in Jordan would be in accordance with the right to equality and non-discrimination

2.3.1 The right to equality and non-discrimination as a prerequisite for the enjoyment of other human rights

The right to equality and non-discrimination is considered a norm of customary international law and a general principle relating to the protection of human rights.¹¹² The key international human rights instrument protecting this right is the International Covenant on Economic, Social and Cultural Rights (ICESCR). According to Article 2(2), state parties undertake to guarantee that the rights in the Covenant will be exercised "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."¹¹³ The wording of the provision suggests that any kind of discrimination on the said grounds is considered unlawful under the Covenant. Similarly, the

¹¹¹ Francis, A. (2015), p. 23.

¹¹² United Nations Human Rights Committee, General Comment No. 18, United Nations Compilation of General Comments, p. 134, para.1.

¹¹³ ICESCR, Article 2(2).

right to equality and non-discrimination is set out in the Universal Declaration of Human Rights Articles 1 and 2.¹¹⁴

Particularly relevant when exploring potential discrimination issues in regards to the right to work, is the ILO Convention Concerning Discrimination in Respect of Employment and Occupation (hereafter the Discrimination Convention).¹¹⁵ Article 2 of the Convention states that each member state undertakes to “declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.”¹¹⁶ For the purpose of the Convention, Article 1(a) defines “discrimination” as “any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.” Again, an ordinary understanding of the provision implies that it is absolute and that any distinction on the said grounds would constitute discrimination.

2.3.2 Justifying differentiation: Do the ends justify the means?

Despite what seems to be suggested by the mandatory language in the said human rights and labour law provisions, not all differentiation is considered unlawful discrimination. This is consistently established in case law of the international monitoring bodies, according to which distinctions are justified provided they are, in general terms, *reasonable* and imposed for an *objective* and *legitimate* purpose.¹¹⁷ In this respect, the Human Rights Committee (HRC) has noted that the enjoyment of rights and freedoms on equal grounds “does not mean identical treatment in every instance” and that “differentiation based on reasonable and objective criteria does not amount to prohibited discrimination.”¹¹⁸ For instance, policies of affirmative action favour members of disadvantaged groups who suffer from discrimination and thus explicitly differentiate between particular groups of people. Such policies aim at eliminating or diminishing conditions that cause or contribute to creating discrimination and therefore have an

¹¹⁴ UDHR, Articles 1 and 2.

¹¹⁵ ILO, Convention Concerning Discrimination in Respect of Employment and Occupation, 1960.

¹¹⁶ *Ibid.*, Article 2.

¹¹⁷ *Supra* note 110, pp. 133-136, para. 8.

¹¹⁸ *S. W. M. Broeks v. The Netherlands*, Communication No. 172/1984, (views adopted on April 1987) in UN.Doc.GAOR,A/42/40, p. 150, para. 13.

objective and *legitimate* purpose for differentiating between such groups.¹¹⁹ Another example can be found in part V of the Migrants Convention, which explicitly separates between the rights of different categories of workers, such as frontier workers, seasonal workers and itinerant workers.¹²⁰ In sum, then, certain types of distinctions between groups of persons are lawful, provided the differentiation is *reasonable* and has a *legitimate* and *objective* purpose.

2.3.3 The potentially discriminatory nature of the zones

In their proposal for the establishment of special economic zones in Jordan, Betts and Collier suggest that international companies investing in the zones could employ Syrian refugees and Jordanian nationals in “defined proportions,” whereas Syrian firms setting up in the zones might “exclusively” hire Syrian refugees.¹²¹ In regards to the right to equality and non-discrimination, companies *exclusively* hiring Syrian refugees may raise legal issues in at least two regards. First, these companies would be differentiating between Syrians and the local Jordanian population, currently suffering from vast unemployment and redundancy. Secondly, companies exclusively employing refugees of Syrian descent would be differentiating between Syrians and refugees of other nationalities. The question thus arises as to whether such differentiation would constitute unlawful discrimination under ICESCR Article 2(2) and the Discrimination Convention Article 1(a).

The first legal issue to be examined is whether differentiating between Syrian refugees and Jordanian nationals in regards to employment in the proposed work zones would constitute unlawful discrimination under the said provisions. As a general starting point, the categorical differentiation between Syrian refugees and Jordanian nationals in respect of employment in the zones would objectively constitute distinction based on “national or social origin” under ICESCR Article 2(2) and “national extraction or social origin” under Article 1(a) of the Discrimination Convention. The question thus arises whether such differentiation could be considered *reasonable* and whether the purpose of such distinction would be *objective* and *legitimate*. As previously noted, increasing competition and worsening working conditions in Jordan’s informal labour sector is causing frustration and resentment amongst the Jordanian pop-

¹¹⁹ Ritor, I. and Zamir, E. (2014) “Affirmative Action and other group trade-off policies: identifiability of those adversely affected,” *Organizational Behaviour and Human Decision Process*, Vol. 125 (2014), pp. 50-60.

¹²⁰ United Nations General Assembly, International Convention Concerning the Protection of the Rights of All Migrant Workers and the Members of Their Families, 18 December 1990, Part. IV, Articles 57-63.

¹²¹ Betts, A. and Collier, P. (2015), p. 86.

ulation. The purpose of formally employing Syrian refugees in separate development zones would thus be to avoid the refugees from flooding the informal Jordanian labour market, pushing down local wages and diminishing working conditions. Employing refugees in special work zones separate from the national labour market could stop them from negatively affecting the Jordanian labour market, as the refugees would no longer be in competition with local Jordanians for already existing jobs.¹²² Moreover, Syrian companies exclusively recruiting Syrians in the zones could easily relocate to their country of origin in the event of peace. The purpose of exclusively employing Syrian refugees in the special economic zones would thus arguably be *objective* and *legitimate*.

Furthermore, it must be asked whether such differentiation would be *reasonable* and appropriate in light of the current situation in Jordan, where unemployed locals are highly frustrated due to the large influx of Syrian refugees. In this environment of vast unemployment, companies exclusively providing Syrians with the right to work in special zones would presumably cause increased resentment and frustration amongst unemployed Jordanians. Witnessing foreign business enterprises investing in their country, privileging refugees while leaving the local population unemployed, would probably seem largely unjust to the locals. Moreover, providing Syrian refugees with work in special zones would presumably not resolve the staggering unemployment rates in Jordan in the near future. On the other hand, the overall aim of the special economic zones may be imposed as a justification for such differentiation. If the exclusive employment of refugees in the zones could contribute to positive long-term effects in the Jordanian labour market, such differentiation would arguably be reasonable. Moreover, if all Jordanians and Syrian refugees alike would be eligible for employment in the zones, the initial purpose of establishing special zones separate from the regular economy would dissolve. However, based on an overall assessment of the current unemployment situation in Jordan, exclusively hiring Syrian refugees in the proposed special economic zones by virtue of their refugee status and Syrian nationality cannot be considered *reasonable*. Consequently, if businesses investing in the proposed zones were to exclusively hire Syrian refugees, this would amount to unlawful discrimination towards Jordanian nationals under ICESCR Article 2(2) and the Discrimination Convention Article 1(a).

¹²² *Ibid.* p. 86.

A subsequent legal question is whether Syrian firms operating in the proposed development zones could lawfully limit themselves to exclusively hiring refugees of Syrian descent, as opposed to refugees of other nationalities. Again, the general presumption is that distinctions based on nationality would constitute unlawful discrimination based on “nationality” under ICESCR Article 2(2) and “national extraction” under the Discrimination Convention Article 1(a). The critical issue is thus whether such differentiation would be *reasonable* and whether it would have a *legitimate* and *objective* purpose. The legitimacy and objectiveness of such differentiation based on the refugees’ nationality does not seem obvious. On the one hand, one could argue that if Syrian companies were to solely recruit Syrian refugees in the economic zones, the companies and their employees could easily relocate to Syria in the event of peace. On the other hand, employing Iraqi and Palestinian refugees would not arguably prevent companies from such relocation. Moreover, refugees of other nationalities have the same persistent needs as Syrian refugees, and hence favouring the latter by virtue of their nationality would not be reasonable. In sum, then, the exclusive employment of Syrian refugees in the zones would not be reasonable and would not have an objective and legitimate purpose. Consequently, differentiating between Syrian refugees and refugees of other nationalities in respect of employment in the zones would constitute unlawful discrimination under ICESCR Article 2(2) and the ILO Convention Concerning Discrimination in Respect of Employment and Occupation Article 1(a).

2.3.4 Conclusion

Based on the above assessment, the answer to the legal question this section has sought to address, whether the establishment of special economic zones for the employment of Syrian refugees in Jordan would be in accordance with the right to equality and non-discrimination, depends on the consideration of at least two different scenarios. In the first hypothetical scenario, refugees and Jordanian nationals alike would be eligible for employment in the proposed zones and workers would be recruited on equal terms. As has been argued in the above discussion, this would be compatible with the right to equality and non-discrimination under ICESCR and the Discrimination Convention. In a second scenario, however, Syrian firms would exclusively recruit Syrian refugees for employment in the special economic zones. As has been discussed, differentiating between Syrian refugees, Jordanian citizens and refugees of other nationalities in regards to employment would constitute unlawful discrimination

based on “nationality or social origin” under ICESCR Article 2(2) and “national extraction or social origin” under the Discrimination Convention Article 1(a).

In order to avoid violating the right to equality and non-discrimination, businesses in the zones would thus need to employ both refugees and local Jordanians. As such, the hiring of refugees and locals in defined proportions could be a legally feasible option. For instance, Thomas Gammeltoft-Hansen has recently suggested a system where one would implement a 1:1 ratio and hire one Jordanian for every refugee that would be employed in the zones.¹²³ Ideally, such an approach could enable a fair distribution of employment opportunities and avoid resentment amongst the local population. This could thus be an option for implementing Betts and Collier’s proposal in a legally sound manner, without violating ICESCR Article 2(2) and the ILO Convention Concerning Discrimination in Respect of Employment and Occupation Article 1(a).

Having legally evaluated Betts and Collier’s proposal under the right to work, the right to freedom of movement and the right to equality and non-discrimination, the following chapter will examine whether the actors present in the special economic zones could be held legally accountable under international law for potential human rights violations.

¹²³ Gammeltoft-Hansen, T. ”På flukt fra realitetene? Hvordan utforme fremtidens flyktningpolitikk,” Litteraturhuset, Oslo, 6 April 2016, video lecture available at: <http://www.uio.no/om/samarbeid/akademisk-dugnad/arrangementer/pa-flukt/fremtidens-flyktningpolitikk.html>

3 Exploring legal accountability in the proposed special economic zones

Throughout the legal analysis of Betts and Collier's proposal, a crucial issue is to what extent the Jordanian state, the corporations investing in the zones, the states in which these corporations are incorporated and the UNHCR and its implementing partners could be held legally accountable for potential human rights violations in the zones. The following sections will seek to address this issue. Due to the limitations of the thesis, emphasis will be put on the first three of the said actors.

3.1 The Jordanian state and its responsibility for human rights violations in the special economic zones

As a general rule, the responsibility for human rights protection rests upon the state. This derives from the traditional notion of state sovereignty and territorial jurisdiction.¹²⁴ The responsibility of states for internationally wrongful conduct is considered customary international law and was codified by the International Law Commission (ILC) in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).¹²⁵ These articles determine when an international obligation has been violated and the legal consequences of such violations. According to Article 2, in order for an act to be considered "internationally wrongful," the conduct must constitute a "breach" of an international obligation of the state and must be "attributable" to that state.¹²⁶ What constitutes a "breach" by one particular state will depend on that state's international obligations, deriving from treaty or customary international law. Whether the violation is "attributable" to the state must be determined under ARSIWA Article 4, stating that "[t]he conduct of any state organ shall be considered an act of that state under international law, whether the organ exercises legislative, executive, judicial or any other function, whatever position it holds in the organization of the state, and whatever its character as an organ of the central government of a territorial unit of the state."¹²⁷ Accordingly, a state can be held responsible for the conduct of its organs, its officials and others acting on its be-

¹²⁴ Rehman, J. (2010), p. 14.

¹²⁵ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10, A/56/10, Chapter IV.E.1.

¹²⁶ ARSIWA, Article 2.

¹²⁷ ARSIWA, Article 4.

half. In regards to the state's duty to protect human rights, it is generally accepted that the rules on state responsibility apply to human rights law. This was confirmed by the ILC in its Articles and Commentaries and through the human rights treaty bodies' application of the general rules on state responsibility to key human rights matters before them.¹²⁸ In the case at hand, this entails that Jordan would be responsible for human rights violations of actors acting on its behalf in the special economic zones.

A much-debated issue is whether states may additionally be held accountable for the conduct of non-state actors. Indeed, a key question regarding responsibility in the proposed work zones in Jordan is whether the Jordanian state would be responsible for human rights violations by non-state actors in the zones. In this respect, the International Court of Justice (ICJ) noted in the *Genocide* case that “[t]he fundamental principle governing the law of international responsibility [is that] a state is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf.”¹²⁹ This entails that the state, as a general rule, cannot be held responsible for the conduct of non-state actors. However, states hold a due diligence duty and are obliged to take *preventive* action in order to avoid non-state actors from committing such violations and to take subsequent *reactive* measures.¹³⁰ Preventive action includes the implementation of legislation prohibiting companies from violating human rights and reactive measures entails penalizing companies if such violations were to occur. In this regard, the UN Human Rights Committee noted in General Comment No. 31 that a violation of this obligation by a state party could occur if it permits or fails to “take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by private persons or entities.”¹³¹ Applied to the case at hand, Jordan would thus

¹²⁸ Crawford, J. (2002) *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge. For instance, the Inter-American Court of Human Rights (I-ActHR) held in *Awas Tingni v. Nicaragua*, I-ActHR, IHRR (2001) [153] that “[a]ccording to the rules of law pertaining to the international responsibility of the State and applicable under International Human Rights Law, actions or omissions by any public authority, whatever its hierarchic position, are chargeable to the State which is responsible under the terms set forth in the American Convention [on Human Rights]”.

¹²⁹ *Application of the Convention on the Prevention and the Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Order of the Court on Provisional Measures, International Court of Justice, 13 September 1993, ICJ Reports, 1993, p. 3, para. 52.

¹³⁰ States' obligation to act with due diligence when non-state actors commit injuries against aliens was established in the early cases of *Janes*, *Youmans* and *Massey*. *Janes'* claim (*US. v. Mexico*), 1926, 4 RIAA 82; *Youmans'* claim (*US. v. Mexico*), 1926, 4 RIAA 110; and *Massey's* claim (*US. v. Mexico*), 1927, 4 RIAA 155.

¹³¹ Human Rights Committee, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 8.

be obliged to take such preventive and reactive measures to avoid human rights violations in the proposed special economic zones.

At present, however, Jordan does not have any provisions under its national legislation or penal code requiring business enterprises to respect human rights.¹³² According to the UN Working Group on Business and Human Rights, Jordan has committed to developing a National Action Plan (NAP) for the implementation of the United Nations Guiding Principles on Business and Human Rights (UNGPs).¹³³ Although this is certainly a step in the right direction, the fact that Jordan currently has not implemented these principles is worrisome. In 2011, for instance, Jordanian authorities arrested the manager of a garment factory after a female employee accused him of rape. Allegedly, female workers at the factory had regularly been subject to sexual abuse. Although the Jordanian government reportedly investigated the issue, no further legal action was taken.¹³⁴ The same year, the Institute for Global Labour and Human Rights published a report asserting that foreign guest workers at a factory in Jordan producing clothes for the American corporation Walmart had routinely been beaten, sexually abused, underpaid and forced to work excessive hours.¹³⁵ Again, the Jordanian government took no legal steps. Nor did Walmart or the United States. Considered in light of Jordan's lacking legislation and implementation of corporate social responsibility, these examples indicate that business enterprises are presently not being adequately held accountable for their human rights violations in the country. An implementation of Betts and Collier's development zone proposal would thus risk leaving refugee workers in a legal limbo without access to effective remedy.

Furthermore, a subsequent legal issue is whether international law imposes full responsibility for refugee protection upon the state, notwithstanding the state's capacity to fulfil this obligation. While it may be the duty of the host state to protect persons within its territory from the abusive practices of international corporations, states, especially developing ones, typically

¹³² Penal Code of the Hashemite Kingdom of Jordan (No. 16 of 1960). Adopted on 5 November 1960.

¹³³ See, for instance, the Business and Human Rights Resource Centre's overview of National Action Plans, available at: <http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>

¹³⁴ Business and Human Rights Resource Centre (2012) "Annual Briefing: Corporate Legal Accountability," June 2012, p. 10.

¹³⁵ Kernaghan, C. (2011) "Sexual Predators and Serial Rapists run Wild at Wal-Mart Supplier in Jordan," *Institute for Global Labour and Human Rights*, June 2011.

lack the resources to do so, or may even be complicit in violations.¹³⁶ Again, as a general rule, the ultimate responsibility for human rights and refugee protection rests upon the host state, notwithstanding its capacity or ability to provide such protection. However, the principles on state responsibility provide that certain conditions, notably distress, *force majeure* and necessity are mitigating circumstances for state responsibility and may thus be indicative of the state's inability to ensure protection.¹³⁷ In this respect, Janmyr argues that states' duty to protect human rights does not demand that the state is responsible for all human rights violations taking place within its jurisdiction, as this would depend on whether an alleged violation was caused by the state's *inability* to provide effective protection or its *unwillingness* to do so.¹³⁸ According to Janmyr, inability, as opposed to unwillingness, may be imposed in the applicability of circumstances precluding wrongfulness and a discussion of due diligence.¹³⁹

In light of the current situation of mass influx, lack of resources, security concerns and high levels of unemployment, the Jordanian government may thus argue that it is *unable* to offer adequate protection for refugees in the country. Assuming that the insufficient human rights protection is indeed caused by the government's *inability*, this may be imposed in the applicability of the circumstances precluding wrongfulness, such as distress, *force majeure* and necessity. On the other hand, the increasing scepticism towards Syrian refugees amongst the local population in Jordan is suggestive of a growing *unwillingness* to support the refugees. Though a detailed discussion of whether Jordan is in fact unwilling or unable to protect refugees' rights within the country goes beyond the scope of this thesis, the above considerations suggest that Jordan would not *per se* be the sole responsible actor for refugees' human rights protection if one were to implement the proposed special economic zones.

In sum, then, although the Jordanian state would not be responsible for non-state actors' human rights violations in the proposed zones, it would hold a due diligence responsibility to take preventive and reactive action in order to avoid such abuses. However, as has been discussed, Jordan presently does not have an effective apparatus for holding business enterprises accountable. Notwithstanding whether this is due to Jordan's inability or unwillingness to

¹³⁶ De Brabandere, E. (2010) "Human Rights Obligations and Transnational Corporations: The Limits of Direct Corporate Responsibility," *Human Rights and International Legal Development*, p. 77.

¹³⁷ ARSIWA, Articles 20-27.

¹³⁸ Janmyr, M. (2012), p. 223.

¹³⁹ *Ibid.* p. 227.

offer protection, in practice, this would effectively leave companies investing in the zones largely unaccountable and unrestrained. Accordingly, the question arises as to which alternative actors would be responsible in the event of human rights violations in the proposed zones. As has been argued by Janmyr, under certain circumstances the host state's primary responsibility for refugee protection may be shared with other actors present in the camps.¹⁴⁰ The following sections will examine the legal accountability of such alternative actors.

3.2 Corporate social responsibility: Due diligence or a fragmentation of accountability?

In recent years, the need for corporations to implement human rights standards in their decision-making processes and project implementation has increasingly been recognized. In this respect, the UN Guiding Principles on Business and Human Rights (UNGPs) provide a framework setting out three key responsibilities: the duty of the state to *protect* against human rights abuses (cf. section 3.1 above), the corporate responsibility to *respect* human rights and the access to effective *remedy* for victims of human rights violations.¹⁴¹ Although the principles are of a non-binding, soft law character, corporate responsibility to respect human rights is now considered a global standard of expected conduct for all business enterprises wherever they operate, notwithstanding states' abilities or willingness to fulfil their own human rights obligations. The UNGPs call on companies to carry out due diligence reports in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts in regards to the ICCPR, ICESCR and the eight core ILO conventions.¹⁴² Accordingly, the rights that have been discussed in Chapter 2 of this thesis, the right to work, the right to freedom of movement and the right to equality and non-discrimination, are encompassed in corporations' social responsibility.

Though UNGPs is increasingly gaining global recognition, with most international corporations having these principles integrated in their codes of conduct, UNGPs is not legally binding and therefore does not impose any *de facto* legal obligation upon corporations. Moreover,

¹⁴⁰ Janmyr, M. (2012), p. 223.

¹⁴¹ Human Rights Committee, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (UNGPs), endorsed by Resolution 17/4, 16 June A/HRC/17/31 March 2011.

¹⁴² UNGPs, Principle 12.

there is no enforcement mechanism at the international level, which ultimately leaves it up to states to hold companies accountable for their human rights violations. In regards to the case at hand, if for instance companies such as KFC, Ikea and Royal Dutch Shell were to invest in the special economic zones in Jordan, it would ultimately be the Jordanian state or the states in which these companies are incorporated that would be responsible for prosecuting and penalizing the companies under their national legislation. As has been discussed previously, Jordan has not implemented the UNGP and does not have an effective legislative apparatus for holding companies accountable for alleged human rights violations. Consequently, this leaves the task of enforcement with the corporations' states of domicile. As the following section will demonstrate, such enforcement largely depends the home states' capacity and willingness to investigate and prosecute such allegations.

3.3 Home states and the scope of extra-territorial jurisdiction for corporate nationals' conduct abroad

As previously noted, host states, particularly developing ones, are often unable or unwilling to effectively control the activities of financially powerful corporations operating within their territory. This often leaves these corporations largely unaccountable. The home state of the corporation, on the other hand, that is, the state in which its headquarters are incorporated, is usually an industrialized state with the resources, power and legal interest to regulate the extra-territorial activities of its corporate nationals. The question thus arises as to whether, and if so, in what circumstances, states have extra-territorial obligations under international human rights law for the actions of their corporate nationals abroad. More specifically, would the home states of business enterprises investing in the proposed special economic zones in Jordan be obliged to hold their corporate nationals accountable in the event of human rights violations in the zones?

As a general rule, states are only directly responsible for the human rights violations of their corporate nationals if the latter exercises elements of public authority, acts on the instructions, direction or control of the state, or where the state is complicit in a corporation's wrongful conduct.¹⁴³ However, under certain circumstances the home state may hold corporations accountable under its national legislation for violations it has committed abroad, based on the

¹⁴³ ARSIWA, Article 8.

jurisdictional basis of nationality. Such extra-territorial jurisdiction derives from the active personality principle, which in some cases allows states to enact domestic legislation to their nationals' conduct abroad.¹⁴⁴ Nevertheless, the Commentary to the UNGP states that at present, international human rights law does not generally require states to regulate the extra-territorial activities of businesses domiciled in their territory or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognised jurisdictional basis.¹⁴⁵

Despite the absence of a general obligation for extra-territorial human rights regulation, states have demonstrated an increasing willingness to exercise such jurisdiction. For instance, in December 2015, a Dutch appeals court in The Hague ruled that the court had jurisdiction to consider compensation claims by a Nigerian community against the Anglo-Dutch corporation Royal Dutch Shell for alleged oil spills depriving the local population of their livelihoods.¹⁴⁶ The court held that Shell could be held liable for spills at its subsidiary in Nigeria, potentially enabling compensation claims against the multinational when the case proceeds in March 2016. The Dutch court's establishment of jurisdiction was based on the nationality of the corporation as its office is registered in the Netherlands.¹⁴⁷ Similarly, in March 2016, a London court ruled that residents of two other Nigerian communities, Ogale and Bille, could bring claims against Shell over oil spills in the Niger Delta before the London High Court. Again, jurisdiction was established based on the active personality principle and the nationality link, as the parent company Royal Dutch Shell plc. is based in London.¹⁴⁸ Although the outcome of these pending cases remains to be determined, the increasing readiness of transnational corporations' home states to prosecute their corporate nationals for alleged human rights violations abroad is certainly a step in the right direction.

As previously noted, Jordan has not implemented the UNGP and does, at present, not have an effective legislative apparatus for holding business enterprises accountable for their human rights violations. Therefore, if for instance Ikea were to set up in the proposed development

¹⁴⁴ Evans, M. D. (2010) *International Law*, Oxford, pp. 318 - 320.

¹⁴⁵ OHCHR (2011) "Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework," Geneva, p. 9.

¹⁴⁶ *A.F. Akpan v. Royal Dutch Shell*, The Hague, 18 December 2015, Case No. 200.126.843-01 200.126.848-01, available at: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHDHA:2015:3586>

¹⁴⁷ *Ibid.* para. 3.9: "Shell Petroleum is a company with its registered office in this country, for which reason the Dutch court has jurisdiction [...] to hear a claim instigated against Shell Petroleum."

¹⁴⁸ Leader, D. (2016) "Judge agrees to two Nigerian legal cases against Shell in London High Court", available at: <https://www.leighday.co.uk/News/News-2016/March-2016/Judge-agrees-two-Nigerian-legal-cases-against-Shel>

zones, it would ultimately be up to Sweden to prosecute and penalize the corporation for potential human rights violations under its national legislation. This, in turn, would largely depend on Sweden's national legislation, establishment of jurisdiction and its commitment and willingness to investigate and prosecute such allegations.

To sum up, human rights law neither obliges nor prohibits states from regulating corporate nationals' conduct extra-territorially. In regards to Betts and Collier's proposal for the establishment of work zones in Jordan, this entails that the corporations' home states would not be legally obliged to hold their corporate nationals accountable for alleged human rights violations in the Jordanian zones.

3.4 Responsibility of the UNHCR and its implementing partners

A final actor relevant to the discussion of legal accountability in the proposed special economic zones is the UNHCR and its implementing partners. As one of the key actors in conventional refugee camps, the question arises as to whether the UNHCR would be responsible for human rights violations in the proposed zones. The legal personality of the UN was confirmed in the ICJ's advisory opinion *Reparation for Injuries Suffered in the Service of the United Nations*, which established that the organisation could hold rights and duties imposing international responsibility.¹⁴⁹ Similarly, the ICJ stated in the advisory opinion *Interpretation of Agreement* that, "[i]nternational organisations are indeed subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."¹⁵⁰ More specifically, the responsibility of the UNHCR follows from the ILC's Articles on Responsibility of International Organisations (ARIO), modelled after the previously discussed articles on state responsibility.¹⁵¹

In practice, however, the responsibility of the UNHCR for human rights violations in the proposed special economic zones would largely depend on the organisation's precise role in the

¹⁴⁹ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, International Court of Justice, 11 April 1949, ICJ Reports, 1949, p. 179.

¹⁵⁰ *Interpretation of Agreement of March 1951 between the WHO and Egypt*, Advisory Opinion, International Court of Justice, 20 December 1980, ICJ Reports, 1980, p. 90.

¹⁵¹ International Law Commission, Draft Articles on the Responsibility of International Organisations, Yearbook of the International Law Commission, 2011, Vol. II, part 2.

zones. Some relevant questions in this respect are whether the UNHCR would be involved in managing the zones; whether it would deploy its own staff; whether it would be responsible for recruiting refugees that would be employed in the zones; and whether it would be in charge of delegating responsibility. As Betts and Collier's article "Help Refugees Help Themselves" does not specify the role of the UNHCR in the zones, a general discussion of the organisation's responsibility under international law goes beyond the scope of this thesis.¹⁵² For the purpose of this discussion, then, it is sufficient to state that if one were to implement Betts and Collier's proposal, the specific roles and responsibilities of the UNHCR and its implementing partners would need to be clarified.

3.5 Conclusion

As has been demonstrated throughout the above discussion, international responsibility for the protection of refugees' rights is presently largely fragmented. The problem in this respect is that no one is ultimately accountable. Therefore, the answer to the question this chapter has sought to address, whether the actors present in the proposed special economic zones could be held accountable under international law for potential human rights violations, is not obvious. While the Jordanian state would be the primary responsible party for human rights protection in the zones, Jordan has not implemented the UNGP and does currently not have an effective legal apparatus for holding business enterprises accountable for such violations. Moreover, although corporations investing in the zones would hold a due diligence obligation under the UNGP to respect employees' human rights, these principles are not legally binding and consequently do not entail any *de facto* responsibility. Furthermore, the lack of an international enforcement mechanism ultimately leaves the task of enforcement with the corporations' home states. As home states are not legally obliged to exercise such extra-territorial jurisdiction, enforcement largely depends on these states' national legislation, establishment of jurisdiction and capacity and willingness to prosecute such allegations. In conclusion, then, if one were to establish special economic zones for the employment of Syrian refugees under the current circumstances in Jordan, no one would ultimately be responsible in the event of hu-

¹⁵² For a thorough examination of the UNHCR and its implementing partners' responsibility for human rights protection in refugee camps, see Maja Janmyr's discussion in *Protecting Civilians in Refugee Camps – Unable and Unwilling States, UNHCR and International Responsibility*, pp. 228-344.

man rights violations in the zones. Leaving employed refugees in a legal limbo without access to effective remedy is certainly problematic in this regard.

4 Concluding remarks

The purpose of this thesis has been to legally evaluate Alexander Betts and Paul Collier's special economic zones proposal as set out in their article "Help Refugees Help Themselves," and to anticipate and highlight potential legal issues regarding its implementation. In order to analyse the proposal more specifically, the particular details of the zones would need to be further clarified. As has been explored in the previous chapters, a zonal approach to refugee assistance may indeed be a pragmatic strategy towards today's complex situation. The need for a new take on the refugee predicament seems obvious and though the proposed zones are certainly not an ideal solution, they may constitute an option worth further exploring. Compared to the alternative of leaving encamped refugees unoccupied and entirely dependant on humanitarian aid, granting them limited work rights would arguably be preferable to no rights at all. As such, employment in special economic zones could provide refugees with autonomy, livelihood opportunities and a sense of self-reliance, and host communities could benefit from targeted development assistance from the international community, investments from companies setting up in the zones and the economic boost this could facilitate. Moreover, the need for open-ended humanitarian relief from the international community would presumably decline. Syrian companies in the zones could create an economy in exile, which, in the event of peace, could be relocated to Syria. If provided with adequate training, refugees in the zones could develop the required skills and experience to rebuild their country of origin upon return.

However, as has been argued throughout the course of the thesis, the current international legal framework provides inadequate protection of refugees' fundamental rights. Refugee camps are often established and maintained in violation of international law, severely infringing the encamped population's human rights. Accordingly, building work zones upon these structures where refugees are kept in a limited area of space, separated from the rest of the population and without a *de facto* possibility to leave, is legally problematic in regards to the right to freedom of movement under ICCPR. Furthermore, the proposed work zones raise issues in respect of employment differentiation between Syrian refugees, refugees of other nationalities and local Jordanians. As has been discussed, favouring Syrian refugees over locals is problematic in regards to the right to equality and non-discrimination under ICESCR and the Discrimination Convention. Moreover, encamped refugees are often hindered from participating in decision-making processes, which excludes them from integrating into their host communities. In this respect, separating refugees in isolated work zones, segregated from

the rest of the population, obstructs the fundamental objective of local integration. Finally, responsibility mechanisms under the current international legal framework are largely fragmented and partly absent. As has been discussed in Chapter 3, Jordan does not have an effective apparatus for holding corporations accountable for alleged human rights violations; the corporations themselves only hold a due diligence responsibility of a non-binding character; and the home states are not legally obliged to prosecute their corporate nationals for human rights violations abroad. The result is a *de facto* situation where no one would ultimately be responsible in the event of human rights violations in the zones.

Accordingly, to answer the research question and the four subsequent legal issues this thesis has sought to address:

- I. Betts and Collier's proposed establishment of special economic zones for the employment of Syrian refugees in Jordan would only be in accordance with the right to work, provided that employed refugees would be entitled the right to freely choose and accept work and the right to just and favourable working conditions under ICESCR Articles 6 and 7, the Forced Labour Convention Article 1(1) and the Abolition of Forced Labour Convention Article 1(b);
- II. An implementation of the special economic zones would be in violation of the right to freedom of movement under ICCPR Article 12 if these would be established upon the current closed camp structures in Jordan, where refugees' liberty of movement is severely restricted;
- III. Allowing business enterprises investing in the zones to exclusively employ refugees of Syrian descent would be in violation of the right to equality and non-discrimination under ICESCR Article 2(2) and the Discrimination Convention Article 1(a);
- IV. Due to the current fragmented accountability framework, none of the actors in the special economic zones could ultimately be held accountable for potential human rights violations in the zones.

Consequently, as of today, the implementation of Betts and Collier's special economic zones for the employment of Syrian refugees in Jordan would not be in accordance with internation-

al human rights and labour law. In this respect, the considerations above converge to point at the need for the establishment of a coherent policy framework that would ensure the proposed development zones' compatibility with the discussed human rights and labour law standards. In addition to safeguarding refugees' fundamental rights within the zones, such an instrument should clarify and, where necessary, extend the obligations and responsibilities of the Jordanian state, the corporations investing in the zones and the states in which these corporations are domiciled. If implemented in a legally sound and coherent manner, the framework could bridge the accountability gap and the conflicting interests between the respective actors. Founded on the main legal conclusions within this thesis, the following section offers a number of policy recommendations on key elements that should be included in such a framework. To be sure, these recommendations go beyond the *de lege lata* analysis of the thesis.

4.1 Recommendations for a new policy framework: Providing refugees with the right to work without compromising other fundamental rights

As a general starting point, a policy framework for the implementation of Betts and Collier's proposed special economic zones should clearly specify the voluntary and non-coercive structures of the zones, reaffirming the ethical labour practices set out in the core ILO conventions. As such, the right to freely choose and accept work, the prohibition of forced labour and the right to just and favourable working conditions would need to be included. Moreover, in order to reaffirm refugees' right to information and participation, refugees should be involved in decision-making processes, have access to information and be consulted in the establishment of the work zones. The recruitment criteria for employment in the zones should also be clarified in the policy framework, in order to avoid violating the right to equality and non-discrimination. In this respect, defined proportions of refugees and local Jordanians should be eligible for employment in the zones. Furthermore, refugees' right to freedom of movement would need to be ensured. As has been argued throughout Chapter 2, closed refugee camps largely violate this right and therefore building on these structures in order to establish work zones is legally problematic. Accordingly, the economic zones should be premised on open structures that would neither physically nor bureaucratically restrict refugees' liberty of movement.

Finally, a clear structure for holding corporations accountable for human rights violations in the zones should be implemented. As such, the obligations and responsibilities of the Jordani-

an state, the corporations, the home states, and the UNHCR and its implementing partners would need to be clarified and, where necessary, extended. Jordan's primary responsibility for human rights protection within the zones should be reaffirmed and in this respect the development of a National Action Plan (NAP) for the implementation of the UNGP would be a principal step. Arguably, a subsidiary responsibility should be imposed upon the home states of the corporations, based on the jurisdictional principle of nationality and active personality. In this regard, a remedial component where employees in the zones could file complaints if their rights were to be violated would be required. If no effective remedy is available before the national jurisdiction of Jordan, the home states of the corporations should be obliged to offer such remedy by exercising extra-territorial jurisdiction over their corporate nationals abroad. Such a policy framework would safeguard refugee workers' legal protection and access to effective remedies, and would ensure that corporations committing human rights abuses in the zones would be held accountable. Though the special economic zones proposal is not an optimal solution, if implemented in a legally sound and coherent manner, under a clearly specified policy framework, the proposal could indeed be a constructive approach to the current situation where Syrian refugees are completely excluded from Jordan's formal labour market.

Further research should be conducted on whether refugees ought to be given the opportunity to gain work experience and skills in special economic zones and subsequently be offered the possibility to be processed for resettlement in Europe. For instance, countries such as Germany currently suffer from labour shortage within certain sectors and several German companies have expressed a keen interest in hiring Syrian refugees that have recently arrived in the country.¹⁵³ Accordingly, if refugees could be trained and gain relevant skills and experience in special work zones in neighbouring countries while processing their asylum applications in Europe, this could avoid refugees from embarking on perilous journeys across the Mediterranean. Relevant legal issues in this respect would include the criteria for application processing; the relation to the current refugee and asylum regime; issues regarding potential discrimination between the processing of skilled and unskilled workers; and the burden sharing amongst European countries.

¹⁵³ See for instance "Germany Works on Migrant Labor Conundrum," *The Wall Street Journal*, 15 September 2015, available at: <http://www.wsj.com/articles/germany-works-on-migrant-labor-conundrum-1442326943> and "Germany Works to get Migrants Jobs," *New York Times*, 17 September 2015, available at: http://www.nytimes.com/2015/09/18/business/international/migrants-refugees-jobs-germany.html?_r=0

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