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The freedom of movement of asylum-seekers within the host State under international and European human rights law

Tesis doctoral presentada por

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y dirigida por

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A mi abuela,

que siempre se sintió tan orgullosa de mí.

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Ortega y Gasset, one of the greatest Spanish philosophers of recent history, famously said that *yo soy yo y mis circunstancias*. Life is a product of one's own actions and decisions, combined with the people, places and environment that surround us. The same is true for one's accomplishments: they are never entirely our own. I have experienced this in every step of the PhD. While I will not deny that writing it has involved a great deal of personal effort, it has been the privileged environment surrounding me that has really made this dissertation possible. My 'circumstances' during the PhD have been conformed by a beautiful academic triangle made up of the *Universidad de Granada*, the *Vrije Universiteit Amsterdam* and the *Max-Planck-Institut für Völkerrecht*. But as much as my supervisor Javier Roldán likes to joke that the UGR is his favourite *persona jurídica*, I am not actually referring here to the institutions themselves, but to the people they have put in my way.

I will start with my alma mater. The 500-year-old University of Granada is the second home of my supervisor Prof. Dr. Javier Roldán Barbero who, as the reader might have guessed, has a witty sense of humour, which is one of the many qualities that make him so approachable. He is a true *Doktorvater* to me, as the Germans call it: he introduced me to the fascinating world of international law long before I started my PhD, and has never stopped encouraging me to deepen my knowledge in the field and making sure that I am up to date with developments beyond my very specific PhD topic. 'Sometimes you won't see the forest for the trees', he often tells me. I have had the honour of teaching international law alongside him, and have been inspired by his empathetic and Socratic way of transmitting knowledge to students. This is the same style he has used to give me feedback on my thesis during our meetings at his favourite 'academic restaurant', *El Botánico*, and in his long and insightful voice messages. Javier has taken a genuine interest in everything I have sent him, and I have always felt I could rely on his wise advice to help me navigate through uncertainties in the writing process.

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The third corner of my academic triangle is the Max Planck, located in the peaceful and intellectual city of Heidelberg. I already had the opportunity to write my Master's thesis on

asylum detention there in summer 2019. I remember listening to the heated debates of researchers from all over the world at one of the well-known Monday Meetings and thinking 'this is the life I want'. Since then, Prof. Dr. Armin von Bogdandy, Dr. Mariela Morales Antoniazzi and the incredibly efficient librarians of the Max Planck have welcomed me in two more research stays that I have shared with my dear friend Daniel González Herrera, professor from the University of Salamanca. With more experience than me in this profession, but being close in age, he has been extremely helpful in showing me the intricacies of Spanish academia and has given me tips on how to make the most of it. Having him by my side as a 'paranymph' will certainly bring me good luck for my PhD defence.

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I would like to reserve this last paragraph for the two most important people in my life: my parents. I probably would not have chosen this career path if I had not seen how much passion and endeavour they put into their work—and most importantly, if I had not seen them happy with what they do. Besides their ever-present love and support, they have had a direct impact on this PhD thesis: when I was finishing my Bachelor's degree, my father encouraged me to further my curiosity in refugee law by telling me about a summer course on the subject in Barcelona—where I learnt of the existence of the Max Planck internship programme—and later on, my mother insisted that I should do a second Master's degree in Amsterdam. I have also been lucky to share some memorable experiences with them during these years: my mother's visits to Amsterdam and Heidelberg, and my one-month research stay with my father at Jindal Global University in India. To both of you, *mil gracias*.

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Abstract

Asylum-seekers in several European States often have to endure policies that make them feel trapped in a specific part of the country or that constrain their movements to such an extent that their situation resembles detention. How can human rights law respond to these practices? This PhD thesis comprehensively examines the right to free movement within the country under international and European human rights law, as well as under the Spanish and German domestic legal systems. With a specific focus on asylum-seekers, the study analyses this issue from four different angles: (1) the *travaux préparatoires* of the various instruments that enshrine this freedom; (2) the personal scope of the right according to legal doctrine and case law; (3) the material scope of the right, i.e. the distinction between a restriction on movement and a deprivation of liberty; and (4) the safeguards offered by this right. By comparing the protection afforded to asylum-seekers with that extended to nationals and individuals in general, the thesis contributes to the growing literature on *migration exceptionalism*. Additionally, the exploration of the legal status of asylum-seekers under various treaties and the detailed assessment of the definition of 'detention' hold the potential to inform research in other areas of human rights law, including refugee law.

Extended summary

During the COVID-19 pandemic, restrictions on movement became part of the daily lives of millions of Europeans. From prohibitions of moving from one region to another, all the way to strict quarantine measures, citizens of democratic countries stopped taking for granted their right to freely move within their State of nationality. For individuals seeking asylum in European States, however, limitations on freedom of movement are nothing new. They have long had to endure policies that make them feel trapped in a specific part of the receiving country, such as the obligation to stay in a specific city or *Land* in Germany, the geographical restrictions in the Greek islands or the prohibition on leaving the exclaves of Ceuta and Melilla towards mainland Spanish territory. Some policies, like the confinement in the Hungarian transit zones or in the international zones of airports, restrict asylum-seeker's movement to such an extent that the distinction between 'restriction on movement' and 'detention' becomes blurred.

This PhD thesis aims to examine whether, and how, the right to freedom of movement within the country can serve as a tool to protect asylum-seekers from the arbitrary imposition of such restrictions. This is done by analysing this right from four different angles: its historical origins, its personal scope, its material scope (i.e. the limits between this right and the right to liberty) and the safeguards it provides. The analysis primarily focuses on international and regional human rights law, supplemented by two case studies: Spanish and German domestic law. The methodology followed is characterised by the systematic analysis of the *travaux préparatoires* of international instruments, Refugee Convention doctrine and judicial (ECtHR, domestic courts) and quasi-judicial (HRC) decisions.

The study shows that there are *multi-sourced equivalent norms* that give a different scope and content to freedom of movement which fragments the protection offered by this right. By comparing the protection afforded to asylum-seekers with that extended to nationals and individuals in general, the thesis contributes to the growing literature on *migration exceptionalism*. Additionally, the exploration of the legal status of asylum-seekers under various treaties and the detailed assessment of the definition of 'detention' hold the potential to inform research in other areas of human rights law, including refugee law.

Some of the key findings are the following: (1) the drafters of this right feared that granting freedom of movement to everyone would be interpreted as an attempt to afford migrants the right to move *between* States, which led to the exclusion of irregular migrants (under international law) and of migrants generally (under the Spanish constitution) from the personal scope of this right; (2) there are five different perspectives in legal doctrine concerning the question of whether (and which) asylum-seekers are 'lawfully in [the] territory' within the meaning of Article 26 of the Refugee Convention (titled 'libertad de circulación'); (3) the HRC and the ECtHR confer great leeway to States in the determination of whether asylum-seekers are 'lawfully within the country' in the sense of Article 12 ICCPR and Article 2(1) of Protocol 4 ECHR. In Spain and Germany, however, national courts have been crucial in bringing the movement of asylum-seekers under the radar of constitutional protection; (4) the ECtHR uses two different standards of assessment to determine when a confinement of asylum-seekers and of nationals can be qualified as 'detention' and thus falls under the scope of the right to liberty (Article 5 ECHR); and (5) the safeguards afforded by the ICCPR and the ECHR to the right to free movement of individuals in general provide more protection than the Refugee Convention as interpreted by the majority of legal doctrine. This differentiated protection is also visible in the domestic legal systems of Spain and Germany, both at the constitutional and the legislative level.

Overall, while there are some avenues for asylum-seekers to use the right to free movement as an instrument to challenge restrictive European policies, the freedom of movement of asylum-seekers is granted less protection than to nationals, confirming that, as in other areas of human rights law, migration exceptionalism undermines the aspired universality of human rights.

Resumen ampliado

En los inicios de la pandemia de Covid-19, las restricciones a la libertad de movimiento pasaron a formar parte de la vida cotidiana de millones de europeos. Desde la prohibición de desplazarse de una provincia a otra hasta estrictas medidas de cuarentena, los ciudadanos de los países democráticos dejaron de dar por sentado su derecho a circular libremente dentro del Estado de su nacionalidad. Sin embargo, para las personas que solicitan asilo en los Estados europeos, las limitaciones a la libertad de circulación no son nada nuevo. Desde hace décadas, estas personas se encuentran sujetas a políticas que les hacen sentirse atrapadas en una parte del país de acogida, tales como la obligación de permanecer en ciudades o regiones específicas en Alemania, las restricciones geográficas en las islas griegas o la prohibición de

salir de Ceuta y Melilla hacia territorio español peninsular. Algunas políticas, como el confinamiento en las zonas de tránsito húngaras o en las zonas internacionales de los aeropuertos, limitan la movilidad hasta tal punto que difuminan la distinción entre "restricción de movimiento" y "detención".

Esta tesis doctoral tiene por objeto examinar si el derecho a la libre circulación y residencia dentro del territorio del Estado puede servir, y de qué manera, como instrumento para proteger a los solicitantes de asilo de la imposición arbitraria de estas restricciones. Para ello, se analiza este derecho desde cuatro puntos de vista diferentes: sus orígenes históricos, su ámbito de aplicación personal, su ámbito de aplicación físico (es decir, los límites entre la libertad de circulación y el derecho a la libertad física) y las garantías que ofrece. El análisis se centra principalmente en el Derecho Internacional y Europeo de los Derechos Humanos, complementado por dos estudios de caso: Derecho español y derecho alemán. La metodología seguida se caracteriza por el análisis sistemático de los trabajos preparatorios de distintos instrumentos internacionales, la doctrina relativa a la Convención sobre el Estatuto de los Refugiados y las decisiones judiciales (TEDH y tribunales nacionales) y cuasi-judiciales (Comité de DDHH de la ONU).

El estudio demuestra que existen *normas equivalentes de origen múltiple* que dan un alcance y contenido diferentes a la libertad de circulación, fragmentando su regulación en distintos sistemas y niveles normativos. Al comparar la protección que otorga este derecho a los solicitantes de asilo con la ofrecida a los ciudadanos nacionales y a los individuos en general, la tesis contribuye a la creciente doctrina sobre el *excepcionalismo migratorio* en derechos humanos. Además, el análisis del estatus jurídico de los solicitantes de asilo a la luz de diversos tratados y la evaluación detallada del concepto de "detención" pueden servir de base para la investigación en otras áreas del Derecho Internacional de los Derechos Humanos, incluido el Derecho de Refugiados.

Algunas de las principales conclusiones de esta tesis son las siguientes: (1) los redactores de este derecho temían que la concesión de la libertad de circulación dentro del Estado a "toda persona" se interpretara como un intento de otorgar a todo individuo el derecho a circular *entre* los Estados, lo que les llevó a excluir a los migrantes irregulares (en el Derecho Internacional) y a los migrantes en general (en la Constitución española) de su ámbito de aplicación personal; (2) existen cinco perspectivas diferentes en la doctrina sobre la cuestión de si los solicitantes de asilo se encuentran "legalmente en el territorio" y por tanto entran en el ámbito de aplicación personal del artículo 26 de la Convención de Refugiados (titulado "libertad de circulación"); (3) el Comité de DDHH y el TEDH conceden un gran margen de apreciación a los Estados para que estos decidan si los solicitantes de asilo se encuentran "legalmente en el territorio" en el sentido del artículo 12 del PIDCP y del artículo 2, apartado 1, del Protocolo nº 4 del CEDH. En España y Alemania, sin embargo, el Tribunal Supremo y el Tribunal Constitucional Federal han sido determinantes a la hora de situar la libertad de movimiento de los solicitantes de asilo bajo el radar de la protección constitucional; (4) el TEDH pone más obstáculos a los migrantes que a los ciudadanos nacionales para alegar que una medida de confinamiento puede calificarse de "detención" y, por tanto, que entra en el ámbito de aplicación del derecho a la libertad física (artículo 5 del CEDH); (5) las garantías otorgadas por el PIDCP y el Protocolo nº 4 del CEDH al derecho a la libre circulación de

las personas en general, interpretadas por el Comité de DDHH y el TEDH, proporcionan más protección que la Convención de Refugiados, tal y como la interpreta la mayoría de la doctrina jurídica. Esta protección diferenciada también puede observarse en los ordenamientos de España y Alemania, tanto en el plano constitucional como legislativo.

En suma, aunque existen algunas vías para que los solicitantes de asilo puedan utilizar el derecho a la libre circulación como instrumento para impugnar las medidas restrictivas a las que nos hemos referido, la libertad de movimiento de los solicitantes de asilo goza de menos protección que la de los nacionales, lo que confirma que, al igual que en otros ámbitos del Derecho, el excepcionalismo migratorio socava la universalidad que aspiran a alcanzar los derechos humanos y los derechos fundamentales.

Table of cases

1. Introduction – Judgments and decisions

International Court of Justice

Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010, p. 639

United Nations Human Rights Committee

General Comment 35: Article 9 (Liberty and Security of Person), 31 October 2014 (CCPR/C/GC/35)

Williams LeCraft v. Spain, Communication No. 1493/2006, 17 August 2009

European Court of Human Rights

Mengesha Kimfe v. Switzerland, no. 24404/05, 29 July 2010

Court of Justice of the European Union

Judgment of 14 May 2020, *FMS and FMZ,* Joined Cases C-924/19 PPU and C-925/19 PPU, EU:C:2020:367

Judgment of 30 June 2022, *M.A. v. Valstybės sienos apsaugos tarnyba,* Case C-72/22 PPU, EU:C:2022:505

Judgment of 22 June 2023, *Commission v. Hungary*, Case C-823/21, EU:C:2023:504

Inter-American Court of Human Rights

Advisory Opinion OC-21/14, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, 19 August 2014

African Commission on Human and People's Rights

Civil Liberties Organisation and others v. Nigeria, Communication No. 218/98, May 2001

Domestic courts

Bulgaria

Judgment of the Sofia Administrative Court 5909/19.10.2021 on case 9707/20

Germany

Judgment of the Federal Court of Justice V ZB 170/16 (16 March 2017)

Judgment of the Federal Constitutional Court 94, 166 (14 May 1996)

Spain

Judgment of the Supreme Court 1263/2018, 17 July

Judgment of the Spanish Constitutional Court 86/1996, of 21 June.

Order of 24 August 2020 of the Court of First Instance and Preliminary Investigation No. 1 of Melilla

The United Kingdom

NB and Others v. Secretary of State for the Home Department ([2021] EWHC 1489 (Admin))

2. Chapter 2 – International law judgments and decisions

United Nations Human Rights Committee

Celepli v. Sweden, Communication No. 456/1991, 18 July 1994

Karker v. France, Communication No. 833/1998, 26 October 2000

Concluding Observations concerning Lithuania in 1997 UN Doc. CCPR/C/79/Add.87, para 15.

Concluding Observations relating to Armenia (CCPR/C/79.Add.100 (1998))

Concluding Observations relating to Denmark in the year 2000 UN Doc. CCPR/CO/70/DNK

General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986 (HRI/GEN/1/Rev.1)

General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999 (CCPR/C/21/Rev.1/Add.9)

European Court of Human Rights

Balta v. France, no. 19462/12, 16 January 2018

M.H. and Others v. Croatia, nos. 15670/18 and 43115/18, 23 July 2022

M.K. and Others v. Poland, nos. 40503/17, 42902/17 and 43643/17, 23 July 2020

Omwenyeke v Germany, no. 44294/04, 20 November 2007

Piermont v. France, no. 15773/89 and 15774/89, 27 April 1995

Suso Musa v Malta, no. 42337/12, 23 July 2013

Tatishvili v. Russia, no. 1509/02, 22 February 2007

Sissoyeva and Others v. Latvia, no. 60654/00, 9 November 2000

Yildirim v. Romania, no. 21186/02, 20 September 2007

European Commission on Human Rights

Aygün v. Sweden, no. 14102/88, 9 October 1989

Paramarathan v. Germany, no. 12068/86, 1 December 1986

U. and S. v. Germany, no. 11825/85, 1 December 1986

Court of Justice of the European Union

Judgment of 14 June 2012, *ANAFE*, C-606/10, EU:C:2012:348.

Judgment of 19 June 2018, *Gnandi v. État belge*, C-181/16, EU:C:2018:465

Domestic courts

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Judgment of the Federal Constitutional Court 80, 182 (6 June 1989)

Judgment of the Federal Constitutional Court 96, 10 (10 April 1997)

The United Kingdom

UK Supreme Court (*ST (Eritera)* v. Secretary of State for the Home Department [2012] UKSC 12.

The United States

Kan Kim Lin v Rinaldi 361 F. Supp. 177, 186 (1973); aff'd., 493 F.2d (1974)

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European Court of Human Rights (migration-related cases pre-*Ilias and Ahmed*)

Abdolkhani and Karimnia v. Turkey, no. 30471/08, 22 October 2009

Amuur v. France, 25 June 1996, Reports 1996-III

Ilias and Ahmed v. Hungary [GC], no. 47287/15, 21 November 2019

J.R. and Others v. Greece, no. 22696/16, 25 January 2018

Kaak and Others v. Greece, no. 34215/16, 3 October 2019

Khlaifia and Others v. Greece [GC], no. 16483/12, 15 December 2016

Mahdid and Haddar v. Austria, no.74762/01, 8 December 2005, ECHR 2005-XIII (extracts)

Mogos and Others v. Romania, no 20420/02, 6 May 2004

Nolan and K. v. Russia, no. 2512/04, 12 February 2009

O.S.A. and Others. v. Greece, no. 39065/16, 21 March 2019

Rashed v. Czech Republic, no. 298/07, 27 November 2008

Riad and Idiab v Belgium, nos. 29787/03 and 29810/03, 24 January 2008

Shamsa v. Poland, nos. 45355/99 and 45357/99, 27 November 2003

Z.A. and Others v. Russia [GC], nos. 61411/15, 61420/15, 61427/15 and 3028/16, 21 November 2019

European Court of Human Rights (domestic cases pre-*Ilias and Ahmed*)

Ashingdane v. the United Kingdom, 28 May 1985, Series A no. 93

Austin and Others v. the United Kingdom, nos. 39692/09, 40713/09 and 41008/09, 15 March 2012, ECHR 2012

Buzadji v. Moldova [GC], no. 23755/07, 05 July 2016, ECHR 2016 (extracts)

Creangă v. Romania [GC], no. 29226/03, 23 Feburary 2012

De Tommaso v. Italy [GC], no. 43395/09, 23 February 2017, ECHR 2017 (extracts)

De Wilde, Ooms and Versyp v. Belgium, 18 June 1971, Series A no. 12

Engel and Others v. The Netherlands, 8 June 1976, Serias A no. 22

Gahramanov v. Azerbaijan, no. 26291/06*,* 15 October 2013

Guzzardi v. Italy, 6 November 1980, Serias A no. 39

H.L. v. the United Kingdom, no. 45508/99, 5 October 2004, ECHR 2004-IX

H.M. v. Switzerland, no. 39187/98, 26 February 2002, ECHR 2002-II

Iskandarov v. Russia, no. 17185/05, 23 September 2010

Kasparov v. Russia, no. 53659/07, 11 October 2016

M.A. v. Cyprus, no. 41872/10, 23 July 2013, ECHR 2013

Medvedyev and others v. France, no. 3394/03, 29 March 2010, ECHR 2020

Nada v. Switzerland [GC], no. 10593/08, 12 September 2012, ECHR 2012

Rantsev v. Cyprus and Russia, no. 25965/04, 7 January 2010, ECHR 2010 (extracts)

Riera Blume and Others v. Spain, no. 37680/97, 9 March 1999, ECHR 1999-II

Shimovolos v. Russia, no. 30194/09, 21 June 2011

Stanev v. Bulgaria, no. 36760/06, 17 January 2012, ECHR 2012

Storck v. Germany, no. 61603/00, 16 June 2005, ECHR 2005-V

European Court of Human Rights (migration-related cases post-*Ilias and Ahmed*)

A.A.A. and Others v. Hungary, no. 37327/17, 9 June 2022

A.S. and Others v. Hungary, no. 34883/17, 17 May 2022

Alissa and Alissa v. Romania, no. 48780/17, 17 December 2019

H.M. and Others v. Hungary, no. 38967/17, 2 June 2022

J.A. and Others v. Italy, no. 21329/18, 30 March 2023

M.B.K. and Others v. Hungary, no. 73860/17, 24 February 2022

N.A. and Others v. Hungary, no. 37325/17, 1 February 2022

Nur Ahmed and Others v. Ukraine, nos. 42779/12, 18 June 2020

R.R. and Others v. Hungary, no. 36037/17, 2 March 2021

W. v. Romania, no. 33036/18, 13 April 2021

W.O. v. Hungary, no. 36896/18, no. 36898/18, 25 August 2022

European Court of Human Rights (other cases)

G.R. v. the Netherlands, no. 22251/07, 10 January 2012.

Hirsi Jamaa and Others v. Italy [GC], no. 27765/09, 23 February 2012

J.N. v. The United Kingdom, no. 37289/12, 19 May 2016

M.S.S. v. Belgium and Greece [GC], no 30696/09, 21 January 2011

S.Z. v. Greece, no. 66702/13, 21 June 2018

Tarakhel v. Switzerland [GC], no. 29217/12, 04 November 2014

Thimothawes v. Belgium, no. 39061/11, 4 April 2017

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United Nations Human Rights Committee

Abbassi v. Algeria, Communication No. 1172/2003, 28 March 2007

Ackla v. Togo, Communication No. 505/1992, 25 March 1996

Basem Ahmed Issa Yassin et al. v. Canada, Communication No. 2285/2013, 7 December 2017.

Birindwa Ci Birhashwirwa and Tshisekedi Wa Mulumba v. Zaire, Communication No. 242/1987, 2 November 1989

Bwalya v. Zambia, Communication No. 314/1988, 14 July 1993

Celepli v. Sweden, Communication No. 456/1991, 26 July 1994.

Claude Ory v. France, Communication No. 1960/2010, 28 March 2014

El Dernawi v. Libya, Communication No. 1143/2002, 31 August 2007

El Ghar v. Libya, Communication No. 1107/2002, 2 November 2004

Gapirjanov v. Uzbekistan, Communication No. 1589/2007, 18 March 2010

Gillot et al. v. France, Communication No. 932/2000, 15 July 2002

Gorij-Dinka v- Cameroon, Communication No. 1134/2002, 17 March 2005

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Kalenga v. Zambia, Communication No. 326/1988, 27 July 1993

Karker v. France, Communication No. 833/1998, 30 October 2000.

Marques de Morais v. Angola, Communication No. 1128/2002, 29 March 2005

Mika Miha v. Eqatorial Guinea, Communication No. 414/1990, 8 July 1994

Mpaka-Nsusu v. Zaire, Communication No. 157/1983, 26 March 1986

Mpandanijila Thsise et al. v. Zaire, Communication No. 138/1983, 26 March 1986

Olo Bahamonde v. Equatorial Guinea, Communication No. 468/1991, 20 October 1993

Peltonen v. Finland, Communication No. 492/1992, 21 July 1994

Sayadi and Vinck v. Belgium, Communication No. 1472/2006, 22 October 2008

Williams Lecraft v. Spain, Communication No. 1493/2006, 27 July 2009

Yklymova v. Turkmenistan, Communication No. 1460/2006, 20 July 2009

Zoolfia v. Uzbekistan, Communication No. 1585/2007, 30 July 2009

European Court of Human Rights

Bartik v. Russia, no. 55565/00, 21 December 2006

Battista v. Italy, no. 43978/09, 2 December 2014

Baumann v. France, no. 33592/96, 22 May 2001

Bolat v. Russia, no. 14139/03, 5 October 2006

De Tommaso v. Italy, no. 43395/09, 23 February 2017

Denizci and Others v. Cyprus, nos. 25316-25321/94 and 27207/95, 23 May 2001

Földes and Földesné Hajlik v. Hungary, no. 41463/02, 31 October 2006.

Garib v. The Netherlands, no. 43494/09, 6 November 2017

Gochev v. Bulgaria, no. 34383/03, 26 November 2009

Labitia v. Italy, no. 26772/95, 6 April 2000

Landvreugd v. The Netherlands, no. 37331/97, 4 June 2002

Olivieira v. The Netherlands, no. 33129/96, 4 June 2002

Raimondo v. Italy, no. 12954/87, 22 February 1994

Riener v. Bulgaria, no. 46343/99, 23 May 2006

Stamose v. Bulgaria, no. 29713/05

Tatishvili v. Russia, no. 1509/02, 22 February 2007

Timishev v. Russia, nos. 55762/00 and 55974/00, 13 December 2005

Vito Sante Santoro v. Italy, no. 36681/97, 1 July 2004

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Judgment of 15 February 2016, *J.N. v. Staatssecretaris van Veiligheid en Justitie,* C-601/15 PPU, EU:C:2016:84

Judgment of 1 March 2016, *Warendorf v Ibrahim Alo and Amira Osso v. Region Hannover*, Joined Cases C-443/14 & C-444/14, EU:C:2016:127

Judgment of 19 June 2018, *Gnandi v. État belge*, C-181/16, EU:C:2018:465

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Judgment of the Dresden Administrative Court 14 K 1427/01 (7 November 2001)

Judgment of the Federal Administrative Court 130, 148 (15 January 2008)

Kenya

Kituo Cha Sheria v. The Attorney General, Petition No. 19 of 2013 (Ken. HC, July 26, 2013)

New Zealand

Attorney General v. Refugee Council of New Zealand Inc. [2003] 2 NZLR 577 (NZ CA, 16 April 2003)

5. Case study – Spanish law judgments

Judgment of the Constitutional Court 11/1981, 8 April

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Judgments of the Constitutional Court 115/1987, 7 July

Judgment of the Constitutional Court 90/1989, 14 June

Judgment of the Constitutional Court 94/1993, 22 March

Judgment of the Constitutional Court 242/1994, 20 July

Judgment of the Constitutional Court 292/2000, 30 November.

Judgment of the Contentious-Administrative Court of Las Palmas de Gran Canaria n. 5, interim measures, 14 April 2021

Judgment of the High Court of Justice of Andalucía 12085/2010, 25 October

Judgment of the High Court of Justice of Madrid 877/2017, 18 December

Judgment of the Supreme Court 1593/1980, 25 June

Judgments of the Supreme Court 2497/2020 and 2662/2020, 29 July

Judgment of the Supreme Court 422/2021, 10 February 2021

Judgment of the Supreme Court 1552/2021, 14 April 2021

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Judgment of the Federal Administrative Court 56, 254 (27 September 1978)

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Judgment of the Federal Constitutional Court 2, 266 (7 May 1953)

Judgment of the Federal Constitutional Court 6, 32 (16. January 1957)

Judgment of the Federal Constitutional Court 7, 377 (11 June 1958)

Judgment of the Federal Constitutional Court 35, 382 (18 July 1973)

Judgment of the Federal Constitutional Court 43, 203 (25 January 1977)

.Judgment of the Federal Constitutional Court 76, 1 (12 May 1987)

Judgment of the Federal Constitutional Court 78, 179 (10 May 1988)

Judgment of the Federal Constitutional Court 96, 10 (10 April 1997)

Judgment of the Federal Constitutional Court 110, 117 (5 November 2003)

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List of abbreviations

APD	Asylum Procedures Directive (Directive 2013/32/EU)
CETS	Council of Europe Treaty Series
CC	Criminal Code
CE	Spanish Constitution (Constitución Española)
CJEU	Court of Justice of the European Union
CoE	Council of Europe
EC	European Community
ECHR	European Convention on Human Rights
EComHR	European Commission of Human Rights
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
EU	European Union
ExCom	Executive Committee
GR	German Repatriates (case)
GG	Basic Law for the Federal Republic of Germany (Grundgesetz)
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission
IRO	International Refugee Organisation
LRA	Law on the Right to Asylum (Ley 12/2009)
LRFA	Law on the Rights and Freedoms of Aliens (Ley Orgánica 4/2000)
NGO	Non-Governmental Organisation
RC	Refugee Convention
RCD	Reception Conditions Directive (Directive 2013/33/EU)
Rz	Residenzpflicht (case)
TFEU	Treaty on the Functioning of the European Union
UNTS	United Nations Treaty Series
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties

'I was becoming more and more aware of the suffering caused by freedom of movement problems. Asylum seekers couldn't be happy, couldn't be with their family or friends and couldn't live a normal life as a human being under these restrictions (…). While the Germans were celebrating the unity of East and West Germany as well as the fall of the Berlin Wall, stronger walls were deliberately constructed for the confinement of asylum seekers.'

Dr. Sunny Omwenyeke, human rights activist
and former asylum-seeker in Germany

Introduction

1. Background

1.1 Internal restrictions on asylum-seekers in Europe

During the Second World War, in anticipation of the German invasion, the French Government issued an order forbidding all migrants coming from Germany to 'travel or move' from their homes. The great philosopher Hannah Arendt was confined to an internment camp at Gurs, a centre set up for Spanish Republicans fleeing the Civil War.[1] In *The Origins of Totalitarism*, she gave a name to restrictions on freedom of movement similar to those she had suffered: 'Hades'. She described this term as

'those relatively mild forms, once popular even in non-totalitarian countries, for getting undesirable elements of all sorts—refugees, stateless persons, the asocial and the unemployed—out of the way; as displaced persons' camps, which are nothing other than camps for persons who have become superfluous and bothersome.'[2]

Throughout history, refugees have often been subjected to 'Hades' in the States where they sought to build a new life, far away from the horrors of persecution suffered in their home countries. In 1986, Goodwin-Gil pointed out that a number of European countries had long employed the *assignation à résidence* to deal with situations of mass influx of refugees.[3] Indeed, such is the longevity of these measures that, as early as in 1832, the French Aliens Act authorised the Government to confine refugees to certain cities which it designated.[4] However, despite its historical roots, this issue remains 'controversial'[5] and 'heatedly debated'[6] in modern times. Not only because the restrictions on movement imposed by many States at the start of the Covid-19 pandemic affected asylum-seekers in a particularly harsh way[7] but above all because, even in normal times, European States frequently use limitations on freedom of movement within the country as a regular tool to manage the reception of asylum-seekers.

One of the most widely discussed examples of this practice in recent years has been the obligation for asylum-seekers in Greece to remain on the island where they are registered.

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[1] Alonso-Rocafort 2009.
[2] Arendt 1962, p. 445.
[3] Goodwin-Gil 1986, p. 204.
[4] Grahl-Madsen 1963, p. 63.
[5] Marx 2011, p. 1148.
[6] Diehl 2021, p. 142.
[7] For example, in March 2020, reception camps for asylum-seekers on the Greek islands were locked down from 7 p.m. to 7 a.m. During daytime, only one person per family was allowed to leave the camp under police supervision. These restrictions lasted longer than the lockdown of the general population in Greece. For its part, the Netherlands, which barely adopted any measures to limit the movement of its nationals, placed asylum-seekers in emergency accommodation which they were not allowed to leave (ECRE 2020, p. 15). In the United Kingdom, asylum-seekers housed in former military barracks Penally Camp and Napier Barracks were confined for four weeks in poor conditions under threat of arrest if they left the camp (Independent Chief Inspector of Borders and Immigration 2021, p. 12). This confinement was found unlawful by the High Court of Justice in *NB and Others v. Secretary of State for the Home Department* ([2021] EWHC 1489 (Admin)). For data on internal restrictions on movement imposed by States to prevent the spread of Covid-19, see Our World in Data 2023.

This measure was imposed in the context of the EU's 'hotspot approach'[8] as part of the implementation of the 2016 EU-Turkey Statement.[9] It has the effect of preventing irregular secondary movements to other Member States, while keeping them close to Turkey, where they are to be returned according to the Statement.[10] Restrictions on movement, however, are not unique to countries with very specific geographical situations such as Greece. They also exist, for instance, in Ireland, where asylum-seekers are housed in empty hotels in rural areas, with overnight curfews, limited public transport and reporting requirements.[11] In some remote reception centres in Switzerland, curfews are even stricter, starting at 17.00 p.m., and asylum-seekers are required to stay in the canton to which they are assigned.[12] In Austria, asylum-seekers do have the freedom to circulate within the country, but they can only choose their place of residence within an assigned region (*Bundesland*);[13] whereas in Italy, asylum-seekers living in Northern cities are sometimes forcibly transferred to the South in order to keep them far away from the Swiss and French borders.[14] Restrictions on the movement and residence of asylum-seekers in Spain and Germany are also notable, as will be explained below.

Governments claim that these measures enable them to share the responsibility for providing reception services between different regions, give them greater control over applicants during the asylum procedure and have a deterrent effect, making the State a less attractive destination.[15] However, the European Council on Refugees and Exiles (ECRE), a well-established NGO in Brussels, has criticised that there is no published evidence to suggest that restrictions on movement and residence have a deterrent effect on the number of asylum-seekers, ensure compliance with the procedure or increase the rate of decision making on asylum cases.[16] For her part, Tsourdi has argued that European States use these restrictions for mere 'administrative convenience' and that, even if residence in a particular place may be necessary in certain situations, this does not justify the general allocation of all asylum-seekers without the possibility of individual housing.[17]

The effects of detention on asylum-seekers are well documented. According to medical experts, it causes 'an independent deterioration of the mental health of people who are already highly traumatised'.[18] But even less severe measures, such as confining asylum-seekers to specific regions or prohibiting their relocation, can significantly disrupt their lives. For a

[8] The hotspots were conceived by the European Union in the 2015 European Agenda on Migration. The Agenda defined hospots as facilities where the European Asylum Support Office, Frontex and Europol would work on the ground with frontline Member States to swiftly identify, register and fingerprint arriving migrants. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2015) 240 Final, 13 May 2015.
[9] EU-Turkey statement. European Council Press release, 18 March 2016.
[10] Ziebritzki 2018, Majcher 2018.
[11] These centres are called 'Direct Provision Centres' and have been central to the Irish asylum reception system since the beginning of the century (Moynihan 2020).
[12] Künzli *et al.* 2017, pp. 8 and 37.
[13] Klammer 2022a, p. 626
[14] Tazzioli and Garelli 2020, p. 20.
[15] ECRE 2002, p. 5.
[16] Ibid.
[17] Tsourdi 2022, pp. 13-14.
[18] Filges *et al.* 2015, p. 40. See also the recent report of the World Health Organisation on the health of refugees and migrants (WHO 2022, pp. 66-68).

start, according to the UN High Commissioner for Refugees (UNHCR), not being able to move to the vicinity of friends or compatriots with similar backgrounds makes it more difficult for them to process their traumatic experiences with people they can trust. In a similar vein, based on her anthropological research in Denmark, Larsen concludes that not being surrounded by a network of relatives and not having the opportunity to build new family-like relationships with co-ethnics within one's local surrounding seriously affects the ability of refugee families to establish a new life.[19]

Restrictions on movement and residence also reduce the likelihood of finding employment, especially for those asylum-seekers whose residence is limited to a rural municipality. Moreover, they create barriers to accessing essential services, including legal aid and specialist healthcare.[20] In the worst cases, they force family members to live apart and break the law in order to stay together.[21] This is what happened to Mengesha and her husband, two (rejected) asylum-seekers who were assigned to different Swiss cantons and denied the possibility of living together for five years. In 2010, the European Court of Human Rights condemned Switzerland for violating their right to family life.[22] Similarly, Denmark's former immigration minister, Inger Støjberg, was sentenced in 2021 to two months in prison by a special court for illegally separating several asylum-seeking couples, some of whom had children.[23]

More generally, if the residence restriction is accompanied by a prohibition on leaving a specific area, this may have a strong psychological impact on the individual, who may feel trapped in a part of a country which is already a mystery to him, and which he[24] will not be able to get to know without the possibility of travelling within it. The smaller the area to which the person is confined, the closer the feeling will be to that of living in an open prison, 'recreat[ing] the environment of oppression, fear and uncertainty from which people have fled'.[25]

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[19] Larsen 2011.

[20] UNHCR 2007b, p. 8. The European Council on Refugees and Exiles (2002, p. 6) also stresses that the removal of restrictions on freedom of movement is an important step towards 'building relationships between asylum-seekers and local communities, reducing racial tension and preparing for integration of those who will be granted status'. The Michigan Guidelines on Refugee Freedom of Movement note that freedom of movement 'enables them to establish themselves socially and economically' (Hathaway *et al.* 2018, p. 5).

[21] As early as 2001, UNHCR warned that this had become a widespread problem around the world: 'Another difficulty commonly faced by asylum-seekers is the separation from family members, some of whom may be residing for extensive period in different locations (…), awaiting the outcome of asylum procedures' (UNHCR 2001, p. 4).

[22] *Mengesha Kimfe v. Switzerland*, no. 24404/05, 29 July 2010. For the Court, the distribution of asylum-seekers pursued the legitimate aim, falling within the concept of 'economic well-being of the country' (Article 8(2) European Convention on Human Rights), of a fair distribution of asylum-seekers between the cantons. However, given the long period during which the applicant had been formally separated from her husband—even if she had been living illegally with him in Lausanne—the Court found that the measure was not 'necessay in a democratic society' and was therefore in violation of Article 8.

[23] The Guardian (2021). The former minister had ordered the separation of couples where the woman was under 18. This had been done without an individual examination of the cases and without allowing for exceptions.

[24] Throughout the study, the generic 'he/him' will be used to refer to a 'migrant', 'asylum-seeker' or 'individual' whose gender is irrelevant in the specific context. I will use 'she/her' to refer to the word 'person'. These pronouns sound more natural to me—probably because of the influence of my mother tongue—, although I am aware of the increasing use of 'they/them' as a generic pronoun in academic literature. In either case, I do not intend to make any assumptions about the gender of the person in question.

[25] Pourgourides 1998, p. 24.

1.2 Internal restrictions resembling detention

The greater the impact on a person's freedom to come and go, the more likely it is that we cease to refer to a measure as a 'restriction on movement' and begin to describe it as a 'deprivation of liberty' or 'detention'. In many cases, asylum-seekers are confined in places that are not formally defined as detention centres under national law, but where their movement is restricted to such an extent that the line between 'restriction on movement' and 'detention' is blurred. The island of Kos, for instance, is witness to one of the most distressing contrasts in European territory. While tourists enjoy their holidays on the beach, asylum-seekers and other migrants are held in the EU-funded 'Closed Controlled Access Centre' (CCAC), semi-closed facilities resembling high-security prisons. Those in the centre with an asylum-seekers' card are allowed to leave the centre for 12 hours a day, but must return in the evening or risk losing all access to reception conditions. Moreover, they live surrounded by barbed wire and the police closely register their bodies and belongings every time they enter or leave the premises and monitor their movements throughout the camp.[26] This centre is a portrait of what the future of the EU's borders will probably look like, but also a crystallisation of past and present practices.

As for the future, the CCAC is to serve as a blueprint for the New Pact on Migration and Asylum,[27] through which confinement at the EU's external borders will become a more generalised way of managing the arrival of asylum-seekers. As argued by Cornelisse and Reneman, the Pact will only exacerbate the uncertainty over whether pre-entry procedures imply detention, given its use of vague terms such as the obligation for the authorities to 'hold' asylum-seekers and other migrants at the border during the new screening procedure. It will also create disparities between Member States, since the Pact leaves it largely up to domestic law to qualify the stay in a reception centre or a transit zone as 'detention' or 'restriction on movement'.[28]

Looking to the past and present, the Kos centre, inaugurated in November 2021, may be seen as the reincarnation of the (now closed) Hungarian transit zones. These facilities were also carceral in all respects, with the exception that asylum-seekers were permitted to leave in the direction of Serbia.[29] Other current practices also resemble the CCAC, including the Italian 'hotspots', where 'migrants are able to leave the centre only through openings in the fence, regularly adjusted by the administration and then reopened by migrants'.[30] In some airports, non-nationals arriving by air who claim asylum are held in airport transit zones while

[26] See the report of Equal Rights Beyond Borders (ERBB 2021, pp. 20 *et seq* and p. 45).
[27] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM/2020/609 final.
[28] Cornelisse and Reneman 2021, pp. 12 and 14.
[29] The functioning of these transit zones are extensively examined in Chapter 3. The main difference between the Hungarian transit zones and the CCAC is the fact that the Hungarian authorities discontinued the examination of the asylum claims of those asylum-seekers who left the premises towards Serbia, while the only consequence for asylum-seekers who leave the CCAC for more than 48 hours is the loss of accommodation and reception conditions. However, as noted by Equal Rights Beyond Borders (2021, p. 47), 'in practice the exclusion from the CCAC could lead to barriers to accessing the asylum procedure because of how difficult it is for non-residents to enter the facility'.
[30] AIDA 2023a, p. 160. See also Majcher 2018 and the case before the European Court of Human Rights *J.A. and Others v. Italy*, no. 21329/18, 30 March 2023, which will be analysed in Chapter 3.

the authorities decide on the admissibility of their asylum applications. In theory, they can board a plane and leave the country, but they cannot leave the airport by any other means. This is the case in France, Germany, Austria, Greece, Spain, Romania and Serbia.[31] Another example of confinement that blurs the line between a restriction on movement and detention was the situation of thousands of (mostly Afghan) asylum-seekers who, in 2021, were pushed by the Polish police into the forests along the border between Poland and Belarus. Since the Belarusian border guards did not allow them to re-enter Belarusian territory, they were trapped in the forest.[32] In all these cases, domestic law does not consider the asylum-seeker to be 'detained' and the authorities therefore do not issue detention orders.[33]

Some examples of national practices are particularly striking because the asylum-seekers clearly cannot leave the place in any direction, yet domestic law does not qualify this confinement as a deprivation of liberty. In Bulgaria, for example, some asylum-seekers are placed in a completely closed 'detention centre'. However, in 2021 the Sofia Administrative Court ruled that this placement does not to amount to a deprivation of liberty because the authorities do not intend to detain them, as 'accommodation in such institutions is entirely in their best interest and is aimed at protecting them'.[34] Similarly, in Spain, during the Covid-19 pandemic, asylum-seekers were prohibited from leaving the CETI (Centres for the Temporary Stay of Foreigners) in Melilla for fourteen days. However, the decree ordering their confinement qualified it as a 'generic coercive measure', not as detention.[35] Following litigation by the asylum-seekers, the local court of Melilla contested this qualification, declaring that 'what is being proposed today goes far beyond a simple restriction on movement'.[36] A final example is the case of Croatia, where asylum-seekers intercepted at the border are transported to the nearest police station, where they spend up to several hours being identified. However, the Ministry of the Interior does not consider these persons to be deprived of their liberty.[37]

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[31] ECRE 2018, p. 21.

[32] HFHR 2022, p. 7. Marta Górczyńska, a representative of the Warsaw-based NGO Helsinki Foundation for Human Rights, drew attention to this practice and argued that it should be regarded as a deprivation of liberty at the Conference on Immigration Detention in the EU, held in Kos (Greece) between the 8th and 10th of June 2023.

[33] Spanish law, for example, regulates the so-called 'asylum rooms' (Spanish Ombudsman 2020, p. 60) in airport transit zones. The Law on the Right to Asylum provides that the asylum-seeker 'shall *stay* in the premises set aside for this purpose'. The law does not specify whether the 'stay' in such rooms constitutes detention (Article 22 of Law 12/2009 of 30 October, regulating the right of asylum and subsidiary protection, BOE n. 263, 31/10/2009).

[34] Judgment of the Sofia Administrative Court 5909/19.10.2021 on case 9707/20. This judgment was cited by Diana Radoslavova, from the Centre for Legal Aid—Voice in Bulgaria, at the Kos Conference on Immigration Detention in the EU (*supra* note 32).

[35] Order no. 3161 of 21 August 2020, regarding preventive health measures of a coercive nature applicable in the municipal district of the city of Melilla.

[36] Order of 24 August 2020 of the Court of First Instance and Preliminary Investigation No. 1 of Melilla.

[37] This *de facto* detention has been criticised by the Committee for the Prevention of Torture (CPT 2020, p. 9). After being held at the police station (where many suffer ill-treatment), a large number of asylum-seekers are pushed back, in violation of the principle of *non-refoulement*. This dehumanising practice has been carried out systematically by the Croatian authorities since 2016 (CPS and Pro Asyl 2022).

2. Aim and objectives: the right to free movement of asylum-seekers

The present study aims to examine how human rights law responds to the situations described above. In broad terms, it seeks to answer the following question: How does the right to free movement protect asylum-seekers from these practices in European countries?

In his research paper on the freedom of movement of refugees in Africa, Maple highlights the importance of the right to free movement:

'[O]nce this right is granted, it is seen as a "gateway" right to others contained within the Convention relating to the Status of Refugees such as the right to work and education but also as a gateway to other human rights, for example the right to family life.'[38]

Other authors and institutions have also emphasised the relevance of this right. Returning to the perspective of Hannah Arendt, she believed that movement was the 'oldest and most elementary freedom'.[39] Goodwin-Gil has further stated that 'freedom of movement is among the most precious of human rights, intimately linked to the general notion of liberty as autonomy or self-government, of responsibility for oneself'.[40] Similarly, for the UN Human Rights Committee, freedom of movement is 'an indispensable condition for the free development of a person'.[41]

However, Maple points to the lack of consensus among experts on a number of aspects: when the right is applicable, how the right should be interpreted at the national level and, finally, when restrictions on the right are permitted.[42] It is the indeterminacy of this right, coupled with its 'preciousness', that has sparked my interest in exploring this freedom further.

Freedom of movement, as a human right, exists only within the borders of a State. While there is a right to leave the country, this is an 'incomplete right' insofar as it is not paired with another State's duty to admit to its territory those who exercise it.[43] We can thus not speak of a universal *ius migrandi* in positive law.[44] The right to free movement within the country, in turn, comprises two distinct freedoms: the freedom to choose one's place of residence and the freedom to circulate.[45] This study will focus almost exclusively on the freedom to circulate, although it should be noted that human rights law regulates both freedoms under the same provisions and with the same safeguards. Therefore, the findings will also be relevant to the freedom to choose one's place of residence.

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[38] Maple 2016, p. 2.
[39] Arendt, *Men in Dark Times*, quoted in Alonso-Rocafort 2009, p. 35.
[40] Goodwin-Gil 1986, p. 195.
[41] General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999 (CCPR/C/21/Rev.1/Add.9).
[42] Maple 2016, p. 10.
[43] Abrisketa 2017, p. 152.
[44] There are proposals in legal philosophy advocating for such a right, one of the most prominent defenders of this position being Joseph Carens (1987), but it is not part of positive human rights law.
[45] Maple (2016, p. 8) observes that this distinction is often overlooked. Tsourdi (2022, p. 1563) illustrates the difference between the two freedoms in relation to asylum-seekers as follows: 'An asylum-seeker may be designated to take residence in a particular place without restricting her freedom of movement. Vice versa, assigning a particular area within which the asylum-seeker is allowed to move freely leaves her with the freedom to choose a place of residence within this assigned area'.

I have decided to focus on the right to free movement of *asylum-seekers* for two reasons. Firstly, as shown above, this category of migrants has been particularly targeted by restrictive measures on free movement in European countries. Admittedly, recognised refugees are not always exempt from such policies: for example, Denmark and Germany require recognised refugees to reside in an assigned community for three years, under the assumption that this will facilitate their integration.[46] However, these restrictions only affect their freedom to choose their place of residence, while asylum-seekers are often subjected to both a limitation to choose a home *and* an obligation to stay in a specified area. Secondly, asylum-seekers find themselves in a sort of legal grey zone, given that, depending on the outcome of their asylum application, they will become potential members of the host society or potential outsiders. This 'precarious in-between situation'[47] is particularly important in the context of the right to free movement, as this freedom is often reserved for citizens or for individuals 'lawfully within' the country.

Throughout the study, the term 'asylum-seeker' will be understood to include persons applying for refugee status under the definition of 'refugee' in Article 1 of the Refugee Convention,[48] as well as other persons seeking subsidiary forms of protection (e.g. under Article 15 of the EU Qualification Directive)[49] whose claims are still under consideration by the authorities. The term will also encompass persons who have been denied refugee status at first instance and are exercising their right to an effective remedy against that decision.[50] On the other hand, the terms 'migrant' and 'non-national' will be used interchangeably to refer to non-nationals in general, and the term 'refugee' will cover both asylum-seekers and recognised refugees, unless otherwise specified.

The overall aim of this study is to comprehensively map and evaluate the protection provided to asylum-seekers by the right to freedom of movement in international and European human rights law. To achieve this goal, the study has four key objectives, each corresponding to one of its chapters:

(1) Investigate the *historical origins* of the human right to free movement, the shaping of its scope of protection and the way in which the drafters of the various instruments viewed the position of refugees and other migrants in relation to this right (Chapter 1);
(2) Explore to what extent asylum-seekers fall under the *personal scope* of the right to free movement (Chapter 2);
(3) Examine the criteria to distinguish between restrictions on movement and detention, so as to determine the *material scope* of the right to free movement. Additionally, compare

[46] See Larsen 2011 and Pelzer and Pichl 2016, p. 101. In a criticism to the residence restrictions imposed on recognised refugees in Germany, the latter authors argue that 'the existence of networks among refugee communities should not be understood as something negative—rather, these networks can be very important for the success of integration, for example into the labour market'.
[47] Slingenberg 2022a.
[48] Convention Relating to the Status of Refugees, 28 July 1951 (U.N.T.S., vol. 189, p. 137) and Protocol relating to the Status of Refugees, 31 January 1967 (U.N.T.S. vol. 606, p. 267).
[49] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ L 337/20).
[50] For an in-depth examination of the right to an effective remedy in the context of asylum applications, see Reneman 2014.

the criteria applied in cases involving the confinement of asylum-seekers and other migrants with those employed in 'domestic cases' of confinement (Chapter 3).

(4) Analyse the safeguards of the right to free movement in the law specifically applicable to asylum-seekers, and compare them with those in the law applicable to nationals or to all individuals (Chapter 4);

In the introduction of each chapter, I will elaborate on the specific research questions deriving from each key objective. This approach has been chosen because each chapter offers a different perspective on the right to free movement and thus raises different questions. The present study could be compared to a jigsaw puzzle, where each piece, despite its distinct features, is essential for providing a full picture of the right to free movement of asylum-seekers.

3. Contribution to existing legal doctrine

In his aforementioned research paper, Maple notes that 'the right to freedom of movement for refugees has received limited academic attention on both a normative and legal level'.[51] Indeed, the majority of publications relating to spatial restrictions on migrants and asylum-seekers have focused on detention and not on restrictions to the right to move freely within the country. This is most likely because, as Costello has stressed, 'immigration detention is one of the most disturbing contemporary practices from the point of view of the rule of law human rights'.[52]

With regard to the right to free movement of asylum-seekers and refugees, some authors have dealt exclusively with this right in journal articles,[53] research papers[54] and guidelines.[55] Most authors who have addressed the topic have done so in chapters of books that systematically examine the rights of refugees and migrants under the Refugee Convention and other sources of international law.[56] Finally, Beyani analysed this right as enjoyed by refugees in a chapter of her book on the human right to freedom of movement.[57]

Therefore, as of 2023, there is no book or PhD thesis that comprehensively assesses the state of the right to free movement of asylum-seekers under international and European law. This thesis aims to be a reference source for academics and practitioners at a time when freedom of movement within the country has acquired renewed interest in light of the restrictive practices described above. Moreover, some of the elements of this thesis that add value to existing research are the following:

(a) The examination of the position of migrants in the *travaux préparatoires* of international instruments other than the Refugee Convention. This has been done by Dembour in

[51] Maple 2016, p. 2.
[52] Costello 2015, p. 143.
[53] Zieck 2018, McDonough 2016, Slingenberg 2022b, Pelzer and Pilch 2016.
[54] Maple 2016, Künzli *et al.* 2017.
[55] Hathaway *et al.* 2018.
[56] Bast, Von Harbou and Wessels 2022 and most of the authors quoted in Chapters 2 and 4, such as Hathaway 2021.
[57] Beyani 2000.

relation to Article 16 ECHR ('restrictions on the political activities of aliens'),[58] but remains an underexplored topic.

(b) The classification of all the different views in legal doctrine on whether asylum-seekers are lawfully present in the host State for the purposes of the Refugee Convention. Beyond the specific issue of freedom of movement, this classification is relevant for understanding the position of asylum-seekers *vis-à-vis* the Refugee Convention more generally, in particular for the interpretation of Article 18 RC ('self-employment') and 32 ('expulsion'), both of which pertain to refugees 'lawfully in [the] territory'.

(c) The analysis of the 'principle of conditional lawfulness', whereby international law allows States to make the 'lawfulness' of a person's migratory status *conditional* on complying with specific requirements (such as restrictions on movement). I have found only two authors (Hathaway and Marx) who reflect upon and problematise this principle.[59]

(d) The systematisation of the criteria to distinguish a restriction on movement from detention. I have found only one article that systematically examines the case law of the European Court of Human Rights (ECtHR) on this issue in relation to the confinement of patients in psychiatric hospitals.[60] This part of the thesis is of general relevance to the study of confinement practices resembling detention beyond the field of migration.

(e) The comparison between the human rights protection of nationals and that of migrants, which has been carried out with regard to several human rights,[61] but not with regard to freedom of movement within the country.

4. Scope of the research

4.1. Member States of the Council of Europe

This study is limited territorially to the analysis of the law applicable in the Member States of the Council of Europe. It primarily focuses on international and regional human rights law, supplemented by two case studies (Spanish and German domestic law), which have been selected to explore the regulation of the freedom of movement of asylum-seekers in fundamental rights law, i.e. 'the crystallisation of human rights in particular constitutions and domestic legislation'.[62] The inclusion of the case studies will provide an additional layer of analysis from a different perspective (constitutional/domestic law), thus making the study more comprehensive. The reasons for choosing these two countries are explained below.

The key international and European instruments to be examined from a legal doctrinal perspective include the Refugee Convention (RC),[63] the International Covenant on Civil and

[58] Dembour 2015, p. 35 *et seq.*
[59] Hathaway 2021, p. 391; Marx 2011, p. 1156-1157.
[60] Allen 2009. Some reflections on the case law of the European Court of Human Rights on this matter in relation to migrants are found in Cornelisse (2010, pp. 280-282) and ECRE (2018, pp. 7-10). See also the blog post Majcher 2018, which refers to some specific migration-related cases of the Court, and the blog post Stoyanova 2019, which critically reviews the 2019 Grand Chamber case relating to the Hungarian transit zones.
[61] See below, Section 6.2.
[62] Ruiz Robledo 2018, p. 217.
[63] Convention Relating to the Status of Refugees, 28 July 1951 (U.N.T.S., vol. 189, p. 137) and Protocol relating to the Status of Refugees, 31 January 1967 (U.N.T.S., vol. 606, p. 267).

Political Rights (ICCPR),[64] the European Convention on Human Rights (ECHR)[65] and Protocol 4 to the ECHR.[66] The Universal Declaration of Human Right (UDHR)[67] will not be analysed from a doctrinal point of view, since the Declaration is not a binding treaty.[68] However, the *travaux préparatoires* of the Declaration are explored in Chapter 1, as the purpose of this chapter is not to undertake a legal doctrinal analysis, but rather to explore the origins of the right to free movement. Therefore, an analysis of the drafting process of the UDHR, as the founding document of international human rights law, is essential to this end. On another note, the selected articles of these instruments are those relating to the right to free movement in ordinary times, and thus the question of derogations from this right in times of war or other exceptional circumstances will not be addressed.[69]

4.2. The exclusion of EU law from the analysis

To the expert reader, it might come as a surprise that the Charter of Fundamental Rights of the European Union[70] is not included in the analysis.[71] This deliberate omission derives from the fact that the Charter does not contain an article specifically dealing with the right to free movement within the country. While the Charter largely mirrors the rights enshrined in the ECHR and its Protocols,[72] the closest provision to Article 2(1) of Protocol 4 ECHR is Article 45, which lays down that:

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[64] International Covenant on Civil and Political Rights, 16 December 1966 (U.N.T.S., vol. 999, p. 171 and vol. 1057, p. 407).

[65] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (CETS, No. 5) as amended by Protocol 14, 13 May 2004 (C.E.T.S., No. 194). The case law on the admissibility test of Article 5 ECHR (the right to liberty) will be examined in Chapter 3 to explore the limits between that right and the right to freedom of movement within the country.

[66] Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, 16 September 1963 (C.E.T.S., No. 46).

[67] Universal Declaration on Human Rights (New York, 10 December 1948), UN General Assembly Resolution 217 A (III).

[68] As to whether Article 13 UDHR has become customary law, see the contrasting positions of Schabas 2021, p. 242 (who argues that freedom of movement under the Declaration is part of customary law) and Hannum 1996, p. 346 (arguing the opposite). I believe it has, as will be noted in Chapter 2 when discussing the personal scope of the right.

[69] For example, Article 9 of the Refugee Convention allows States to take 'provisional measures' (including limitations on free movement) in such times, and Articles 4 ICCPR and 15 ECHR foresee the derogation of human rights in times of emergency. For an analysis of the derogation of freedom of movement in various treaties, see chapter 7 of Beyani 2000. It is also worth noting that in the early stages of Covid-19, several States derogated from the right to freedom of movement in the ICCPR and in Protocol 4 ECHR. For an examination of these derogations, see Girma Teshome 2022.

[70] Charter of Fundamental Rights of the European Union, 26 October 2012 (OJ C 326/391).

[71] Other international instruments have also been excluded. The International Convention on the Protection of Migrant Workers and Members of their Families (U.N.T.S. vol. 2220, p. 3)—which also guarantees the right to free movement in Article 39—has been left out of the analysis because hardly any Member States of the Council of Europe (with the exception of Albania, Turkey and Bosnia and Herzegovina) are parties to this treaty. It should be noted that the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live (UNGA Res. 40/144, of 13 December 1985) reiterates this right in Article 5, and the International Convention for the Elimination of Racial Discrimination (U.N.T.S. vol. 660, p. 195) provides in Article 5 that freedom of movement shall comply with non-discrimination obligations.

[72] The Charter sets out the same rights as the ECHR and its Protocols, adding some rights relating to modern issues such as data protection and cloning, as well as to social aspects such as the right to fair working conditions and the right of persons with disabilities to benefit from integration policies.

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

However, the 'right to move and reside freely' in this article refers to the right of EU citizens to move to and reside in a Member State *other than their own*, subject to the conditions set out in the Citizenship Directive.[73] This provision reproduces Article 20(2) of the Treaty on the Functioning of the European Union (TFEU) and is designed to facilitate the realisation of the EU internal market.[74] While it could be argued that, unlike the TFEU, Article 45(1) of the Charter also protects the right of citizens to move *within* the territory of their own Member State when they are affected by a measure (such as a residence restriction) taken by a Member State in the implementation of EU law, it could also be argued that, pursuant to Article 52(2) of the Charter, Treaty derived rights included in the Charter cannot be interpreted autonomously from the TFEU.[75]

Be that as it may, whether asylum-seekers enjoy the right to free movement under Article 45 is out of the question, since paragraph 2 provides that:

2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State

Article 45(2) therefore merely enshrines a prerogative of the Union, not a justiciable right.[76] Nevertheless, it is worth noting the argument put forward by Bast, von Harbou and Wessels, who contend that the right to free movement *within* the territory of each Member State is incorporated into EU law as a general principle in the sense of Article 6(3) of the Treaty on European Union.[77] They apply the presumption of substantive homogeneity between EU fundamental rights and human rights, stating that:

'Given that all EU Member States are party to the ICCPR, the Refugee Convention and to Protocol No. 4 ECHR (except for Greece, which did not sign Protocol No. 4) we assume that the right to freedom of movement within the territory of each Member State is a general principle of EU law, subject to the qualifications and permissible restrictions laid down in these instruments.'[78]

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[73] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ L 158/77). EU citizens who travel to another Member State for more than three months must be either economically active or economically independent. Cross-border movement may also be restricted for reasons of public policy, public security and public health; the restrictions imposed during the peak of the Covid-19 pandemic being an example of the latter.

[74] Explanations relating to the Charter of Fundamental Rights (OJ C 202/17). Article 20(2) TFEU reads: 'Citizens of the Union shall enjoy the rights and be subject to the duties provided in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States (…)'.

[75] Spaventa 2021, p. 1223-1224. Article 52(2) of the Charter states that Treaty-derived rights 'shall be exercised under the conditions and within the limits defined by those Treaties', thus limiting the possibility for an autonomous 'life' of Article 45 (Spaventa 2021, p. 1212).

[76] Spaventa 2021, p. 1224.

[77] This provision reads: 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

[78] Bast, Von Harbou and Wessels 2022, p. 82. The fact that Greece is not party to Protocol 4 ECHR may be one of the reasons why the right to free movement within the country was not included in the EU Charter. As to why Greece did not accede to this Protocol, I asked various Greek asylum lawyers about this during the Kos Conference on Immigration Detention in the EU (*supra* note 32). Two senior lawyers, Erika Kalanzi and

While this is a convincing argument, examining the right to free movement of asylum-seekers *as a general principle of EU law* would involve scrutinising the same instruments and case law of as the right to free movement of asylum-seekers *under international and European human rights law*. It would therefore not add an additional layer of an analysis to this study.

It should also be noted that there is an important judgment of the Court of Justice of the EU (CJEU) relating to the definition of detention, which is however not examined in this thesis. In *FMS and FMZ*, the CJEU came to the opposite conclusion to the ECtHR in *Ilias and Ahmed v. Hungary* (examined in Chapter 3) and declared that the confinement of asylum-seekers in the Hungarian transit zones amounted to detention. However, in this judgment, the CJEU only defined the concept of 'detention' within the meaning of Directive 2008/115 (Returns Directive) and Directive 2013/33/EU (Reception Conditions Directive), without mentioning the right to liberty under Article 6 of the Charter. This was despite the fact that the referring judge had asked the Court to interpret those Directives 'in the light of Article 6 and Article 52(3) of the Charter'.[79] It therefore appears that this judgment is not the most appropriate one to identify the limits between a restriction on movement and detention under European human rights law.[80] The same can be said of a subsequent judgment (*M.A.*) concerning the confinement of asylum-seekers in a Lithuanian reception centre, a measure that Lithuanian law did not qualify as detention. In this case, the CJEU also ruled that the applicant had been deprived of his liberty, but referred only to the definition of detention under the Reception Conditions Directive.[81]

Finally, Article 7 of the Reception Conditions Directive (RCD)[82] regulates the movement and residence restrictions that Member States may impose on asylum-seekers. However,

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Angelos Kaffes, gave me several potential reasons. One of them was that, historically, north-eastern Greece was inhabited by a minority of Slavic-speaking Muslims, the Pomaks. Between the 1950s and the 1990s, Greece established an internal border between that area and the rest of the country. The Pomaks had to acquire a passport and show it to military personnel if they wanted to leave the north-eastern territory. This was done because the Pomaks were considered a threat to national security, and the authorities wanted to keep them in a delimited area so that they could be more easily monitored. Another possible reason was that, between the 1920s and the 1970s, some Greek islands such as Mykonos acted as open prisons. Kalanzi also told me that Greece made a reservation to Article 26 of the Refugee Convention because the Government did not want Muslim refugees to move to the north-east to avoid a larger concentration of Muslims near the Turkish border.

[79] Judgment of 14 May 2020, *FMS and FMZ,* Joined Cases C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paras. 79 and 302. Article 52(3) of the Charter provides that, in so far as the Charter contains rights which correspond to those guaranteed by the CEDH, the meaning and scope of those rights shall be the same as those laid down by the said Convention. It may be that the CJEU did not refer to Article 6 or Article 52(3) of the Charter so as to avoid the need to explain why it had reached a different conclusion from the ECtHR in *Ilias and Ahmed*. In fact, while the referring court did mention the Grand Chamber judgment, the CJEU kept silent on this point.

[80] After this judgment, the Hungarian Government closed the transit zones, only to set up a new asylum regime under which it is no longer possible to apply for asylum on Hungarian territory (thus violating EU law once more, as confirmed by the Judgment of 22 June 2023, *Commission v. Hungary*, Case C-823/21, EU:C:2023:504). For this reason, Nagy (2020) describes *FMS and FMZ* as a 'phyrric victory' for asylum-seekers. For her part, Cornelisse (2020) argues that, under EU law, confinement in centres at the EU's external borders (such as the Hungarian transit zones) nearly always constitute detention, as it forces asylum-seekers to choose between forfeiting their right to liberty (article 6 of the Charter) if they stay in the country, and renouncing their right to asylum (Article 18 of the Charter) and their right to remain (Article 9 of the Asylum Procedures Directive) if they leave to a third country.

[81] Judgment of 30 June 2022, *M.A. v. Valstybės sienos apsaugos tarnyba,* Case C-72/22 PPU, EU:C:2022:505.

[82] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ L 180/96).

given the focus of this study on international human rights law, this provision of EU secondary legislation is not further examined. While Article 7 RCD could have been chosen as a case study, other authors have already commented on this provision,[83] whereas the selected case studies of Spain and Germany have received less attention in the anglophone literature.[84]

5. The Spanish and German case studies

The domestic legal systems of Spain and Germany will be assessed in Chapters 2 (the personal scope of the right) and 4 (the safeguards of the right). Both countries have been selected because of their intrusive policies on the free movement of asylum-seekers in recent years, which in turn have spawned a wealth of domestic case law, doctrinal debates and legal issues.

On the one hand, for over a decade, the Spanish police have prevented asylum-seekers in Ceuta and Melilla, two Spanish exclaves in Northern Africa, from moving to the Iberian Peninsula, even after their applications had been deemed admissible. These restrictions have been implemented as a matter of administrative practice without a clear regulatory framework.[85] Since 2020, similar restrictions have been imposed on asylum-seekers in the Canary Islands.[86] Subject to police discretion and discriminatory practices—based on nationality—as to who is transferred to the mainland, many asylum-seekers have been confined, sometimes for years,[87] in living conditions significantly poorer than in other parts of Spain.[88] While restrictions in Ceuta, Melilla and the Canary Islands are gradually being lifted as of July 2023,[89] the Spanish practice—along with Greece, as mentioned above—remains a prime example of how southern European States take advantage of their geographical particularities to prevent secondary movements to other EU countries and to serve the deterrence goals set by the EU.[90]

On the other hand, among Central European countries, Germany has one of the 'most invasive'[91] regimes restricting the residence of asylum-seekers: the *Residenzpflicht*. This term is 'linguistically untidy'[92] because *Residenzpflicht* means 'obligation to reside', but it is used in the literature and the public debate to describe a practice that is legally called 'spatial restriction' (*Räumliche Beschränkung*). Under this system, asylum-seekers cannot leave a particular *Land*—and, in some regions, a particular municipality—without permission of the authorities. The consequence for asylum-seekers of not complying with the spatial restriction is a fine or even imprisonment for up to one year.[93] The existence of the *Residenzpflicht* dates back to 1982,

[83] See Tsourdi 2022 for a systematic analysis of this article. Several authors (McDonough 2009, Pelzer and Pilch 2016) have questioned whether this provision is consistent with the Refugee Convention.
[84] The only exception I have found, regarding Germany, is McDonough 2009.
[85] Boček, 2018.
[86] Barbero 2021, p. 192.
[87] Bondanini, 2017, p. 75
[88] Spanish Ombudsman 2021, p. 65.
[89] AIDA 2023b, p. 105.
[90] Barbero, 2021, p. 199; Ferrer-Garrado and Albetmas 2016, p. 529.
[91] Hathaway 2021, p. 539.
[92] Stahmann 2011, p. 348.
[93] Articles 85 and 86 Asylum Act (BGBI. I p. 2477, last amended on the 9-7-2021).

and it has had a strong influence on EU asylum law, given that it served as the model for Article 7 of the Reception Conditions Directive, which allows EU Member States to limit the movement of asylum-seekers to an 'assigned area'.[94]

These case studies are however not included in Chapter 3 (the material scope of the right) because there are very few judgments from Spanish and German domestic courts on the definition of detention in the field of migration. Nonetheless, it is worth briefly contrasting here two judgments of the constitutional courts of these countries:

(a) For the Federal Constitutional Court, the right to liberty under Articles 2(2) and 104 of the *Grundgesetz* is not affected when an asylum-seeker is held in an airport transit zone. The Court reasons that detention only exists if a person is prevented by the authorities from going to a place that is 'actually and *legally accessible*' to her (i.e. where the law allows her to go). For asylum-seekers who land at a German airport without appropriate travel documents, German territory 'is *legally inaccessible* until their entitlement to asylum has been established'.[95] The Court finds that, even if an asylum-seeker in such a situation cannot be asked to return to his country of origin because of the possible risk of persecution, the resulting restriction on movement at the airport is not the consequence of a measure attributable to the German public authorities.[96]
(b) While the German courts consider that a situation as intrusive as being held in an airport transit zone does not amount to a deprivation of liberty, the Spanish Constitutional Court has ruled that the mere momentary immobilisation and request for identification by the police in the street—to which asylum-seekers and other migrants are often subjected in Spain [97]—constitutes detention and thus interferes with the right to liberty under Article 17(1) of the Spanish Constitution.[98] The different approaches of the two courts illustrate the complexities of defining when a situation qualifies as 'detention'.

6. Two theoretical pillars

There are two ideas or theoretical pillars that underpin this study and link the various chapters together: 'multi-sourced equivalent norms' and 'migration exceptionalism'.

[94] McDonough 2009, p. 526. See Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ L 180/96).
[95] Therefore, for the Federal Constitutional Court, asylum-seekers present at a German airport have not yet entered the territory. This is commonly referred to as the 'fiction of non-entry' (Costello 2015, p. 151).
[96] Judgment of the Federal Constitutional Court 94, 166 (14 May 1996), paras. 117-119. As will be seen in Chapter 3, the ECtHR in *Ilias and Ahmed* applies a similar reasoning (i.e. that the restriction in such cases cannot be attributed to the action of State authorities). On a different note, in a judgment rendered in 2017, the Federal Court of Justice (to be distinguished from the Federal Constitutional Court) nuanced that, if the restriction on movement in the airport transit zone continues without a court order beyond the maximum time limit laid down by German law (30 days), the measure becomes a deprivation of liberty (Judgment of the Federal Court of Justice V ZB 170/16, 16 March 2017, para. 7).
[97] The over-representation of racial minorities in these street police checks led the HRC to find Spain in breach of the prohibition of discrimination under Article 26 (*Williams LeCraft v. Spain*, Communication No. 1493/2006, 17 August 2009). For an analysis of the practice of 'racial profiling' in Spain and its human rights implications, see Oviedo Moreno 2020.
[98] Judgment of the Spanish Constitutional Court 86/1996, of 21 June.

6.1. Multi-sourced equivalent norms

This study examines how the right to free movement protects asylum-seekers in different legal systems, some of which are primarily conformed by only one United Nations resolution (the UDHR) or treaty (the Refugee Convention), some of which comprise a treaty and the decisions of an international court or body (the ECHR and the ICCPR), and some of which consist of a more complex system of primary and secondary norms and decisions from different courts (the Spanish and German legal orders). All these legal systems contain norms on the right to free movement which feature a certain degree of similarity in their content. For this reason, this study fits into Broude's and Shany's doctrinal category of 'multi-sourced equivalent norms', which they define as follows:

'Two or more norms which are (1) binding upon the same international legal subjects;[99] (2) similar or identical in their normative content; and (3) have been established through different international instruments or "legislative" procedures or are applicable in different substantive areas of the law.'[100]

Broude and Shany place emphasis on the concept of 'equivalent' rather than 'equal' norms because 'even identically phrased norms entail different normative consequences resulting from the distinct political, normative and institutional environments in which they function'.[101] Applying this concept to the present study, it is noticeable that, while the core of the right to free movement is the same in the various legal systems, each of them was created in a different historical and political context (Chapter 1) and each has a different set of institutions that develop the content of the right. All these factors lead to different interpretations of the personal scope of the right (i.e. *whether* it applies to asylum-seekers and *to which* asylum-seekers; Chapter 2) and the safeguards it provides (e.g. whether the authorities need to look for alternative measures before imposing restrictions on movement; Chapter 4). It is precisely these differences that make the study of multi-sourced equivalent norms 'particularly interesting'.[102]

6.2 Migration exceptionalism or the 'two-tier system'

The second guiding theme of this study is the comparison between the legal protection afforded to the freedom of movement of asylum-seekers and that provided to nationals or individuals in general. This comparison builds on previous research which has shown that international law tends to establish lower human rights standards in the context of migration than in other contexts.

For instance, Cornelisse has examined how the ECtHR sets a much higher threshold for the application of Article 3 ECHR (prohibition of inhuman or degrading treatment) in cases concerning the removal of migrants suffering from serious illnesses than in 'domestic cases'

[99] In our case, Council of Europe Member States, with the exception, of course, of the Spanish and German legal orders, which are only binding on the respective States.
[100] Broude and Shany 2011, p. 5. While these authors focus solely on international law, this study also includes equivalent norms present in two domestic legal orders. In fact, Broude and Shany (2011, p. 3) acknowledge that 'normative parallelism is not unique to international law and exists in a variety of domestic legal settings'.
[101] Broude and Shany 2011, p. 8.
[102] Broude and Shany 2011, p. 7.

relating to individuals with health problems. She thus shows how human dignity,[103] despite its rhetorical universality, is not equally protected for all human beings:

'That the same court will not prohibit the extradition or deportation of an immigrant suffering from the same ailment [as an individual in a "domestic case"] seems highly likely. (…) Again, the relationship between rights holder and duty bearer seems of crucial importance in this assessment. Treatment that in a purely domestic context will be seen as inhuman or degrading will not always be perceived as reaching the required severity for the application of Article 3 ECHR so as to block the removal of an immigrant.'[104]

For her part, Dembour has reviewed the migration-related case law of the ECtHR on, inter alia, Article 14 ECHR (prohibition of discrimination) and has found that, beyond the sphere of social security 'conceived in a rather limited way'[105] and beyond the situation of legally settled migrants, the Court either does not examine or explicitly rejects complaints concerning laws and policies that discriminate between nationals and migrants on the sole ground of nationality.[106] Similarly, Ismaïli concludes in her PhD thesis that, when the (potential) separation between parents and minor children is at stake, the ECtHR applies different standards in its assessment on whether such separation would violate Article 8 ECHR (right to family life) in family law cases than in migration law cases. While in the former the decisive factor for the outcome is the best interest of the child, in the latter the Court's careful analysis of the parent-child relationship is often absent.[107]

Distinct human rights safeguards have also been identified at the level of the UN between the Refugee Convention (which specifically addresses the rights of refugees) and the two UN Covenants (the ICCPR and the International Covenant on Economic, Social and Cultural Rights or ICESCR, the rights of which generally accrue to all individuals). Hathaway notes that, while the two general human rights treaties contain several provisions protecting the necessities of life such as Article 7 ICCPR (prohibition of degrading treatment) and Article 11 ICESCR (right to an adequate standard of living),

'the drafters of the Refugee Convention (…) paid surprisingly little attention to the importance of meeting the basic needs of refugees who arrive to seek protection. The Convention does not address rights to food, water, or healthcare, and only regulates access to public housing for refugees once they are lawfully staying in a given country.'[108]

Another example of the divergent standards at the UN level cited by Hathaway is the right to liberty, with respect to which the ICCPR offers much stronger safeguards than the Refugee Convention, to the point that 'much of the core value of Article 31(2) [of the

[103] The author observes that, in the legal discourse of the ECtHR, Article 3 is closely connected to the idea of human dignity, given that the Court perceives any violation of the prohibition of torture, inhuman or degrading treatment as 'an affront to human dignity' (Cornelisse 2019, p. 98).
[104] Cornelisse 2019, p. 110.
[105] Dembour 2015, p. 266.
[106] Ibid., pp. 280-281. Spalding (2022, p. 167) comes to a similar conclusion.
[107] Instead, the Court is guided by the State's interest in controlling migration: it makes the protection afforded by Article 8 dependant on whether the State's decision-making process has been careful and whether the parents have complied with domestic migration regulations. See Ismaïli 2019.
[108] Hathaway 2021, pp. 589-590. As has been noted in Chapter 2, Article 31(2) covers detention (affecting the right to liberty) *and* restrictions on movement and residence (affecting the right to move and to choose one's residence within the country).

Refugee Convention] has been eclipsed by the Covenant's broad-ranging prohibition of "arbitrary arrest or detention"'.[109]

In the United States, legal scholars have observed that the US Supreme Court applies special immigration doctrines that depart from mainstream constitutional norms. This trend has been termed 'immigration exceptionalism'.[110] This concept has also been used by European academics. Costello, for example, employs it to refer to the lower standards that the ECtHR grants to migrants detained under Article 5(1)(f) ECHR in the context of migration control than to individuals detained in other contexts.[111] This author, together with Kaytaz, further applies the term to a practice that is closely related to restrictions on movement: the obligation of asylum-seekers to regularly report their whereabouts to the authorities. She affirms that:

'Migration exceptionalism is also evident when States insist that migrants comply with bureaucratic requirements, such as reporting obligations, and duties to aid the authorities in determining their claims, in a manner that goes beyond what would be expected of insiders in their dealings with bureaucracy.'[112]

Another recently coined term to describe this trend is 'a two-tier human rights system'. In her book on the case law of the ECtHR on migration, Spalding shows that the Court has created a human rights system with one tier that applies to citizens and a second tier reserved for non-citizens. The first one is characterised by stringent procedural safeguards which prevent the State from abusing its power (such as the protection of the right to a fair trial under Article 6 ECHR), which the second one lacks. This also results in a two-tier criminal justice system, whereby States cherry-pick measures from criminal and immigration law. Thus, migrants suffer the effects of criminal and criminal-like measures (such as administrative detention and deportation) but without the strong safeguards offered by criminal justice.[113]

The present study aims to ascertain whether the 'migration exceptionalism' or the 'two-tier human rights system' identified by the doctrine in other areas of human rights law is also present in the context of the criteria on which the ECtHR relies to decide on the applicability of Article 5 ECHR, i.e. the *distinction* between a restriction on movement and detention (Chapter 3) and in the context of the *safeguards* offered by the right to free movement at the various normative levels (Chapter 4).

[109] Ibid., p. 524.
[110] Rubenstein and Gulasekaram 2017.
[111] Costello 2015, p. 147. Other authors have also pointed out this differentiated protection in relation to the right to liberty under Article 5 ECHR. See, inter alia, Cornelisse 2010, pp. 300-312 and Spalding 2023, pp. 60-67. In my previous research, I found that the ECtHR has lowered the level of protection under Article 5 for asylum-seekers even further since the 2015 'refugee crisis' (Ruiz Ramos 2020).
[112] Costello and Kaytaz 2013, p. 11.
[113] Spalding 2022, p. 152.

7. Methodology

The present study follows a positivist approach to the law and adopts the classical legal method, i.e. 'the process of knowledge or the construction and understanding of the law'.[114] The three main sources examined throughout the chapters are commonly used in international legal scholarship: (1) the *travaux préparatoires* of international instruments, (2) legal doctrine and (3) judicial and quasi-judicial decisions.[115] In this regard, it is a 'black letter law' research, as opposed to the increasingly popular—and meritorious—studies that employ other methods, such as feminist theory and empirical legal research, to expand our knowledge of the socio-legal aspects of the law (sometimes referred to as 'law in context').[116] However, a distinctive feature of this study in terms of method is the compilation of a large set of documents and decisions and the systematic analysis of their content, with close attention to detail and to the nuances of the arguments of treaty drafters, legal scholars, courts and independent bodies.

7.1 Systematic analysis of *travaux préparatoires*

Courts, lawyers and States mainly resort to the *travaux préparatoires* in order to assist them in interpreting the rights and obligations derived from a treaty. According to Article 32 of the Vienna Convention on the Law of Treaties (VCLT), preparatory works are a supplementary means of interpretation, to be consulted only when the other means of interpretation listed in Article 31 VCLT leave the meaning ambiguous or obscure or lead to a result which is manifestly absurd or unreasonable.[117] Several legal scholars, whose work is examined in Chapters 2 and 4, use the *travaux préparatoires* of the Refugee Convention to interpret the right to free movement of refugees under that instrument.

However, the main analysis of the *travaux* of the various international instruments will be carried out in Chapter 1. This chapter does not purport to interpret international treaties through Article 32 VCLT, but rather to provide an insight into the origins of the right to free movement within the country in international law and, in particular, the position of non-nationals with regard to this freedom in the minds of the drafters. Indeed, as noted by Schabas, beyond Article 32 VCLT the *travaux préparatoires* of human rights instruments have their own intrinsic interest, as 'they enable us to comprehend the status of debate about legal issues at a given time and in a particular forum' and 'contribute to a grasp of the origins of human rights law and its contemporary meaning'.[118]

Unlike the case law and legal doctrine, the preparatory works have not been listed at the beginning or at the end of this study because of the long list of documents examined. They

[114] Pérez González 1989, p. 219.
[115] Jiménez Piernas 1993.
[116] See for example Dez (2022), who draws on Judith Butler's theory and uses empirical legal research to examine how PrintRights, a cooperative of undocumented asylum-seekers in Amsterdam, framed its action during the Covid-19 pandemic within the human right to freedom of expression.
[117] This hierarchy between Article 31 and 32 VCLT is blurred in practice, as international courts often use preparatory works even when the conditions of article 32 are not fulfilled (Amann 2019, p. 217).
[118] Schabas 2014, pp. 587-588.

are however quoted in the footnotes whenever I refer to them. The *travaux* of the different instruments have been retrieved from the following sources:

(a) The compilation of the *travaux* of the UDHR by W. A. Schabas.[119]
(b) The compilation of the preparatory works of the ICCPR by the University of Virginia School of Law[120] and the *Guide to the 'travaux préparatoires' of the ICCPR* by M. J. Bossuyt.[121]
(c) The *Collected Edition of the 'Travaux Préparatoires' of Protocol No. 4*, published by the Council of Europe.[122]
(d) The compilation of the *travaux* of the Refugee Convention by P. Weis[123]

7.2 Systematic review of legal doctrine on the Refugee Convention

A significant part of Chapters 2 (the personal scope) and 4 (the safeguards) is devoted to the examination of the right to free movement under the Refugee Convention. Unlike other treaties, this Convention did not create a monitoring body with the power to issue general guidelines to States to facilitate its consistent application.[124] Therefore, the judgments of national courts—one of the means of interpretation of treaties under the VCLT ('subsequent practice')—could be useful for exploring the meaning of Articles 31 and 26 RC, which enshrine the right to free movement of refugees. However, the scarcity of domestic judgments interpreting these provisions, together with the inherent difficulties in reviewing the case law of all State parties to the Refugee Convention, have led me to focus on the interpretation of Articles 31 and 26 of the Refugee Convention conducted by legal scholars. In this respect, it is worth noting that, under Article 38 of the Statute of the International Court of Justice (ICJ), both 'judicial decisions' and 'the teachings of the most highly qualified publicists' are a subsidiary means for the determination of rules of international law.[125]

In order to find this legal doctrine, I have reviewed the literature that systematically examines the rights contained in the Refugee Convention, as well as that which specifically addresses the right to free movement of refugees. In total, I have analysed the work of 16 authors.[126] I have also reviewed the reports of the United Nations High Commissioner for Refugees (UNHCR) that are relevant to this topic, since UNHCR plays a key role in providing

[119] Schabas 2013.
[120] University of Virginia School of Law, UN Human Rights Treaties Travaux Préparatoires, ICCPR. Available at: https://hr-travaux.law.virginia.edu/international-conventions/international-covenant-civil-and-political-rights-iccpr
[121] Bossuyt 1987.
[122] Council of Europe 1976.
[123] Weis 1990.
[124] Clark and Crépeau 1999, p. 402.
[125] Statute of the International Court of Justice, 24 October 1945.
[126] I count Goodwin-Gil and McAdam as only one author, given that their book is written in co-authorship. There are two authors which I only analyse in either Chapter 2 or Chapter 4: Maassen (1997), who only writes on the personal scope of the right to free movement in the Refugee Convention without reflecting on its safeguards, and Weissbrodt (2008), who makes an interesting comment on the safeguards of Article 31 RC but does not analyse the personal scope of the right.

interpretative guidance on the Refugee Convention and in encouraging a harmonised application of its provisions by State parties.[127]

7.3 Systematic content analysis of judicial and quasi-judicial decisions

7.3.1 The ECtHR and the HRC

Together with legal doctrine, the case law of the European Court of Human Rights (ECtHR) and the decisions of the UN Human Rights Committee (HRC) provide the basis for the legal analysis carried out in Chapters 2 and 4.

The authority of the ECtHR to interpret the provisions of the Convention and its Protocols over and above the views of State parties derives from Article 32 ECHR, which provides that 'the jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention'. Although the traditional role of the ECtHR is to provide remedies in individual cases, in recent decades the Court has also dealt with systematic human rights violations, setting human rights standards and acquiring a 'constitutional function'.[128] In its case law, the Court applies two main principles of interpretation: that which seeks to give effect to the object and purpose of the Convention (the teleological approach), and that which seeks to give it a practical and effective application in the light of present-day conditions (the evolutive approach).[129]

As for the HRC, the ICCPR does not make clear that the Committee is to be the final interpreter of the treaty.[130] Nevertheless, the fact that the Committee receives periodic reports from States and other parties, along with its experience in applying the Covenant, has led legal commentators to argue that, at least from a moral point of view, 'the interpretation provided by the HRC overrides interpretations provided by States'.[131] From a legal perspective, the importance of the Committee's interpretation lies in the fact that one of the intentions of State parties to the ICCPR in establishing the HRC was to give greater precision to the content of the obligations under the Covenant.[132] Importantly, in its well-known *Diallo* judgment, the ICJ stated that it 'ascribe[d] great weight to the interpretation adopted by this independent body [the HRC]'.[133] The ICJ was referring specifically to the Committee's 'views', i.e. those decisions resulting from communications submitted to it by individuals. Ulfstein has reflected on what exactly 'ascribing great weight' to the views of the Committee may mean in practice for national courts, coming to the conclusion that it entails 'a presumption of the correctness of such findings', which 'requires State parties, including national courts, to present good reasons for any conflicting opinion'.[134]

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[127] Chetail 2012, p. 64. See also Chimni (1998, p. 366), who affirms that UNHCR 'promotes norms of international behavior'.
[128] Harmsen, 2007, p. 51.
[129] Rainey *et al.* 2014, p. 81.
[130] Harrington 2015.
[131] Citroni 2015.
[132] Ulfstein 2012, p. 98.
[133] *Case concerning Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010, p. 639, para. 66).
[134] Ulfstein 2012, p. 100.

Not only the ICJ, but also various domestic courts share the view that pronouncements of international human rights treaty bodies 'deserve to be given considerable weight in determining the meaning of a relevant rights and the existence of a violation'.[135] The Spanish Supreme Court has gone even further, declaring that the decisions of the UN Committee for the Elimination of Discrimination against Women have binding force on the Spanish State.[136]

In order to gain a comprehensive understanding of the judgments and decisions of the ECtHR and the HRC, these will be examined by means of a systematic content analysis of judicial (and quasi-judicial) decisions. This method, developed by Hall and Wright, borrows from a standard social science technique—content analysis—, thus 'bringing the rigor of social science to our understanding of the case law'.[137] It involves the collecting a set of judicial opinions on a particular subject, systematically reading them, recording consistent features of each and drawing inferences about their use and meaning. A key aspect of systematic content analysis is that, unlike most classic legal scholarship, the method for selecting the case law are made explicit. This makes the research replicable, i.e. it allows other academics to replicate the research results, thus generating objective knowledge about what courts do.[138]

In Chapter 2 (the personal scope of the right), the case law has been chosen based on the following criteria:

(1) I have drawn two HRC views from the *OHCHR Iuris Database* by cumulatively selecting 'CCPR' and 'Article 12(1)' in the advanced document search.[139] The analysis of these cases is complemented by an examination of two Concluding Observations and two General Comments of the HRC cited by Joseph and Castan in *The ICCPR: Cases, Materials, and Commentary*.[140]
(2) I have included six ECtHR judgments from Slingenberg's article *European case law on migrants' social and mobility rights*, in which she used the *HUDOC Database* to find these rulings.[141] I have selected three additional judgments directly from *HUDOC*, searching for the text 'without necessarily requiring that an individual be granted formal

[135] This was observed by the International Law Commission (ILC) in its Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties – Conclusion 13: Pronouncements of expert treaty bodies (ILC Doc. A/73/10, p. 114, para. 22, fn. 649). The ILC cites judgments from Germany, Colombia, India and Bangladesh. It also quotes a decision of the African Commission on Human and People's Rights where it stated that 'in interpreting and applying the Charter, the Commission (…) is also enjoined by (…) decisions and general comments by UN treaty bodies' (*Civil Liberties Organisation and others v. Nigeria*, Communication No. 218/98, May 2001, para. 24).
[136] Judgment of the Supreme Court 1263/2018, 17 July. While this judgment 'has been warmly welcomed by the [Spanish international law] doctrine' (Manero Salvador 2023, p. 279), Escobar Hernández (2019, p. 251) has criticised that describing the decisions of UN treaty bodies as 'binding' distorts their legal nature and that, in any case, the Supreme Court's ruling is based on the circumstances of the particular case and cannot be extrapolated to any situation involving the implementation of a decision adopted by any UN Committee.
[137] Hall and Wright 2004, p. 64.
[138] Ibid.
[139] The database is available at: https://juris.ohchr.org/AdvancedSearch. From the 27 results, there were only 2 where the 'lawfulness' of non-nationals was explicitly discussed (*Celepli v. Sweden*, Communication No. 456/1991, 18 July 1994 and *Karker v. France*, Communication No. 833/1998, 26 October 2000).
[140] Joseph and Castan 2013, p. 397, p. 399 and p. 399, fn. 13.
[141] Slingenberg 2022b, p. 7, fn. 27. The database is available at: https://hudoc.echr.coe.int/eng.

authorisation to stay'.[142] One further case was taken from Abrisketa's article *The European Pact on Migration and Asylum: Border Containment and Frontline States*.[143]

In Chapter 4 (the safeguards of the right), the case law has been chosen as follows:

(1) I have retrieved twenty-six HRC views from the *OHCHR Iuris Database* by cumulatively selecting 'CCPR', 'Article 12(1)' and 'Article 12(3)' in the advanced document search.[144] General Comment No. 27: Article 12 (Freedom of Movement) serves to complement the analysis.[145]
(2) I have drawn 17 ECtHR judgments from *HUDOC* by cumulatively selecting the filters 'Article P4-2-3', 'Importance Level: Key cases' and 'Importance Level: 1'. To these judgments, I have added the case *Garib v. The Netherlands* due to its relevance for the interpretation of Article 2(4) of Protocol 4 ECHR (restrictions on public interest grounds).[146]

Since Articles 12(3) ICCPR and 2(3) of Protocol 4 ECHR provide identical guarantees for both the right to free movement within the country and the right to leave the country, some of the selected cases actually concern the right to leave.[147]

7.3.2 The focus on the ECtHR in Chapter 3

Chapter 3 addresses the material scope of the right to free movement, i.e. the distinction between restrictions on movement (covered by Article 2 of Protocol 4 ECHR) and detention (covered by the right to liberty under Article 5 ECHR). In this chapter, I have chosen to focus solely on the case law of the ECtHR because the Human Rights Committee has not developed a detailed jurisprudence on the distinction between the two concepts, beyond a general assertion that 'deprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement under article 12'.[148]

Indeed, in the individual communications where this point was raised, the Committee did not examine the definition of detention in detail. For example, in *Celepli v. Sweden*, the applicant argued that the obligation imposed on him to remain within a specific town amounted to detention because of the long duration of the measure (seven years) and the

[142] This is the expression that the Court used in *Suso Musa v. Malta* (no. 42337/12, 23 July 2013, para. 98) when considering whether a provision under Maltese asylum law amounted to an authorisation for asylum-seekers to stay in the territory of the country. Slingenberg (2014, p. 120, fn. 92) quoted that paragraph of the judgment, and a search of this expression in HUDOC (Date of search: 2nd August 2023) has led me to find two further cases on the same issue.
[143] Abrisketa 2022, p. 475, quoting *M.K. and Others v. Poland*, no. 40503/17 and 42902/1, 23 July 2020.
[144] The database is available at: https://juris.ohchr.org/AdvancedSearch. From the 31 results, I have discarded those decisions where the Committee declared the complaint under Article 12 inadmissible without further discussion.
[145] General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999 (CCPR/C/21/Rev.1/Add.9)
[146] Even though *Garib v. The Netherlands* is a 'key case', it did not appear in the results of the search.
[147] However, the *facts* of these cases, the *arguments* of the parties in the dispute and the *domestic law* involved will not be examined as in-depth as in the judgments concerning the right to free movement and to choose one's residence within the country.
[148] This was stated in General Comment 35: Article 9 (Liberty and Security of Person), 31 October 2014 (CCPR/C/GC/35).

requirement to report to the police three times a week.[149] The Committee simply examined the case under Article 12 ICCPR without responding to this particular allegation. Similarly, in *Karker v. France*, the applicant contended that the geographic area within which he was allowed to move was so small that it amounted to 'a closed space', especially since he was constantly followed by the police. The Committee merely rejected this claim without giving reasons for it.[150]

This constrasts with the rich case law of the ECtHR, which has had an impact on refugee and international human rights law: for example, the general principles that the Court laid down in *Guzzardi v. Italy* and *Amuur v. France* have been quoted by UNHCR in its Guidelines relating to the Detention of Asylum-seekers,[151] as well as by the Inter-American Court of Human Rights.[152]

On a different note, the methodology followed to review the case law of the Court will be the same as in Chapters 2 and 4: the systematic content analysis of judicial decisions. However, what is particular about Chapter 3 is that, instead of placing all judgments at the same level of analysis, my starting point will be two specific judgments: *Ilias and Ahmed v. Hungary* and *Z.A. and Others v. Russia*. These judgments, rendered in November 2019, will serve as a point of reference for examining the other selected cases. The reason for this is the importance of *Ilias* and *Z.A.*, as these are two Grand Chamber judgments where the Court made explicit the criteria that should be used to determine the applicability of Article 5 ECHR to cases of confinement of asylum-seekers and other migrants in transit zones and reception centres ('migration-related cases'). Therefore, these two judgments will serve to (1) examine the pre-*Ilias* case law on the applicability of Article 5 ECHR to migration-related cases; (2) compare the criteria set out in *Ilias* and *Z.A.* with pre-*Ilias* judgments on the applicability of Article 5 ECHR to situations where the applicant was confined in a non-migration related context ('domestic cases'); and (3) observe the impact of the criteria set out in *Ilias* and *Z.A.* on subsequent migration-related cases.

In order find migration-related cases rendered prior to *Ilias*, I have used different sources:

(a) The judgments *Ilias* and *Z.A.* themselves, which cite six previous cases concerning the confinement of migrants in airport transit zones and reception centres.[153]
(b) Cornelisse's book *Immigration Detention and Human Rights*, which cites one additional judgment.[154]
(c) In *HUDOC*, I have introduced the words 'partir de sa situation concrète' and 'one of degree or intensity'—two expressions that the Court commonly uses in the cases

[149] *Celepli v. Sweden*, Communication No. 456/1991, 18 July 1994, para. 5.2.
[150] *Karker v. France*, Communication No. 833/1998, 26 October 2000, paras. 5.3 and 8.5.
[151] UNHCR 2012, p. 9.
[152] Advisory Opinion OC-21/14, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, 19 August 2014, pp. 54-55.
[153] See *Ilias*, paras. 214 and 216.
[154] *Rashed v. Czech Republic*, no. 298/07, 27 November 2008 (Cornelisse 2010, p. 282).

regarding the applicability of Article 5[155]—and the filters 'Article 5', 'Importance Level: Key cases' and 'Importance Level: 1'. Through this search I found one additional case.[156]

(d) So as to find more cases related to the confinement in refugee camps, I searched for 'J.R. et autres c. Grèce' in *HUDOC*, which resulted in two more judgments being added to the list.[157]

As to the pre-*Ilias* domestic cases, these have been selected as follows:

(a) Through a search in *HUDOC*,[158] I have found nineteen cases with the words 'partir de sa situation concrète' and 'one of degree or intensity' and the filters 'Article 5', 'Importance Level: Key cases' and 'Importance Level: 1'.

(b) In addition, I have selected two other cases which, albeit not being classified in *HUDOC* as 'key cases' or as 'importance level 1', were quoted by the Court in *Ilias* and *Z.A.* under the section 'relevant principles'.[159] Finally, I have also added *De Wilde, Ooms and Versyp v. Belgium*[160] to the list, given that it is often cited in the different judgments examined.

Finally, eleven post-*Ilias* migration-related cases have been selected by searching in *HUDOC* the terms 'Ilias and Ahmed v. Hungary', 'Ilias et Ahmed c. Hungrie' and 'R.R. and Others v. Hungary'.[161] Three further unpublished judgments against Hungary have been included.[162]

7.4 Classical legal doctrinal analysis in the case studies

In the Spanish and German case studies, the methodology slightly differs from that followed in the examination of the ICCPR and the ECHR. The reason for this is that, in international human rights, the main 'raw materials of the law'[163] are the text of the treaties and the jurisprudence of the Committee/Court, while domestic law encompasses a wide variety of sources: the Constitution, secondary legislation (adopted by Parliament and by the Government) and the case law of different courts at different levels. Therefore, rather than a systematic content analysis of the case law of a particular court, I have analysed those laws and judgments that I have found most relevant for the study after reviewing legal doctrine.

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[155] The reason for this difference between the English and the French search is that the English version of the expression 'partir de sa situation concrète' is not as consistently used as the French expression (sometimes the Court says 'his or her concrete situation', sometimes 'the situation of the applicant' etc.). Therefore, for the English search I decided to use an expression that is always used in the same manner.

[156] *Abdolkhani and Karimnia v. Turkey*, no. 30471/08, 22 October 2009. Date of search: 1st of July 2020.

[157] *O.S.A. and Others. v. Greece*, no. 39065/16, 21 March 2019 and *Kaak and Others v. Greece*, no. 34215/16, 3 October 2019. Date of search: 1st of July 2020.

[158] Date of search: 13th of July 2020.

[159] These cases are: *Gahramanov v. Azerbaijan* (dec.), no. 26291/06, 15 October 2013 and *Kasparov v. Russia*, no. 53659/07, 11 October 2016.

[160] *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 65, Series A, no. 12.

[161] Date of search: 27th of July 2023.

[162] The details of these judgments (nos. 83/18, 3047/18 and 8172/18) were presented by Gruša Matevžič, a senior legal officer of the NGO Hungarian Helsinki Committee at the Conference on Immigration Detention in the EU, held in Kos (Greece) between the 8th and 10th of June 2023.

[163] Weiler 2022.

8. Thesis structure

Chapter 1 will explore the historical origins of the right to free movement, briefly presenting the state of the right in international law at the time of the League of Nations, State practice before 1948 and the adoption of the American Declaration of Human Rights, the first international instrument to include this freedom. The main sections will discuss at length the *travaux préparatoires* of the UDHR, the ICCPR, Protocol 4 ECHR and the Refugee Convention. Each section will consider how the drafters of the various instruments understood the importance of the right to free movement within the country, the purpose of the right (or its permissible restrictions) and the position of non-nationals in relation to this freedom.

Chapter 2 will focus on the personal scope of the right to free movement. Since there are many different views in legal doctrine on whether (and which) asylum-seekers may enjoy freedom of movement under the Refugee Convention, this chapter will first categorise this legal doctrine into different groups. This will be followed by a review of the case law of the HRC and the ECtHR on the personal scope of the right in the ICCPR and Protocol 4 ECHR, which grant this freedom only to persons 'lawfully within' the country. It will then critically examine the idea that, under international law, States can make the 'lawfulness' of a person's migratory status conditional on their compliance with restrictions on movement. The chapter will conclude with the case studies of Spain and Germany, where the question of the personal scope of the right has given rise to a rich body of domestic jurisprudence

Once examined *to whom* the right applies, Chapter 3 will explore its material scope, i.e. *when* the right to free movement ceases to apply and gives way to the right to liberty. To this end, it will explain the criteria set out by the Grand Chamber of the ECtHR in 2019 to distinguish between a 'restriction on movement' and a 'deprivation of liberty' in cases of confinement of asylum-seekers and other migrants. It will then look at previous migration-related cases to determine whether these criteria are indeed a summary of the case law, as the Court asserts. The chapter will subsequently compare the criteria set out in 2019 for the confinement of asylum-seekers with those used by the Court in other cases of confinement ('domestic cases') in order to identify possible differences. Finally, it will scrutinise the post-2019 case law to assess the impact of the Grand Chamber's criteria on subsequent case law.

The last part of the study, Chapter 4, will be devoted to the safeguards of the right to free movement at different normative levels. It will start with the Refugee Convention, where, as in the case of the personal scope, legal doctrine offers different interpretations, which will be thoroughly systematised. Following this, the case law of the ECtHR and the HRC on the matter will be reviewed. Once this has been achieved, the safeguards of the Refugee Convention (which apply specifically to asylum-seekers) will be compared with those of the ECtHR/HRC (which apply to all individuals). Finally, the case studies of Spain and Germany will examine whether the right to free movement affords distinct constitutional and legislative guarantees for asylum-seekers and nationals.

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Before delving into the content of this study, I would like to ask the reader to keep in mind the human element behind the technicalities intrinsic to legal research. I myself sometimes get lost in the complex details of the law and lose sight of why it is important to conduct research in the field of human rights. For this reason, I would like to end this introduction with a quote from Ben, who had been stuck in Melilla for a year when he was asked how he felt about his situation. He replied:

'I made enough friends since I arrived here. I sympathize with many people of many nationalities, and in the CETI [Temporary Stay Centers for Immigrants] I have many friends. I try to get along with many people because it's the best way not to become crazy. But for me occasionally it becomes difficult. Well, during the first year I've done what I could. I participated in Spanish language courses, I have also participated in the Semana Santa, I learned to dance Sevillanas (…). I also did painting courses and have done farming training. Well, in my mind, I thought that after all that, I could easily leave, but I see that nothing changes, it's always the same situation. And it gets worse, I try to be strong but the situation intends to affect me (…). The problem is that I am blocked here, I can't go further or back. And it hurts.'[164]

[164] Words of Ben, interviewed in 2011 by Bondanini 2017, p. 76.

Chapter 1 – A historical exploration of the right to free movement within the country in international law

1.1 Introduction

In his compilation of the *travaux préparatoires* of the Universal Declaration of Human Rights (UDHR), Schabas beautifully notes that 'the exploration of the past helps in better understanding the present as well as in pointing the way to the future'.[165] Exploring the past in order to understand the present is precisely the intention of this opening chapter. By delving into the preparatory work of the various human rights instruments, I will set the conceptual framework for the analysis of positive law that will be conducted in the subsequent chapters. This will fulfil the first key objective of this study: to investigate the historical origins of the human right to free movement, the shaping of its scope of protection and the way in which the drafters of the various instruments viewed the position of refugees and other migrants in relation to this right.

The present chapter is guided by the following research questions:

(1) What importance did the international community ascribe to the right to free movement within the country?
(2) What purpose did this right have in the minds of its drafters?
(3) Was this right intended to be enjoyed by migrants? Why was this freedom reserved for 'lawful' migrants in international human rights treaties?
(4) What did the drafters of the different instruments say about restrictions to the freedom of refugees and other migrants to move throughout the territory of the host State?

The main sections of this chapter (1.5 to 1.8) will analyse the deliberations held by the drafters of four pivotal international instruments: the UDHR, the International Covenant on Civil and Political Rights, Protocol 4 to the European Convention on Human Rights and the Refugee Convention. The discussions will be grouped into different categories that will roughly correspond to the questions guiding this chapter, with some variations that will be explained at the beginning of each section. To conclude, the answers to the four research questions will be made explicit in Section 1.9.

Since this study focuses on the freedom of movement of asylum-seekers within host States in Europe, I will not review the *travaux* of other regional human rights treaties, such as the African Charter on Human and Peoples' Rights. However, before proceeding to the main analysis, I will briefly examine the state of the right to free movement within the country in international law prior to the adoption of the UDHR in three distinct sections: (1.2) the right at the time of the League of Nations, (1.3) State practice at the time of drafting of the UDHR, and (1.4) the American Declaration of Human Rights (which preceded the UDHR).

To achieve a smoother reading of the debates, I will not specify in the main text the exact UN or Council of Europe organ where a particular comment was put forward, unless it is

[165] Schabas 2013, p. cxvii.

relevant to the discussion. Instead, I will only mention the nationality of the diplomat (if he or she was a delegate from a State) or refer to his or her name (if not). Nonetheless, in order to provide some context, it is useful here to list the organs where these debates took place:

(a) *The UDHR:* deliberations were held at the UN Commission on Human Rights (a subsidiary organ of the UN Economic and Social Council), the Drafting Committee (created *ad hoc* by the Commission) and the UN General Assembly between June 1947 and December 1948.
(b) *The ICCPR:* discussions were conducted at the UN Commission on Human Rights and the Third Committee (a subsidiary organ of the UN General Assembly)[166] between June 1947 and December 1959.
(c) *Protocol 4 to the ECHR:* debates were held at the Committee of Experts (a subsidiary organ of the Parliamentary Assembly of the Council of Europe[167]), the Subcommittee No. 12 (a subsidiary organ of the Committee) and the Committee of Ministers between May 1958 and September 1963.
(d) *The Refugee Convention*: negotiations took place at the Ad Hoc Committee on Statelessness and Related Problems (created *ad hoc* by the UN Economic and Social Council or ECOSOC) and the Conference of Plenipotentiaries (convened by the UN General Assembly) between February 1950 and November 1951.

1.2 The right in international law at the time of the League of Nations

Under the auspices of the League of Nations, various attempts were made to establish a standardised set of rules regarding the international responsibility of States for damage caused to foreign nationals and their property. These efforts were documented in 1956 by García Amador, the Rapporteur of the International Law Commission (ILC).[168] Based on this compilation, he submitted to the UN General Assembly a list of the rights of non-nationals which, if violated, would trigger the international responsibility of the host State.[169] The right to liberty and security was included in this list, but not the freedom to move within the country and choose one's place of residence. This suggests that, in the decades before the United Nations, this freedom was not at the core of the emerging minimum standard for the protection of the rights of non-nationals. García Amador's work could be seen as a preface to the history of a human right that, as this chapter will show, encountered numerous obstacles in its recognition, particularly in the case of migrants.

The only international instrument that enshrined this right during the inter-war period was a very specific treaty, namely the 1938 Convention concerning the Status of Refugees Coming from Germany. Article 2 of that Convention read:

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[166] The Third Committee of the UN General Assembly continues plays a pivotal role in the promotion of human rights, with the bulk of its resolutions dealing with this matter. The European Union, with its enhanced observer status at the UNGA, has been active in placing human rights on the Third Committee's agenda (Pérez Bernárdez 2016a, p. 330 *et seq.*).
[167] At the time, this organ was called 'the Consultative Assembly'.
[168] Responsibility of the States for injuries caused in the territory to the person or property of aliens. Part I: Acts and Omissions (UN Doc. A/CN.4/106, 15 February 1957).
[169] Article 6 of the García Amador's report ((UN Doc. A/CN.4/106, 15 February 1957).

Without prejudice to the power of the High Contracting Party to regulate the right of sojourn and residence, a refugee shall be entitled to move about freely, to sojourn or reside in the territory to which the present Convention applies, in accordance with the laws and internal regulations applying therein.[170]

1.3 State practice at the time of drafting of the UDHR

The way in which the right to free movement was reflected in the constitutions in force at the time of the UDHR's drafting (1946) may shed light on how the international community understood free movement when this right entered the realm of general international law. It can also serve to determine whether this right already existed as customary international law before it was laid down in the Universal Declaration. This section will therefore examine the constitutions compiled by the UN Secretariat in 1947, which include 18 fundamental laws from Latin America, 18 from Europe, 6 from Asia, 5 from the Middle East, 4 from Africa and 1 from North America.[171] The reason why only 4 African constitutions were assembled is that, in 1948, most African countries were still 'non-self-governing territories'[172] and thus lacked a constitution. This also explains the absence of an African perspective in the drafting of the UDHR, since non-self-governing territories did not have the competence to adopt international legal instruments.[173]

The first noteworthy observation from these constitutions is that the right to free movement—as part of positive law—appears to originate from the Latin American constitutional tradition. Indeed, fourteen constitutions from this region (almost 80% of the Latin American texts compiled by the Secretariat) contained this freedom. Moreover, the American Declaration of the Rights and Duties of Man, adopted some months before the UDHR, also includes this right, as will be discussed in the next section. This finding can be placed within the broader context of the role that this region has played in the history of human rights. As Carozza has shown, Latin American constitutions of the 19th and 20th centuries were very advanced in their recognition of individual rights.[174]

In contrast to Latin America, only four European constitutions (22% of them) recognised the right to free movement, which seems to indicate that this freedom was not as relevant for post-war European States.[175] As for the United States, this right was indirectly acknowledged by entitling the citizens of each State making up the US to all the privileges and immunities of citizens when they were present in the other States—which meant that

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[170] League of Nations, *Convention concerning the Status of Refugees Coming From Germany*, 10 February 1938, League of Nations Treaty Series, Vol. CXCII, No. 4461.
[171] UN Doc. E/CN.4/AC.1/3/Add.1, 11 June 1947. It should be noted, however, that the Director of the Human Rights Division of the UN Secretariat, John P. Humphrey, did not draw on existing constitutions when writing the first draft of the UDHR. Instead, he reviewed the draft declarations submitted to him by various institutions. See Humphrey 1984, p. 32.
[172] This term appears in the Charter of the United Nations and Article 2 UDHR.
[173] This has prompted a debate on whether the UDHR is truly 'universal'. For an analysis of this debate and the impact of the UDHR in Africa, see Udombana 2008.
[174] Carozza 2003, pp. 300 and 304.
[175] With regard to the other regions of the world, the number of constitutions compiled by the Secretariat is too small to draw any conclusions. Nevertheless, in Asia and Africa, 50% of the constitutions surveyed by the Secretariat (3/6 and 2/4, respectively) included this right, as did 40% of those from the Middle East (2/5).

they had the right to change their residence. It is interesting to note that the second most powerful actor on the world stage at the time, the Soviet Union, did not foresee the right to free movement in its constitution.

Regarding the question of the right to free movement and choice of residence *of non-nationals*, the constitutions can be classified into four categories, ranging from the most favourable to the most restrictive. The first group of constitutions granted the right to free movement to *all persons*, without any specific immigration-related restriction, and applied the principle of non-discrimination to every individual. Among these, the constitutions of Argentina and Honduras stand out, as they explicitly stated that migrants enjoyed the same fundamental rights as citizens.[176]

The second group did not distinguish between nationals and non-nationals when granting the right to free movement, but either gave the legislator the power to impose *specific restrictions to that right for reasons of immigration*, or stipulated that the principle of equality before the law applied only to nationals—which, in practice, would have meant that placing migrant-specific restrictions would not have been considered discriminatory.[177] Within this group, the 1917 Mexican Constitution provides a glimpse into the subsequent developments of the freedom of movement under international law. According to Article 11, 'the law may restrict [free movement] on the ground of (…) immigration, or on *undesirable aliens*'. Given the importance of the Mexican Constitution for the history of human rights law,[178] this provision can be seen as a precursor to the exclusion of irregular migrants from the personal scope of the right to free movement under international law.

The third group of constitutions *reserved all rights for nationals only*, including the right to free movement.[179] It is telling that three of the four European Constitutions which enshrined this right belonged to this category. This shows not only that the legal traditions on the European continent at the time mostly ignored the right to free movement, but also that European States were reluctant to grant rights to migrants.

The last group consists of only two fundamental laws: those of Costa Rica and the United States. These constitutions were peculiar in that, although most rights applied to both citizens and migrants without discrimination, non-nationals were specifically excluded from the enjoyment of the right to free movement and choice of residence.[180] This may imply that these two States linked the right to free movement to national sovereignty, which is an anomaly given that the rights that States tended to reserve for nationals were either of a political or economic nature.[181]

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[176] The other constitutions in this group were those from Bolivia, Chile, Ecuador, El Salvador, the Philippines and Sweden.

[177] Six Latin American and two Asian constitutions fall into this category: constitutions of The Dominican Republic, Mexico, Panama, Peru, Nicaragua, Cuba, China and Siam.

[178] Carozza 2003, pp. 300 and 304.

[179] Constitutions of Iran, Syria, Chzechoslovakia, Poland, Turkey, Egypt and Ethopia.

[180] The Constitution of Costa Rica provided that 'all men are equal', but at the same time only Costa Ricans could 'move to any point in the Republic'. The 14th Amendment to the US Constitution stated that no person within a State's jurisdiction could be denied equal protection before the law, yet only 'citizens of each State [had] the right to change residence'.

[181] For example, the Constitution of Mexico granted the right of association only to citizens, and Bolivia reserved for nationals the right to acquire property close to the national border.

This analysis reveals that, prior to the drafting of the UDHR, the human right to move freely within a State and to change one's place of residence was not an established international custom, as State practice was not sufficiently widespread. In addition, there was no consensus on whether, and to what extent, migrants could claim this right. Consequently, Article 13(1) UDHR did not simply 'crystallise' an existing international custom, but introduced a new right into the realm of international law.

1.4 The American Declaration of Human Rights

Together with the aforementioned constitutions, the UN Secretariat compiled other human rights declarations that could serve as a basis for the UDHR. One of these texts was the 'Draft Declaration of the International Rights and Duties of Man'.[182] This draft declaration influenced both the regional and universal human rights systems. On the one hand, it was a preliminary version of the American Declaration of the Rights and Duties of Man (ADHR), which was adopted some months before the UDHR, thus becoming the first general human rights instrument in the history of international law. On the other, it was presented by the Chilean delegation to the UN General Assembly during the drafting process of the UDHR.[183]

Despite laying the groundwork for both human rights instruments, the draft declaration evolved differently at the regional and the universal levels regarding the right to free movement: while the UDHR followed the line of the proposed text by not excluding migrants from the personal scope of this right, the final version of the ADHR provided that 'every person has the right to fix his residence within the territory of the State *of which he is a national* and to move about freely within such territory' (Article VIII).

The *travaux préparatoires* of the ADHR do not shed any light on why its drafters—assembled in the Working Group on Human Rights—included this personal limitation to Article VIII.[184] However, by examining the nationalities of the ten delegates who comprised this working group, we can see that three of them represented States whose constitutions did not recognise freedom of movement,[185] and one represented the United States, which, as noted above, reserved this right for nationals. Three other delegates represented States where limiting the right to free movement of migrants was not considered discriminatory.[186] The composition of the Working Group may therefore explain why the drafters were only able to achieve a consensus that the right to free movement in the ADHR should be exclusively granted to nationals.

[182] UN Doc. E/CN.4/2, 8 January 1947. This text was commissioned by the Inter-American Conference on Problems of War and Peace in February 1945 and formulated by the Inter-American Juridical Committee.
[183] UN Doc. A/C.1./38, 6 November 1946.
[184] Article II (right to liberty, which included the right to free movement) of the document drafted by the Inter-American Juridical Committee was transformed, without further explanation, by the Working Group on Human Rights into Article VIII (right to residence and transit). This amendment was adopted without comment by the Sixth Commission of the Ninth Inter-American Conference. See Paúl 2017, pp. 184, 189 and 272.
[185] Brasil, Uruguay and Colombia.
[186] Cuba, Mexico and Peru.

1.5 The right to free movement in the *travaux* of the UDHR

Once the predecessors of the right to free movement in the UDHR has been examined, we may now delve into the *travaux préparatoires* of this document to understand the intentions and concerns of the 'founding fathers' of international human rights law when they included freedom of movement in Article 13 of the 1948 Declaration.

This article provides:

'1. Everyone has the right to freedom of movement and residence within the borders of each state.

2. Everyone has the right to leave any country, including his own, and to return to his country.'

The restrictions that the Declaration allows on freedom of movement within the country are the same as those for the other rights enshrined in the instrument. Article 29(2) UDHR generally stipulates that

'in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.'

In order to offer a multi-dimensional understanding of the origins of this freedom, I have divided the analysis into three parts: (1.5.1) the importance of the right, (1.5.2) the purpose of the right and (1.5.3) the position of migrants in the debate. The latter is in turn divided into two parts: the personal scope of the right and immigration-related restrictions on freedom of movement.

1.5.1 Importance of the right

Mirroring the division in the international community over the recognition of the right to free movement as a constitutional right, the inclusion of this freedom in the UDHR was a challenging journey marked by several obstacles.

To begin with, only one of the two main proposals for a UDHR enshrined this freedom. John P. Humphrey, the author of the first draft of the Declaration, borrowed much of the language of his proposal from the aforementioned 'Draft Declaration of the International Rights and Duties of Man' and from a text prepared by the American Law Institute.[187] The latter did not mention freedom of movement, even though Humphrey claimed that this had been the best proposal he had received.[188] Ultimately, however, Mr. Humphrey chose to include this right in his draft. While the right to free movement appeared as an isolated right in Humphrey's text, René Cassin, who was tasked with the formulation of a more elaborate

[187] Morsink 1999. The document written by the American Law Institute can be found in UN Doc. E/CN.4/AC.2/SR.3, 6 December 1947.
[188] 'I borrowed freely from it', he wrote in Humphrey 1984, p. 32.

version of the Declaration based on Mr. Humphrey's work,[189] placed it in the same article as the right to emigrate.[190]

Secondly, no European proposal incorporated the right to move freely within the State,[191] while the US draft did.[192] This confirms the hypothesis presented above that freedom of movement was not relevant to European States.

Thirdly, during the initial debates on the draft UDHR, the right to emigrate was made unconditional, while the right to free movement was initially subject to specific limitations.[193] This suggests that delegates were more concerned about the risk of States arbitrarily preventing individuals from leaving their countries than about possible arbitrary restrictions on internal freedom of movement. As Mr. Cassin pointed out, '*any* restriction on the freedom to emigrate might be a flagrant form of persecution'.[194]

In terms of their position on whether or not freedom of movement within the country should make the leap to the international legal realm, two main groups of States can be identified. For the first group, there was no doubt that the UDHR should contain a provision on the right to free movement. According to the Australian delegate, this was 'unquestionably one of the fundamental rights of man', and the representative of India (Hansa Mehta) regarded it as being on the same level as the freedom of speech and assembly.[195] The delegate of the Philippines affirmed that freedom of movement was a right that he 'whole-heartedly desired', and Chile considered it a 'sacred right (…) necessary to progress and civilisation'. Ecuador's delegate went even further, linking this right to the very existence liberal democratic systems, as he believed that if free movement were not guaranteed in absolute terms, democracies would turn into dictatorships. Greece and Belgium also considered this right to be 'vital'.[196]

On the other side of the debate, Eric H. Low, representing South Africa, argued that freedom of movement was not indispensable to physical and mental existence. In his view, dignity would not be impaired if a person was prohibited from residing in a particular area of the country. South Africa openly justified its opposition to this right on apartheid grounds, stating that '[this right] would destroy the whole basis of the multi-racial system of the Union of South Africa and would certainly not be in the interests of the less advanced indigenous population'.[197] These words aligned with South Africa's portrayal of apartheid as a system that protected the non-European population.[198] China also sought to exclude the right to free

[189] Schabas 2013, p. xc. Although not the "père exclusive de la Déclaration', Cassin is credited as 'le principal inspirateur' (Agi 1998, p. 229).
[190] UN Doc. E/CN.4/AC.1/W.2, 16 June 1947. René Cassin was the delegate of France.
[191] See for instance the UK proposal submitted by Lord Dukenston (E/CN.4/AC.1/4, 5 June 1947).
[192] UN Doc. E/CN.4/AC.1/11, 12 June 1947.
[193] UN Docs. E/CN.4/AC.2/SR.9, 10 December 1947 and E/CN.4/52, 6 December 1947.
[194] UN Doc. E/CN.4/Sub.2/SR.8, 28 November 1947 [emphasis added].
[195] UN Doc. E/CN.4/SR.55, 2 June 1948.
[196] UN Doc. A/C.3/SR.12079, 2 November 1948.
[197] UN Doc. E/CN.4/82/Add.4, 27 April 1948 and UN Doc. A/C.3/SR.90, 1 October 1948.
[198] Yugoslavia criticised South Africa for its racial regime during the discussions (UN Doc. A/C.3/SR.10137, 13 October 1948). Years later, in 1956, international condemnation of apartheid led Mr. Louw to make statements implying that South Africa would withdraw from the United Nations. See Office of the Historian, 'Telegram From the Mission at the United Nations to the Department of State', *US Department of State*. Available at: https://history.state.gov/historicaldocuments/frus1955-57v18/d309.

movement from the UDHR, though it did not provide a reason.[199] Finally, for the Soviet bloc, internal freedom of movement was a domestic issue within the sovereign prerogatives of the State and should remain outside the international human rights regime.[200] Notably, one of the reasons why the Soviet bloc abstained from voting in favour of the UDHR as a whole was that the provision dealing with freedom of movement 'did not allow for any limitation which the State might find it necessary to impose'.[201]

1.5.2 Purpose of the right

The analysis of some of the drafts of the Universal Declaration presented by the delegates suggests that the purpose of the right to free movement is *closely linked to that of the right to physical liberty*. Indeed, the proposals of Chile and Ecuador conceived the right to free movement and to choose one's place of residence as part of the right to liberty.[202] Even though Mr. Humphrey split the two rights into two separate articles, both rights were introduced in the UDHR in order to 'protect the spirit of freedom'.[203] According to the Chinese representative, Mr. Chang, the right to internal free movement was the final stage of liberty, representing the fullest way in which physical liberty could be manifested: freedom to move across the whole country.[204]

René Cassin distinguished between the right to liberty, which concerns the physical protection of the individual, and the right to free movement and to choose one's place of residence, which deals with '*the relation of man to his fellows*'—as do the rights to privacy, family and home.[205] From his statements, it is clear that interference with the right to free movement affects not physical integrity but the individual's ability to make decisions about his private life.

The first delegate to stress the need to enshrine freedom of movement in the UDHR was Hansa Mehta. Mrs. Mehta's interest in this right may have been linked to the political situation that India was living at that time. India gained independence from Great Britain in July 1947, while the UDHR was being drafted. However, the newly born State was culturally and politically divided by the existence of 562 native states, each under the partial control of a local ruler. The Indian National Congress actively pursued the political integration of these states into India, and Mrs.Mehta herself—as member of the Constituent Assembly that drafted the Indian Constitution—was committed to *building a national identity* in India.[206] The right to freedom of movement within the country would have been an important tool in achieving this, as it would allow Indian residents to integrate in other parts of the country. It

[199] UN Doc. E/CN.4/AC.1/18, 3 May 1948.
[200] UN Doc. E/CN.4/SR.55, 2 June 1948.
[201] UN Doc. A/PV.182, 10 December 1948.
[202] UN Docs. E/CN.4/2, 8 January 1947 and E/CN.4/32, 12 November 1947.
[203] As mentioned by the Greek representative in UN Doc. A/C.3/SR.12079, 2 November 1948.
[204] Mr. Chang asserted: 'in that series of articles the idea of liberty was gradually and progressively enlarged; it was applied first to the individual, then to the family, and finally to the country. That series of articles therefore served to develop and clarify the idea of liberty' (UN Doc. A/C.3/SR.10340, 15 October 1948).
[205] UN Doc. A/C.3/SR.163145, 29 November 1948. Mr. Chang also affirmed that the right to free movement is closely associated in meaning with the right to privacy, family and home.
[206] Menon 1956. Mrs. Mehta is also credited for changing the text of Article 1 of the UDHR from 'All men are born free and equal…' to 'All human beings are born free and equal', thus making the UDHR gender-neutral.

is therefore plausible that Hansa Mehta promoted the inclusion of this freedom in the Universal Declaration with this in mind.

According to Mrs. Mehta and the representative of the Philippines, it was necessary to remove barriers that in many States prevented individuals from travelling or moving from one part of the country to another.[207] Thus, the construction of freedom of movement as an international human right was a *reaction to the laws of the States* that restricted its exercise, particularly colonial laws in African non-self-governing territories, as noted by Yugoslavia.[208]

For many States, the main purpose of the right to free movement was the *prevention of discrimination*. In the early discussions of the drafters, Mr. Wilson (the representative of the UK) affirmed that this freedom had at its core 'the prevention of discrimination (on grounds of race, colour…) [concerning] where people might live and how they might move from place to place'.[209] The US also included in its proposal the right to equal enjoyment of freedom of movement.[210] This is another difference from the right to physical liberty, which was not explicitly linked to the principle of non-discrimination by the drafters of the UDHR.

Finally, there was particular concern among some drafters that States might restrict freedom of movement in order to persecute certain groups in the name of the general welfare of the people, 'as had been done by the Nazis'.[211] Similarly, the World Jewish Congress stated in a communication to the UN that this right should protect the honour and security not only of individuals but also of racial and religious groups,[212] and the Government of India affirmed that this right was tailored to condemn residential segregation within a State.[213] Only the USSR rejected the idea that freedom of movement was a matter related to non-discrimination.[214]

1.5.3 The position of migrants in the debates

Personal scope of the right

Article 13(1) UDHR grants the right to free movement and residence to 'everyone'. However, it is clear from the *travaux* that not all drafters agreed in making migrants holders of this right. This reluctant acceptance of a broad personal scope of the right in the drafting process of the Declaration might be seen as a foreshadowing of the reservation of freedom of movement for persons 'lawfully within the country' in subsequent human rights treaties.

In effect, close to the adoption of the final text of the UDHR, the Egyptian and Cuban delegates proposed an amendment whereby freedom of movement would be guaranteed only to nationals. They argued that, even if this right were granted to everyone, 'the immigration laws in force in most countries would almost automatically limit the meaning

[207] UN Docs. E/CN.4/AC.1/3/Add.1, 11 June 1947 and A/C.3/SR.12079, 2 November 1948.
[208] UN Doc. A/C.3/SR.163145, 29 November 1948.
[209] UN Doc. E/CN.4/AC.1/SR.13 20 June 1947.
[210] UN Doc. E/CN.4/AC.1/11, 12 June 1947.
[211] UN Doc. E/CN.4/Sub.2/SR.8, 28 November 1947.
[212] UN Doc. E/CN.4/51, 5 December 1947.
[213] UN Doc. E/CN.4/82/Add.7, 4 May 1948.
[214] UN Doc. E/CN.4/Sub.2/SR.8, 28 November 1947.

and scope of the text'. Their proposal was ultimately rejected,[215] but there were other, more subtle, rejections of the term 'everyone'.

Even though the UDHR does not allow States to make reservations—given that it is not a binding treaty—the comments made by some delegates may be seen as a form of reservation, since they reinterpreted the term 'everyone' to exclude certain categories of non-nationals from the scope of Article 13(1). There was an apparent desire on the part of some States to leave out irregular migrants from the scope of the right. For example, the US and the UK spoke of migrants 'admitted into a country under national law' when referring to the beneficiaries of freedom of movement. Greece made its stance even more explicit by affirming that 'Article [13] presupposed that the individual had obtained permission to enter'. Other States seemed to want to limit the personal scope even further, reserving it only for long-term migrants with a residence permit. For instance, the USSR referred to 'any person *residing*' in the State, and the Philippines affirmed its support for the inclusion in the UDHR of a right of the individual to circulate within the territory 'in which *he is a resident*'.[216]

In a different vein, the ample personal scope agreed in the final version of the text was welcomed by the International Refugee Organisation (IRO), which believed that free movement within the country would be beneficial to 'persons coming within their mandate'.[217] These included persons who did not yet hold refugee status (in the sense of the 1933 Convention relating to the International Status of Refugees), as well as displaced persons.[218]

Immigration-related restrictions on movement

In the drafting process of Article 29(2) UDHR (restrictions on the rights enshrined in the Declaration), the two representatives of the French Government—Spanien and Cassin—referred to the limitations on internal freedom movement that States should be allowed to impose in the context of migration management. As a general rule, Spanien held that 'aliens would be subject to the general laws of the country they entered, including any restrictions as to their liberty of movement within that country which might be applied in accordance with [the UDHR]'.[219] He thus supported a principle of non-discrimination between migrants and nationals. However, Cassin identified two exceptions where States should be entitled to specifically restrict freedom of movement of migrants on the grounds of migration management.

First, a *sudden influx* of migrants would necessitate certain restrictions on movement in order to prevent harm to both migrants and the national population. Recalling the massive arrival

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[215] UN Doc. A/C.3/SR.12079, 2 November 1948.
[216] *Ibid.*
[217] UN Doc. E/CN.4/41, 1 December 1947.
[218] According to Annex I of the IRO Constitution (New York, 15 December 1946, 18 U.N.T.S. 3), 'refugees' within its mandate were persons who had left their country of nationality because they had been victims of the Nazi, Fascist or Falangist regimes or because they had been considered refugees before the outbreak of the Second World War. The IRO was also responsible for 'displaced persons', i.e. persons who were not direct victims of these regimes but who were forced to leave their country as a result of the actions of the authorities of these regimes.
[219] UN Doc. E/CN.4/Sub.2/SR.9, 30 November 1947.

of half a million refugees in France during the Spanish Civil War, Cassin argued that 'had the Government allowed those [refugees] to move about without restrictions, they might have caused themselves and the host country a great deal of damage by settling in already overcrowded areas'.[220] Secondly, if migrant or refugee 'forgot to observe the requisite political neutrality',[221] this should also be a ground for restricting internal freedom of movement.

1.6 The right to free movement in the *travaux* of the ICCPR

Like other human rights enshrined in the UDHR, freedom of movement within the country only made its way to a general human rights treaty at the universal level in 1966 with the adoption of the International Covenant on Civil and Political Rights, the Western-driven counterpart of the USSR-led International Covenant on Economic, Social and Cultural Rights.

Article 12 ICCPR provides:

'1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided 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.

4. No one shall be arbitrarily deprived of the right to enter his own country.'

Although negotiations on the Covenants began at the same time as the UDHR, the binding nature of these treaties made it more difficult to reach a consensus among States. The debates on Article 13(1) UDHR and Article12(1) ICCPR may thus be seen as a continuum, which is why this section will follow the same structure as the previous one: (1.6.1) the importance of freedom of movement for the Covenant's drafters; (1.6.2) the purpose that this right had in their minds; and (1.6.3) the position of migrants in the debates. In addition, a fourth (1.6.4) section has been included which examines a series of debates that took place in the Third Committee of the UN General Assembly in 1952 on the 'problems of assistance to refugees', in which questions around freedom of movement were also raised.

1.6.1 Importance of the right

The *travaux* of Article 12(1) ICCPR confirm the hypothesis that freedom of movement has its roots in Latin America. This was noted by the delegate of Uruguay, according to whom 'the whole of the modern history of the Americas had been the result of international recognition of the basic right to liberty of movement [within the State and across

[220] UN Doc. E/CN.4/AC.1/SR.36, 17 May 1948. Cassin did not attempt to define the term 'sudden influx', but he mentioned as an example that 'States might find themselves invaded by 500 thousand persons in one day' (UN E/CN.4/AC.1/SR.13, 20 June 1947).
[221] UN Doc. A/C.3/SR.12079, 2 November 1948.

territories]'.[222] He pointed out that this right had been part of Spanish law since the sixteenth century, providing a legal basis for the Spanish colonisation of the Americas. It was, of course, only a freedom for the dominant race, as the Australian representative observed.[223] Nonetheless, the tradition of liberty of movement within the country was maintained on the continent after the independence of Latin American States, as can be seen in their 19th and 20th century constitutions, reviewed above.

On a similar note, the Uruguayan delegate affirmed that, from the perspective of legal philosophy, the first mention of the right to free movement had been made by Francisco de Vitoria. This sixteenth-century Spanish intellectual (who made a major contribution to the theory of international law) reasoned that man has a natural disposition to socialise. In Vitoria's conception, this entailed that man has the right to communicate with others and, as a consequence of this prerogative, he also has the right 'to travel different regions of the earth and stay for some time in them, unless he commits damage to those regions or their inhabitants'.[224]

The relevance of the right to internal free movement in the Covenant was a contentious point during the drafting process of Article 12(1), mirroring the controversy that arose during the *travaux* of Article 13(1) UDHR. Freedom of movement within the country appears to have been of less concern to States than freedom to emigrate, since the first draft of Article 12 contained only the right to leave the country.[225] Moreover, in subsequent drafts of this article, only the right to free movement was subject to restrictions, as 'it was especially important that no individual holding political views opposed to those of the Government should be prevented from leaving'.[226]

Some delegates explicitly opposed the inclusion of freedom of movement in the Covenant. The representative of the United Kingdom was 'not certain that this right was a basic one' and proposed to delete it,[227] but only received support from Greece.[228] In contrast, delegates from other European countries, America, Asia, Middle East and Oceania stressed the importance of freedom of movement as a human right.[229] Of particular note are the remarks of Hansa Mehta (India). In response to a comment from the United Kingdom, she acknowledged that the large number of exceptions to the right—in what later became Article 12(3) ICCPR—made its implementation difficult. However, she observed that these

[222] UN Doc. E/CN.4/SR.151, 19 April 1950.
[223] *Ibid.*
[224] Mora Hernández 2013. A further argument made by Vitoria came from his conception that the sea, rivers and harbours were 'public things common to all', and 'therefore it is not lawful to keep any one from them', with the conclusion that 'the aborigines would be doing a wrong to the Spaniards, if they were to keep them from their territories' unless the Spaniards did harm to them (Brown Scott 2000, pp. 142-143).
[225] UN Doc. E/CN.4.21, 25 June 1947.
[226] UN E/CN.4/SR 106, 31 May 1949. Eventually, however, both rights were subject to the same restrictions (UN Doc. A/C.3/SR.959, 17 November 1959) at the proposal of Argentina, Belgium, Iran, Italy and the Philippines (UN Doc. A/C.3/L.812/Rev.2, 16 November).
[227] UN Docs. E/CN.4/365, 22 March 1950 and E/CN.4/SR.315, 29 May 1952.
[228] UN Doc. E/CN.4/SR.150, 17 April 1950.
[229] Belgium, France, Chile, Uruguay, and Ecuador, China and Pakistan and Lebanon. Australia regarded freedom of movement as a human right, but preferred to include it in a later treaty 'in the interest of speedy acceptance of the covenant' because of the divergences that had emerged over the permissible restrictions to the right. See UN Docs. E/CN.4/SR.150, 17 April 1950; E/CN.4/SR.315, 29 May 1952 A/C.3/SR.957, 16 November 1959; and A/4299, 3 December 1959.

exceptions did not deprive freedom of movement of its status as a human right: other rights, such as freedom of speech and the right of association, were also not granted unconditionally in the Covenant, but nevertheless qualified as human rights.[230]

Finally, it is worth mentioning the reflections of the Spanish delegate, who believed that this right touched on two fundamental concepts—that of territory and that of population. Therefore, a well-drafted Article 12(1) was of outmost importance both legally and politically, as any flaws in its implementation could 'shake the very foundations of the State'.[231]

1.6.2 Purpose of the right

The debates on Article 12 ICCPR reveal the potential confusion between the right to free movement and the right to liberty (Article 9 ICCPR), as they share similar nature and purpose. During these discussions, three delegates blurred the distinction between the two rights. Mr. Malik (Lebanon) argued that freedom of movement within the country was 'an essential part of the right to personal liberty'. Similarly, Mr. Ordenau (France) and Mrs. Mehta maintained that the right to *physical liberty* would be worthless if an individual was deprived of liberty of movement within his own country. Only the representative of Australia made a clear distinction between them, stating that the freedom of movement was not as fundamental as personal liberty.[232]

In a different vein, concerns about *preventing discrimination* against certain groups were raised. The United States emphasised the need to interpret Article 12(1) in the context of Article 26, which prohibits discrimination. Similarly, Mrs. Mehta expressed her alarm at the state of affairs in various countries where thousands of people were being deprived of their freedom of movement. Sweden cited two examples: apartheid in the Union of South Africa and the 'deplorable situation of thousands of Hungarians',[233] probably referring to the forced relocation of thousands of people carried out by the Hungarian Government to secure property and housing for the members of the Communist Party.[234]

The *travaux* of the Covenant also indicate that the right to free movement had another important purpose: to *prevent the violation of other rights.* Uruguay and Lebanon considered that the rights of individuals would be very seriously diminished if they were not able to reside in the place most suited to their preferences and needs. The delegate of Chile shared similar concerns, stating that 'those whose purpose it was to deny people their fundamental rights always began depriving them of the rights to move freely through [the State's] territory'.[235]

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[230] UN Doc. E/CN.4/SR.150, 17 April 1950. Mrs. Mehta had already proposed that freedom of movement within the country be included in the Covenant during the preparatory works of the UDHR (UN Doc. E/CN.4/SR.37, 13 December 1947).
[231] UN Doc. A/C.3/SR.956, date unknown.
[232] UN Doc. E/CN.4/SR.150, 17 April 1950.
[233] UN Docs. E/CN.4/SR.150, 17 April 1950 and UN Doc. E/CN.4/SR.315, 29 May 1952.
[234] Tökés 1998, p. 317.
[235] UN Docs. E/CN.4/SR.151, 29 May 1952 and E/CN.4/SR.150, 17 April 1950.

1.6.3. The position of migrants in the debates

Personal scope

The initial drafts of Article 12(1) ICCPR reproduced the UDHR, granting the freedom to move and choose one's residence to 'everyone'.[236] However, in 1950, the United States (represented by Mrs. Eleonor Roosevelt) proposed an amendment to this provision which reserved this right for persons 'lawfully within the territory of a State'.[237]

Mrs. Roosevelt explained that the US had inserted this amendment

'not in order to alter the substance of the original draft in any way, but in order to *meet the objection* that the draft was so *ambiguously worded* that it might be construed as guaranteeing freedom of movement across national frontiers without due regard to immigration regulations. That had never been the Commision's intention'.[238]

Therefore, according to Mrs. Roosevelt, the addition of the word 'lawful' was a response to the concerns of some States as to how Article 12(1) would place an obstacle on States to control their borders. This was a rather strange justification for two reasons. First, because draft Article 12(1) clearly stated that there was a universal right to freedom of movement and residence *within the borders* of each State. This provision was not 'ambiguously worded', and it is questionable that any interpreter would understand that the right could also be exercised *between the borders* of different States. Secondly, the discussions do not show any evidence that other delegates feared that Article 12(1) would be construed as enshrining a universal *ius migrandi*. Thus, it is uncertain which 'objection' Mrs. Roosevelt was referring to.[239]

Despite the novelty of the US proposal, it met with no opposition from the other State representatives. Only Mrs. Rossel (Sweden) reflected on it when she stated that she

'found it difficult to accept the words "lawfully" in paragraph 1(a). There were some 100,000 foreign refugees in Sweden upon whom Swedish legislation imposed certain residence restrictions, but whose presence in Sweden was lawful'.[240]

Although her intention with this comment is not very clear, it appears that the Swedish delegate did not even want to grant freedom of movement to 'lawful' migrants, fearing that this would make it difficult for Sweden to maintain its residence restrictions on refugees. As for the other delegates, India and Chile merely expressed their approval of the US amendment without comment,[241] which was adopted by 7 votes to 3, with 4 abstentions.[242] A decade later, seven different amendments were tabled by several countries, but all of them retained the word 'lawful' in the text. Even Latin American States, whose constitutions

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[236] UN Docs. E/800, Art. 11(2) and E/CN.4/SR 106, 31 May 1949.

[237] UN Doc. E/CN.4/365, 22 March 1950. The amendment used the word 'legally', but this was changed to 'lawfully' in the final version of Article 12.

[238] UN Doc. E/CN.4/SR.151, 19 April 1950 [emphasis added].

[239] The only objections raised during the discussions related to the need for States to restrict the freedom of movement of migrants *in certain circumstances* (i.e. to avoid the formation of racial groups and for economic grounds; see below). These comments did not therefore intend to exclude all irregular migrants from the scope of Article 12(1) ICCPR.

[240] UN Doc. E/CN.4/SR.315, 29 May 1952.

[241] UN Docs. E/CN.4/SR.150, 17 April 1950 and E/CN.4/SR.151, 19 April 1950.

[242] UN Doc. E/CN.4/SR.151, 19 April 1950.

recognised the right to free movement for all persons without discrimination,[243] did not object to the US proposal. There was therefore a tacit consensus that did not seem to require further discussion.[244] The fact that the other delegates did not defend the right of 'everyone' to move freely within the country may indicate that they all believed it was a good idea for States to have the power to decide which migrants would be granted this right.

Immigration-related restrictions on movement

According to Article 12(3) ICCPR

'The above-mentioned rights shall not be subject to any restrictions except those which are provided 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.'

When the drafters of this provision discussed the grounds on which States should be allowed to impose restrictions on freedom of movement, they also considered certain situations related to migration management. The Brazilian delegate stated that immigration countries should be given some latitude to adopt measures for the distribution of migrants across their territory in order to *avoid the formation of small racial groups* in certain regions. The legal justification for such measures under Article 12(3) ICCPR would be the concept of 'national security'.[245]

In a similar vein, the Australian and the French delegates (Mr. Shann and Mr. Cassin) explained that in their respective countries, the authorities subjected migrants to a probationary period of one year, during which they were required to live in a specific area (in Australia) or department (in France). Although in both cases the measure was adopted for *economic reasons*, their purposes were slightly different: in Australia, the authorities 'watched over the migrants during the period of their adjustment to life in the country' to ensure that their work 'helped to solve the two most serious problems facing the Australian economy: the supply of manpower and unemployment'. Meanwhile, France implemented these restrictions to prevent migrants from flooding into cities and 'increasing the unemployment rates there'. While Mr. Shann proposed adding an explicit restriction 'for migration purposes' in Article 12(3) to cover these cases,[246] Mr. Cassin believed that these measures would already fall under the term 'national security'—possibly understood in this context as 'economic security of the nation'. For that reason, the Australian amendment was ultimately withdrawn.[247]

1.6.4 The parallel debates on 'problems of assistance to refugees'

At one of its meetings in 1952, the Third Committee of the UN General Assembly

[243] UN Doc. E/CN.4/AC.1/3/Add., 11 June 1947.
[244] UN Doc. A/4299, 3 December 1959.
[245] UN Doc. A/C.3/SR.289, 19 October 1950.
[246] UN Doc. E/CN.4/219, 20 May 1949.
[247] UN Doc. E/CN.4/SR.106, 31 May 1949.

'decided to suspend for the time being its consideration of the draft international covenant on human rights in order to take up the question of refugees and stateless persons and that of problems of assistance to refugees, items 30 and 31 respectively of the General Assembly's agenda'.[248]

While these debates are not strictly speaking part of the *travaux préparatoires* of the ICCPR, the fact that the forum, the participating States and the period in which they took place were the same as those of the debates on the Covenant makes it worth examining these documents to deepen our understanding of the position of non-nationals in the minds of the drafters of the ICCPR. In these debates, several State representatives raised the issue of the freedom of movement of refugees within the host country.

As a starting point, it is important to note that the assimilation of refugees into society was the preferred solution to the 'refugee problem' in the 1950s for the UNHCR and several States[249]—not so for the Soviet Union and some of its allies, who favoured repatriation.[250] It was in this context that some delegates saw freedom of movement within the country as a means of promoting the integration of refugees.

The UK delegate stressed that refugees should be integrated into the economic life of the countries where they resided, since they could do much to enrich a country through their knowledge, skills and labour. He gave the example of the Balkan refugees in Trieste (Italy), who had arrived from behind the Iron Curtain to escape mass executions by the Yugoslav armies. They were forced to reside in Trieste, where their chances of integration were very low, as thousands of them lived in camps controlled by the Allied Military Government.[251] According to the UK delegate, 'the circumstances of the refugees in Trieste would be much improved if they were allowed to circulate freely in Italy'.[252] He thus drew a link between the freedom of movement of refugees within the host country and their increased potential to contribute to the country's economy and improve their own well-being.

Similarly, the representative of Australia regarded the freedom of the refugee to choose his place of residence as an essential element for preserving of family unity and, more generally, giving the refugee a sense of freedom. He mentioned that the Australian Government made efforts to house refugee families together near the place of work of the head of the family. However, where this was not possible, these families sometimes chose to look for alternative accommodation in order to be together, even if this meant living in a less comfortable place. In the view of the Australian delegate, this open option for refugees was very important because 'even if [refugees] had not yet found the housing conditions they had hoped for in Australia, at least they had found freedom'.[253]

France and Denmark indirectly recognised the granting of this right to refugees as a positive development by recalling the 'very valuable work' of the Committee of Experts on the

[248] UN Doc. A/C.3/SR.373, 2 January 1952.
[249] Chile (UN Doc. A/C.3/SR.374, 2 January 1952), the United Kingdom (UN Doc. A/C.3/SR.375, 3 January 1952), China (UN Doc. A/C.3/SR.378, 7 January 1952) and Australia (UN Doc. A/C.3/SR.379, 8 January 1952) expressed their preference for this solution.
[250] UN Docs. A/C.3/SR.377, 4 January 1952 and A/C.3/SR.378, 7 January 1952.
[251] Catholic Relief Services (1956).
[252] UN Doc. A/C.3/SR.375, 3 January 1952.
[253] UN Doc. A/C.3/SR.379, 8 January 1952.

Problem of Refugees and Overpopulation, a committee of the Council of Europe (CoE).[254] A year before the debate at the UN on the 'refugee problem' (1951), this Committee had issued a recommendation, adopted by the Parliamentary Assembly of the CoE, calling on States 'to facilitate as far as possible the free movement of refugees'.[255]

For his part, the Chilean representative affirmed that in Chile all refugees were subject to the same laws as Chilean citizens, and that they were free to enter and leave the country at will—which means that they were also entitled to move around the country.[256]

Finally, it is interesting to note that Mr. Jan Van Heuven Goedhart (UNHCR) suggested that States should consider internal relocation of refugees not as a coercive measure, but as a policy to motivate refugees to move—of their own free will—to certain parts of the country where they would have more opportunities to work. He cited the case of Austria, where a private agency offered loans to refugee farmers to resettle on farms.[257]

1.7 The right to free movement in the *travaux* of Protocol 4 ECHR

The right to free movement within the country in the European human rights system does not appear in the 1950 European Convention on Human Rights but in its Fourth Protocol, adopted on the 16th September 1963.[258] While the ECHR represents 'the first step for the collective enforcement of certain of the rights stated in the Universal Declaration of Human Rights',[259] the purpose of Protocol 4 was to extend this collective guarantee to certain civil and political rights not yet protected by the 1950 treaty.[260]

In order to decide which rights to include in Protocol 4, the drafters closely followed the debates taking place at the UN in relation to the ICCPR, which was in an advanced stage of drafting at the time (1958). In fact, the first draft of the preamble to Protocol 4 explicitly mentioned that the Council of Europe was 'taking account of the work being done at the United Nations to draw up an [ICCPR]'.[261] On this point, it is interesting to note that not all

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[254] UN Doc. A/C.3/SR.375, 3 January 1952.
[255] Parliamentary Assembly Recommendation 13, 7 December 1951.
[256] UN Doc. A/C.3/SR.374, 2 January 1952.
[257] *Ibid.*
[258] Although the drafting of the Protocol began after that of the ICCPR, Protocol 4 was completed before the UN Convenant. While the European text was opened for signature in 1963, the UN Covenant was not finalised until 1966. This illustrates the particular difficulties of reaching agreements at the world level, involving States with very different political and legal backgrounds, compared to the relatively quicker legal processes that take place between more homogenous States at regional levels. Indeed, as noted by Shelton (2013), one of the factors that gave rise to regional human rights law was the frustration with the long-stalled efforts of the UN to conclude a human rights treaty.
[259] CoE Do. 828, 2 May 1958.
[260] When the drafting of this Protocol began, the text was intended to become the Second Protocol to the ECHR. In the meantime, however, two other protocols were adopted which, unlike Protocol 4, did not add any substantive rights to the ECHR: Protocol No. 2 confers upon the European Court on Human Rights competence to give advisory opinions at the request of the Committee of Ministers, and Protocol No. 3 amends certain articles of the Convention.
[261] CoE Doc. As/Jur (10) PV 2 Revised, 22 September 1958. This reference was later deleted to ensure formal coherence with the ECHR and the First Protocol (which did not mention the UN treaty), but a summary of the comments made in the UN on the articles in the draft ICCPR (corresponding to those to be included in the Protocol) was annexed to the *travaux préparatoires* of Protocol 4 ECHR. Moreover, when discussions on the inclusion of a particular provision in the Protocol reached an impasse, one of the legal experts suggested that

drafters agreed on whether the content of the rights in the European human rights system was more or less protective than the rights in the universal system. One of the main drafters of Protocol 4, Mr. Hermod Lannung, believed that the definitions of rights contained in the draft ICCPR were 'more liberal'.[262] Another notable drafter, Mr. Eduard Wahl, considered that the UN draft Covenant was less protective because 'it had to make allowance for the less advanced member countries of that organisation'.[263]

Article 2 of the Protocol reads:

'1. Everyone lawfully within the territory of a States shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.'

Since there is a natural connection between the *travaux* on the right to free movement in the UDHR, the ICCPR and Protocol 4, this section will follow the same structure as the other two: (1.7.1.) the importance of the right in the minds of the drafters; (1.7.2) the purpose that they wanted to attach to this freedom; and (1.7.3) the position of migrants in the discussions. It is important to note that, unlike in the preparatory work of the other two human rights texts, the *travaux* of Protocol 4 ECHR do not disclose the position taken up by individual governments, but that of individual experts.[264]

1.7.1 Importance of the right

The drafters of Protocol 4 regarded the rights in this protocol as 'traditionally recognised rights in the countries of Free Europe'.[265] However, these rights were not part of the 'irreducible minimum' of human rights protection in Europe, which is composed of the rights enshrined in the 1950 European Convention. Instead, they represented a 'bolder and more generous conception' of human rights.[266] It can thus be argued that the rights in

this could be overcome by 'knowing more about the considerations which had led the United Nations to draft this article' (CoE Doc. As/Jur (11) PV 3, 31 August 1959).

[262] CoE Doc. AS/Jur XII (10) 1, 21 August 1958.

[263] CoE Doc. AS/Jur XIII (11) PV 1, 25 August 1959. Therefore, he thought that the ICCPR could not be taken entirely as a model for Protocol 4.

[264] This was the condition set by the Committee of Ministers for the publication of the commentaries of the Committee of Experts (CoE Doc. CM (64) 221, 5 November 1964).

[265] CoE Doc. AS/Jur XII (10) 1, 21 August 1958. This statement is questionable, given that most European constitutions in the first half of the 20th century did not enshrine the right to free movement within the country, as shown above.

[266] CoE Doc. AS/Jur XII (10) 1, 21 August 1958.

Protocol 4 were considered less important than rights such as life, the prohibition of torture and family life—all of which are present in the 1950 Convention.

The lesser relevance of the rights in Protocol 4 compared to those in the ECHR is reflected in the statement of one of its drafters, Mr. Toncic, who was unsure whether the proposed articles of draft Protocol 4 should be added to the list of human rights guaranteed by the Convention system. He acknowledged that there were rights in the draft ICCPR that were not guaranteed in the ECHR, but he believed that there was a reason for this: the Covenant did not have a control mechanism as strong as the ECHR. Therefore, European States should be more cautious in the Council of Europe than in the UN about committing to protect less essential rights.[267]

More specifically with regard to the right to free movement, the drafters were not in complete agreement on the pertinence of its recognition as an international human right. Some members of the Committee of Experts even questioned whether it was a human right at all.[268] According to one of these experts, a clause such as Article 2 of the Protocol had its place in a convention on establishment, but not in a human rights treaty.[269] This was not the majority view, which endorsed the position of Mr. Lannung, who stated that '[the right to free movement] is an important right which is not always respected even in democratic countries; it is highly desirable that it should receive international protection'.[270]

Finally, the right to free movement was deemed less relevant than the right to leave a country (Article 2(2) of Protocol 4). Seven drafters proposed subjecting the right to free movement to restrictions based on the economic well-being of the country, but they excluded the right to leave a country from such limitations.[271] Although this restriction was not ultimately included for either right, it signals that the drafters were willing to allow States greater leeway in limiting the right to free movement than in restricting the right to leave a country. Article 2(4) supports this proposition, since it authorises restrictions based on the public interest regarding the right to free movement, but not regarding the right to leave a country.

1.7.2 Purpose of the right

The right to free movement was part of the 'common conception of democracy of European States'.[272] The *preservation of liberal democracies* was therefore one of the purposes of this freedom in the minds of the drafters of the Protocol.

Moreover, five of the drafters claimed that the freedom to choose one's place of residence was 'similar to the right to respect for a home' (article 8(1) ECHR).[273] This is an interesting comparison, since these are both negative rights—requiring only that the State does not to interfere—and they both *protect 'the home'*: Article 2(1) of Protocol 4 protects the right to

[267] CoE Doc. AS/Jur XII (10) PV 2, 5 January 1959.
[268] CoE Doc. DH/Exp (60) 27 and Appendix I and II, 10 February 1961.
[269] CoE Doc. DH/Exp (61) 15, 7 August 1961.
[270] CoE Doc. 1057, 22 January 1960.
[271] CoE Doc. DH/Exp (61) 35 Final, 7 October 1961.
[272] CoE Doc. AS/Jur XII (11) 1, 8 June 1959.
[273] CoE Doc. DH/Exp (61) 15, 7 August 1961.

choose that home and, once this has been realised, Article 8(1) protects the right to live in that home without public interference.

With regard to the nature of the right to free movement, Mr. Lannung drew a distinction between fundamental rights and civil rights. The enjoyment and exercise of the former group flowed from being 'a man' (i.e. a person), while the latter flowed from the possession of a certain nationality. According to him, all rights in Protocol 4 would flow from being a person.[274] However, this is not the case for the right to free movement: this right flows not only from being a person, but from being a person with a lawful immigration status, as will be discussed below. It could therefore be argued that the right to free movement lies on the borderline between a *fundamental right and a civil right*.

Finally, the same question arose as in the ICCPR as to whether the purpose of this right was to prevent interference with freedom of movement only by public authorities or *also by non-State actors*. In its original draft, Article 2(3) of Protocol 4 protected the right to free movement only against unlawful restrictions by 'a public authority'. However, Mr. Eissen pointed out that this 'seemed to leave the door open for limitations other than those imposed by public authorities'.[275] For this reason, the third paragraph of Article 2(3) was redrafted in more general terms ('no restrictions shall be placed…'), so as to make clear that States have a positive obligation to protect freedom of movement from unlawful limitations by non-State actors.

1.7.3 The position of migrants in the debates

Personal scope

The proposed exclusion of all non-nationals

Even though the UDHR granted freedom of movement to 'everyone' and the draft ICCPR extended this right to lawfully present migrants, some of the drafters of Protocol 4 sought to make this right exclusive to citizens. They argued that freedom of movement should be recognised 'only in respect of nationals of Contracting Parties in their own countries and not in respect of aliens or stateless persons'.[276] While this proposal was ultimately not adopted, it reinforces the hypothesis that European States were hesitant to grant freedom of movement to migrants, as reflected in the personal scope of this right in the European constitutions analysed above.

'Lawfully within': the disregard for irregular migrants

The final decision of the drafters was to follow the draft ICCPR and afford the right to free movement to 'everyone lawfully within the territory of a State'. However, there was no discussion on why irregular migrants should be excluded from the enjoyment of this freedom.

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[274] CoE Doc. AS/Jur XIII (10) 3, 10 November 1958.
[275] CoE Doc. AS/Jur XIII (11) PV 1, 25 August 1959.
[276] CoE Doc. DH/Exp (60) 27 and Appendix I, II, 10 February 196.

It is interesting to note that, at times, the drafters even seemed to forget (or deliberately ignore) that, under the agreed version of Article 2(1) of Protocol 4, irregular migrants were not holders of the right to free movement. Commenting on Articles 2 and 3 of Protocol 4, Mr. Lannung drew a distinction between the personal scope of these provisions. He stated that 'the freedoms defined [in Article 2] would be valid *for all persons within the jurisdiction of the Contracting parties*, whereas only certain categories of such persons would benefit under [Article 3]'.[277] Indeed, only nationals benefit from the prohibition of exile and the right to enter their country of nationality (Article 3), but Article 2(1) does not apply to all persons within a State's jurisdiction: it applies only to lawfully present migrants. Similarly, Mr. Lannung stated in more general terms that 'the [fourth] Protocol to the Convention on Human Rights should deal with the treatment of *each individual* regardless of his nationality' as though all human beings were holders of the right.[278]

The meaning of 'lawfully within'

The first draft of Article 2(1) of Protocol 4 gave freedom of movement to persons *legally* within the country ('légalement' in the French version). The UK Government[279] and other delegates proposed replacing this expression with 'lawfully within' ('régulièrement'), which was accepted by the majority of the drafters. The reason offered for this amendment was that 'in most States the administrative authorities enjoy considerable discretionary powers enabling them to admit or refuse entry to aliens and control their stay'.[280] Therefore, the personal scope of the right was somewhat extended: the beneficiaries of Article 2(1) would be not only those persons with an authorisation for entry derived from a law enacted by Parliament, but also those authorised by the administrative authorities.[281]

Some drafters suggested that the personal scope of the right should be somewhat narrower, and should be granted only to persons 'lawfully residing' in a State. This proposal was rejected by the majority, which stated that non-nationals present in the territory of a State for a limited period would be entitled to move freely within in—although this did not mean that they would be accorded a right to remain permanently in the territory of that State.[282]

The drafters added the following explanatory statement regarding the interpretation of Article 2(1) of Protocol 4:

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[277] CoE Doc. AS/Jur XIII (10) 3, 10 November 1958.
[278] CoE Doc. AS/Jur XII (11) 1, 8 June 1959. On another occasion, Mr. Lannung also affirmed that 'Article 2 is based on Article 12 of the Draft Covenant and states the right of *the individual* to liberty of movement and residence (…)' (CoE Doc. 1057, 22 January 1960). The neglect of the position of irregular migrants was also present in the drafting process of the provision on 'procedural safeguards relating to expulsion of aliens'—an article that was to become part of Protocol 4, but was eventually included in Protocol 7 to the ECHR. Although this provision clearly applies only to migrants 'lawfully resident' in the territory of a State, one of the drafters, Mr. Eissen, affirmed that it accrued to 'all aliens' (Coe Doc. AS/Jur XIII (11) PV 1, 25 August 1959).
[279] CoE Doc. DH/Exp (60) 20, 28 October 1960.
[280] Coe Doc. DH/Exp (61) 15, 7 August 1961.
[281] Similarly, as noted above, the word 'legally' in the draft version of Article 12(1) ICCPR was changed to 'lawfully' in its final version, although the drafters at the UN did not give any explanation for this change (UN Doc. E/CN.4/365, 22 March 1950.
[282] CoE Doc. DH/Exp (61) 35 Final, 7 October 1961.

'The Committee agreed that an alien admitted under certain conditions of entry (not necessarily conditions about residence or movement) which he transgresses or fails to comply with, can no longer be regarded as being "lawfully" in the country.'[283]

In a different part of the *travaux*, the drafters gave an example of a 'condition of entry' that they had contemplated when writing this statement. The majority of them held the view that 'Article 2(1) does not guarantee *a work permit* to aliens lawfully within the territory of a State, *nor does it assure them of a free choice of place of work*. The State is entitled to issue work permits in the light of the economic and social situation'.[284] Therefore, according to these drafters, a State may grant lawful status to a migrant but not allow him to work or restrict the work permit to a specific city or region. If the migrant 'transgresses or fails to comply' with this 'condition of entry' (by working without a permit or in another part of the country), he will cease to be considered 'lawfully in the country' and thus fall outside the scope of Article 2(1).

The position of nationals from non-metropolitan territories

To conclude this section on the personal scope of Article 2(1) of Protocol 4, it is interesting to note that there was some debate as to whether this provision would allow UK citizens from non-metropolitan territories to move freely to mainland UK. While some drafters suggested that each State should decide for itself the meaning of the term 'territory', the majority agreed that it would be preferable to define this concept in the Protocol.[285]

Since, in the UK, each territory had its own laws relating to admission to and expulsion, the majority considered it desirable that Article 2(1) should allow individuals to move only within the territory of the part of the State from which they derived their citizenship.[286] Although the French expert dissociated himself from this view, the following paragraph was added to the provision on the territorial application of the Protocol (Article 5), which reads:

'4. The territory of any State to which this Protocol applies by virtue of ratification or acceptance by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this article, shall be treated as separate territories for the purpose of the references in Articles 2 and 3 to the territory of a State.'

Immigration-related restrictions

Articles 2(3) stipulates that

'no restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

Paragraph 4 of the same article adds:

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[283] CoE Doc. DH/Exp (62) 17, 3 September 1962.
[284] CoE Doc. DH/Exp (61) 15, 7 August 1961 and DH/Exp (61) 35 Final, 7 October 1961.
[285] CoE Doc. DH/Exp (60) 27 and Appendix I and II, 10 February 1961.
[286] CoE Doc. DH/Exp/Misc (63) 10, 14 February 1963.

'The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

As noted above, some drafters drew a parallel between the right to choose one's place of residence and the right to respect for a home in Article 8 ECHR. Since this provision allows for restrictions based on the economic well-being of the country (Article 8(2)), they proposed to add the same limitations in Article 2(3) of Protocol 4. There was also another reason that led them to suggest this amendment: they were concerned that the movement of aliens within a country would hamper the general economic well-being. In response to this argument, the majority of the drafters replied that Article 2(1) would not prevent States from taking into account the economic welfare of the country when deciding on the *admission* of aliens. However, once the alien had been admitted, it would not be possible to restrict his movement on grounds of economic welfare.

The majority of the drafters added that there would be one exception to this rule: if, in a particular situation, the impact of the free movement of aliens on the economic well-being of a country was significant enough to amount to a matter of 'ordre public', the State would be allowed to restrict freedom of movement based on the 'ordre public' ground enshrined in Article 2(3). However, the drafters did not define the point at which a matter affecting the 'economic well-being' of a country would cross the threshold and be considered a matter of 'ordre public'—a criticism voiced by the minority.[287]

In any case, the drafters agreed to add a fourth paragraph to Article 2—restrictions based on 'the public interest in a democratic society'—which would enable States to impose restrictions on movement and residence for reasons of economic welfare, albeit only 'in particular areas'.[288]

Finally, there was an interesting debate on the meaning of the expression 'rights and freedoms of others' in Article 2(3). The question arose as to whether this term allowed State A to restrict the freedom of movement of nationals of State B as a measure of reprisal when the latter State did not allow nationals of State A to enjoy the right to free movement on its territory. Some experts opposed this interpretation, arguing that the obligation to protect the human rights of all persons within the jurisdiction of the State (Article 1 ECHR) precluded the application of the principle of reciprocity to legal relations arising from the Convention. Other experts considered that it was for the (former) European Commission and the European Court of Human Rights to decide on a case-by-case basis whether such retaliatory measures were in accordance with the law and necessary to protect the 'rights and freedoms of others'.[289] Therefore, no definite answer was given to this question.

1.8 The right to free movement in the *travaux* of the Refugee Convention

Unlike the UDHR, the ICCPR and Protocol 4 ECHR, the Refugee Convention enshrines the right to free movement in two distinct provisions: Article 31(2) and Article 26. The former guarantees this freedom to refugees 'unlawfully in the country of refuge' and the latter

[287] CoE Docs. DH/Exp (61) 15, 7 August 1961 and DH/Exp (61) 35 Final, 7 October 1961.
[288] *Ibid.*
[289] *Ibid.*

only to refugees 'lawfully in [the] territory' of a State party to the Convention. Each provision offers a different set of safeguards to refugees.

Articles 31, titled 'refugees unlawfully in the country of refuge', stipulates that

'1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.'

The text of Article 26, titled 'freedom of movement', is the following:

'Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.'

While the personal scope of these articles will be extensively discussed in Chapter 2, it is worth noting here that the term 'lawfully' in Article 26 already appeared in the first drafts of this provision, and that no explanation was given as to why this article only applied to refugees 'lawfully in [the] territory'.[290] The drafters thus took it for granted that the freedom of movement under Article 26 would not be extended to refugees unlawfully in the country.

Given that the Refugee Convention is a 'specialist human rights treaty'[291] focusing only on a particular category of persons (refugees), the parts comprising this section will be somewhat different from the previous sections. The first part (1.8.2) will examine the importance of freedom of movement of refugees in the mind of the drafters. As for the second part, unlike the drafters of the general human rights instruments, the authors of the Refugee Convention reflected on the *raison d'être* of these restrictions on the free movement of refugees rather than on the purpose of the freedom itself. The second part of this section (1.8.2) will thus elaborate on these discussions. Finally, the third part (1.8.3) will analyse the grounds that justify limiting the free movement of refugees as conceived by the Convention drafters. In each part, a distinction will be made between the drafting process of Article 31(2) and that of Article26.

1.8.1 Importance of the right

Refugees falling under Article 31(2)

There are two main reasons to believe that the freedom of movement of this group of refugees was not a major concern of the drafters of the Refugee Convention.

[290] Amann 1994, p. 142.
[291] McAdam 2006, p. 14. Not all authors agree with this qualification of the Refugee Convention. See *infra* note 325.

Firstly, the original draft of the Convention did not contain any provisions relating to the right to move of unlawfully present refugees. The drafter of this initial version, Mr. Giraud, explained that he had excluded such provisions with the case of Spanish refugees in mind. These refugees had arrived in large numbers at the French border towards the end of the Spanish Civil War and were required to remain in reception camps until their status was regularised. Such practices might prove essential in certain circumstances and, to avoid creating any barriers to them, he had chosen to leave the right to free movement out of the Convention.[292] Article 31(2) was only included in the Convention at the request of the IRO representative. He acknowledged that, in emergency situations where States provisionally received large numbers of refugees, it was sometimes impossible for them to grant such refugees full freedom of movement.[293] However, precisely because the problem faced by France was likely to arise in other countries such as Switzerland and Italy, he believed it was essential to include a provision in the Convention that would allow States to respond to these realities.[294] Therefore, an article such as 31(2) was needed to define the restrictions on movement that might be necessary for refugees who had not yet been regularly admitted.[295] This view was supported by the United States,[296] Denmark[297] and Brazil.[298]

Secondly, there was little discussion regarding paragraph 2 of Article 31. Most of the debate centred around paragraph 1, which prohibits States from imposing penalties, on account of their illegal entry or presence, on refugees who meet certain requirements. As the Canadian and French delegates noted, States were anxious that Article 31(1) would deprive them of their right to expel refugees who had entered their territory illegally, or that it would confer on the refugee 'a right of immigration which might be exercised for reasons of mere personal convenience'.[299] This 'anxiety' might have prompted the drafters to focus more on paragraph 1 than on paragraph 2.

Refugees falling under Article 26

Similar to unlawfully present refugees, the drafters of the Convention did not prioritise freedom of movement for refugees 'lawfully in [the] territory'. In fact, the inclusion of this freedom for lawfully present refugees was not on their agenda: it only appeared incidentally during the debates on the right of refugees to receive identity papers (Article 27 RC). France and Belgium stressed that the issuance of residence papers was only the formal aspect of the freedom to move and choose one's place of residence, and argued that the substance of the question needed to be settled first.[300]

Nevertheless, freedom of movement gained more relevance in the discussions on Article 26 than in those on Articles 31(2). One reason for this was that, as noted above, the 1938

[292] UN Doc. E/AC.32/SR.15, 6 February 1950.
[293] UN Doc. E/AC.32/SR.21, 2 February 1950.
[294] UN Doc. A/CONF.2/SR.14, 22 November 1951.
[295] UN Doc. E/AC.32/SR.21. However, as will be discussed in Chapter 4, the restrictions were not actually 'defined', since Article 31(2) does not contain a list of permissible grounds for restricting freedom of movement.
[296] UN Doc. E/AC.32/SR.15, 6 February 1950.
[297] UN Doc. A/CONF.2/SR.14, 22 November 1951.
[298] UN Doc. E/AC.32/SR.21, 2 February 1950.
[299] UN Doc. A/CONF.2/SR.14, 22 November 1951.
[300] UN Doc. E/AC.32/SR.15, 6 February 1950.

Convention concerning the Status of Refugees Coming from Germany already contained a provision similar to Article 26. In light of this, Belgium proposed to include the wording of Article 2 of that Convention into Article 26 RC, although this proposal was not finally adopted.[301]

Furthermore, two delegates confirmed that their governments already granted the right to free movement to regularly admitted migrants and refugees. The representative of France made several remarks on French practice, drawing the interest of his fellow delegates. He explained that, with certain exceptions, migrants with a residence authorisation had the right to take up residence and move throughout the entire national territory. This rule would apply to refugees in the same legal situation. The Australian representative also mentioned that during the Second World War, thousands of refugees had fled to Australia from countries under Japanese occupation. They were granted a residence permit and the right to move and choose their place of residence under the same conditions as Australian citizens.[302]

1.8.2 *Raison d'être* of the restrictions

Refugees falling under Article 31(2)

The reasons that led the drafters to include restrictions on the movement of unlawfully present refugees in Article 31(2) can be grouped into four main categories:

(1) *To prevent harm to public order, national security or the economy when asylum-seekers arrive in large numbers*: France argued that, in such cases, States might feel that to allow a great number of refugees to scatter throughout the territory would be detrimental to public order.[303] Similarly, Belgium expressed concerns about the potential economic and security risks of allowing unrestricted movement of illegally entering refugees.[304]
(2) *To maintain the State's ability to grant asylum*: The French delegate noted that even countries that granted asylum on a generous scale would be unable to continue to do so unless they could obtain information from refugees by provisionally restricting their movement.[305]
(3) *To avoid incentivising illegal entry or presence*: Lebanon, France and the UK feared that an unrestricted right to free movement in the Convention could be interpreted as a legalisation of clandestine entry. They sought to avoid having to receive 'undesirable' refugees residing in a neighbouring country who voluntarily decided to move to another State. Denmark was also concerned that if States were not allowed to force illegally entering refugees to reside in a particular 'concentration camp', they would use this opportunity to abscond from the authorities and remain in the country illegally.[306]
(4) *To safeguard national sovereignty*: More generally, the UK and other delegates wanted to leave 'sufficient latitude' to countries hosting large numbers of refugees. To ease these

[301] UN Doc. A/CONF.2/SR.14, 22 November 1951.
[302] *Ibid.*
[303] UN Doc. A/CONF.2/SR.14, 22 November 1951.
[304] UN Doc. E/AC.32/SR.40, 27 September 1950.
[305] UN Doc. A/CONF.2/SR.35, 25 July 1951.
[306] UN Doc. E/AC.32/SR.24, 13 February 1950.

concerns, the UNHCR representative stated that States could 'rest assured' that their interests would be safeguarded by Article 31.[307]

Refugees falling under Article 26

Regarding Article 26, the drafters provided one main reason on why it was important to enable States to limit the movement of refugees 'lawfully in [the] territory'. According to the French delegate, allowing these restrictions would actually benefit the refugee, as it would *give States an incentive to admit them* to their territory. If States did not have the possibility to limit the validity of residence permits to a specific region, it was likely that many governments would be reluctant to issue such permits at all. The Danish delegate agreed, stating that no texts should be approved that 'might provoke certain Great Powers to refuse to receive refugees'.[308]

1.8.3. Restriction grounds

Refugees falling under Article 31(2)

The text of Article 31(2) does not contain an explicit list of grounds that States can invoke to limit the movement of unlawfully present refugees. Nonetheless, the *travaux* reveal several possible restriction grounds that the drafters had in mind. Three such grounds were mentioned during the drafting process:

(a) *Imperative reasons of national security and order*, which was suggested by Denmark.[309] The President of the Conference of Plenipotentiaries confirmed that *security* was a valid restriction ground.[310]
(b) *Obtaining information on the refugee* and investigating the circumstances in which he had entered the country. This ground was mentioned by France, the UK and the UNHCR representative.[311]
(c) *A great and sudden influx of refugees*, as noted by the President of the Conference.[312] The IRO delegate also considered that a mass arrival of refugees was a ground for restricting their movement.[313]

Refugees falling under Article 26

Article 26 makes the right to free movement subject to 'any general provision applicable to aliens in the same circumstances'. As in the case of Article 31(2), no specific grounds are listed in the article, but in the *travaux* we may identify some limitations that the delegates had in mind when drafting this provision.

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[307] UN Doc. A/CONF.2/SR.14, 22 November 1951.
[308] UN Doc. A/CONF.2/SR.14, 22 November 1951.
[309] UN Doc. E/AC.32/SR.15, 6 February 1950.
[310] UN Doc. A/CONF.2/SR.14, 22 November 1951.
[311] UN Doc. A/CONF.2/SR.35, 25 July 1951.
[312] UN Doc. A/CONF.2/SR.14, 22 November 1951.
[313] UN Doc. E/AC.32/SR.21, 9 February 1950.

For Turkey, *access to frontier or strategic zones*, which was often forbidden to non-nationals, should also be forbidden for refugees. It was Turkey's comment that prompted the US and French delegates to propose that freedom of movement of refugees be subject to the same restrictions as 'aliens in the same circumstances'.

Sweden, supported by the United States[314] and Colombia[315], argued that even after the status of a refugee had been regularised, reasons of *national security* would require the imposition of certain restrictions on his movement. Greece felt that it was important to emphasise this point, as it would make it easier for some States wary of Article 26 to accede to the Refugee Convention.[316]

Venezuela and France considered that the *economic interests* of the reception country would also justify restrictions on movement. The French delegate argued that restrictions on economic grounds would benefit the refugees themselves: he believed that the State was better placed to decide where the refugee could best develop his work life.[317]

Finally, Denmark, the United Kingdom and Canada thought it important to enable States to limit the movement of *refugees from a particular minority* if the authorities deemed it necessary for the security of the State. The Danish delegate cited the example of Denmark and Czechoslovakia, both of which would have been hesitant to admit German refugees in 1938 if they had been obliged to allow them to settle in areas already inhabited by German minorities. The fear had been that the refugees might become involved in the political activities of these minorities against the unity of the country.[318]

1.9 Conclusions

After writing this chapter, I can understand why there is 'an increasing fascination with the drafting history of international human rights instruments'.[319] The *travaux préparatoires* offer a unique insight into the negotiations, compromises and conflicts that took place during the drafting process of these instruments. They reveal the diversity of opinions and values that shaped the final texts, demonstrating that human rights law is not fixed or timeless, but rather the product of historical and political processes that reflect the changing norms of societies. With regard to the right to free movement within the country, the *travaux* of the UDHR, the ICCPR, Protocol 4 to the ECHR and the Refugee Convention have helped me to understand the origins of this right, and I may now answer the questions posed in the introduction. In order to draw general conclusions, I will focus only on the common elements between the preparatory works of the various texts.

[314] UN Doc. A/CONF.2/SR.14, 22 November 1951.
[315] UN Doc. A/CONF.2/SR.13, 22 November 1951.
[316] UN Doc. A/CONF.2/SR.14, 22 November 1951.
[317] *Ibid.*
[318] UN Doc. E/AC.32/SR.38, 26 September 1950.
[319] Schabas 2014, p. 583.

(1) *What importance did the international community ascribe to the right to free movement within the country?*

This freedom was not at the core of the human rights protection regime that gradually emerged after the Second World War. While its origins can be traced to from Latin American constitutional traditions, European constitutions rarely provided for this right. It is probably no coincidence that neither of the first drafts of the UDHR, the ICCPR and the Refugee Convention did not include this freedom, which was only added at later stages of the debates. In the case of the Refugee Convention, freedom of movement for unlawfully present refugees under Article 31(2) was not even proposed by a State but by the International Refugee Organisation, which had been invited to the debates in an advisory capacity. The right was also absent from the ECHR and was only incorporated in Protocol 4, which, according to its drafters, enshrined 'bolder and more generous' rights than the ECHR.

In all the *travaux*, several State representatives and experts questioned whether freedom of movement was a human right at all, among other reasons because it was 'not indispensable for physical and mental existence' and it was a purely 'domestic issue within the prerogative of the State'. Moreover, this freedom was considered less relevant than the right to leave the country, which several drafters of the different instruments wished to make unconditional. Therefore, the right to free movement did not find an easy path into the realm of international law.

(2) *What purpose did this right have in the minds of its drafters?*

Three purposes stand out in the *travaux* of both the UDHR and the ICCPR. Firstly, the drafters made a strong link between the right to personal liberty and the right to free movement, as they both protected the 'spirit of freedom'. Mr. Chang used a nice metaphor, suggesting that the right to move throughout the country was the 'last stage of liberty'. Secondly, freedom of movement was seen as an instrument to fulfil the human need to relate and communicate with others. Thirdly, this right was aimed at preventing residential segregation, such as that imposed in South Africa and in communist Hungary. A further purpose appears in both the UDHR and Protocol 4 to the ECHR: the protection of the home and the private life of the individual. This right thus found a connection with the right to respect for a home.

Finally, the drafters of the Refugee Convention discussed the purpose of the restrictions on movement rather than the aim of the right. The reasons given as to why States needed these restrictions were mostly related to concerns about sovereignty and control over refugees, which may suggest that the drafters of general human rights instruments took freedom of movement within the country as a *right* more seriously than the drafters of the Refugee Convention, who viewed Articles 31(2) and 26 primarily as provisions to guide the authorities in the process of managing the arrival of refugees.

(3) *Was this right intended to be enjoyed by migrants? Why was this freedom reserved for 'lawful' migrants in general human rights treaties?*

The very first general human rights instrument in international law, the American Declaration of the Rights and Duties of Man, reserved freedom of movement only for nationals, as did some European constitutions, the United States and several other constitutions by the end of the Second World War. The idea of granting this right only to nationals lingered on in the drafting processes of the UDHR and of Protocol 4 ECHR, as some drafters suggested including this restriction, although these proposals were not ultimately adopted. Therefore, the view that migrants should enjoy freedom of movement within the host State was not universally shared by the international community.

On the other hand, there is only a vague explanation as to why this right is reserved for 'lawful' non-nationals in general human rights treaties.[320] Such an explanation was provided only by Mrs. Roosevelt during the drafting of the ICCPR. She proposed to include this reservation to the personal scope of the right in order to ensure that freedom of movement within the country would not be interpreted as a right of entry. The other delegates did not discuss this further, nor did the drafters of Protocol 4 to the ECHR.[321] The drafters of the Refugee Convention also took it for granted that the right to free movement under Article 26 should be accorded only to 'refugees lawfully in [the] territory'—even if, unlike general human rights treaties, the Convention did include a right to free movement for unlawfully present refugees in a separate provision, albeit with different safeguards (Article 31(2)). Since Mrs. Roosevelt's comment is the only source we have for understanding the limitation to the personal scope of this freedom, we can tentatively conclude that concerns over the entry of irregular migrants were the main reason for its inclusion in international human rights law.

(4) *What did the drafters of the different instruments say about restrictions to the freedom of refugees and other migrants to move throughout the territory of the host State?*

There were three broad sets of reasons that the drafters of the various instruments mentioned as justifying restrictions on the free movement of migrants: (1) a sudden influx of refugees (in the *travaux préparatoires* of the UDHR and the Refugee Convention), (2) the economic well-being of the State (in the preparatory works of the ICCPR, the Refugee Convention and Protocol 4 ECHR) and (3) national security/public order (in the *travaux* of the Refugee Convention, the UDHR and the ICCPR).

In the context of the 'sudden influx' ground, in both the *travaux* of the UDHR and of the Refugee Convention , the French delegate (Mr. Cassin and Mr. Giraud, respectively) referred

[320] It is also important to note that the broader personal scope of the right in the UDHR ('everyone') was only reluctantly accepted by several drafters, who wished to exclude certain categories of non-nationals from the personal scope of Article 13(1).

[321] The lack of debate on the position of irregular migrants in Protocol 4 is reminiscent of the silence of the drafters in the *travaux* of the ECHR with regard to Article 16. This provision, often referred to as the 'alien clause', states that 'nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activities of aliens'. Dembour (2015, p. 36) notes that 'the alien clause was hardly debated during the *travaux préparatoires* of the Convention, every participant to these implicitly taking its necessity for granted'.

to the restrictions that France had imposed on Spanish refugees who arrived *en masse* fleeing from the Spanish Civil War. However, the reason for mentioning this historical event differed between the preparatory work of the UDHR and that of the Refugee Convention. On the one hand, Mr. Cassin argued that France had introduced these restrictions to prevent Spanish refugees from harming to themselves by settling in already overcrowded areas. Therefore, in order to protect refugees in similar situations in the future, the UDHR should allow States to limit their movement in situations of mass influx. On the other hand, Mr. Giraud affirmed that, precisely because France had had to restrict the movement of Spanish refugees as a response to a mass arrival, it was better to leave the right to free movement out of the Refugee Convention.

France therefore moved from a more refugee-protective approach in the UDHR to a less protective attitude in the Refugee Convention. This shift is also visible in the discussions around the 'national security' and 'public order' grounds in the ICCPR, where Mr. Cassin no longer regarded overcrowding as an issue that would affect the well-being of refugees, but referred to it as a problem of 'national security'. More generally, with regard to these restriction grounds, it can be inferred from the debates in the various *travaux* that several drafters had a negative view of the behaviour of migrants in the host country. While some of them referred to their lack of 'political neutrality' and to the need to prevent 'undesirable aliens', others believed that migrants of the same nationality living close to each other in a given area would pose a threat to national security.

As for the 'economic well-being', the debates on this restriction ground show that some delegates did not value the autonomy of the migrant to make his own life choices. Instead, they saw the migrant as an instrument for the benefit of the State or had a paternalistic view of them. In the drafting process of the ICCPR, the Australian delegate stated that, in his country, migrants were forced to live in a certain area for one year to make sure that they contributed to solve the country's economic problems. In this argument, we find the idea that the migrant must be useful to the State's economy, and that it is justifiable to restrict a human right in order to achieve this end—while the same burden of 'being useful to the State' was not placed on Australian citizens, whose right to free movement was not restricted for economic reasons. For his part, the French delegate explained that, in his county, migrants were placed in a specific department for one year in order to prevent them from settling in overcrowded areas and increasing unemployment there. Here we see a presumption that the migrant is an economic burden, incapable of starting his own business, finding a job or contributing to the economy in any other way. Finally, seven of the experts that drafted Protocol 4 ECHR were concerned that the free movement of migrants within the host country would hamper economic prosperity. Once again, migrants were portrayed as a threat to the national economy.

Only the UNHCR representative (Mr. Jan Van Heuven Goedhart) offered an alternative to this controlling view of the autonomy of migrants. In the debates on the 'refugee problem' that paralleled the drafting of the ICCPR, the Agency encouraged States to use resettlement within the country as a policy to motivate refugees to move to certain areas where they would have more opportunities to work. He thus presented resettlement not as a coercive restriction

on the right to movement, but as a voluntary option that would benefit both the refugee and the State.

This chapter has explored how the right to free movement came to be included in the different international treaties and declarations, paying particular attention to the position of refugees and other migrants in the debates of their drafters. It has thus fulfilled the first key objective of this study. The following chapters will move away from the historical analysis of this right and examine the *positive law* relating to the freedom of movement of asylum-seekers.

Chapter 2 – The personal scope of the right: are asylum-seekers entitled to freedom of movement?

2.1 Introduction

When the drafters of the various texts debated the rights of refugees and other migrants in the 1950s and 60s, they did not explicitly consider the position of asylum-seekers. This is because lengthy and sophisticated refugee status determination procedures did not exist at the time, and 'asylum-seeker' was not a relevant legal category of its own. However, the advent of these determination procedures, particularly in the Global North, has placed asylum-seekers at the centre of legal debates in the doctrine and case law.

In this context, the last chapter of this study—Chapter 4—will explore *how* positive international and European law protects the freedom of movement of asylum-seekers within the host country. If this study were centred on another human right, such as the right to life or the right to physical integrity, this question would be sufficient to gain an in-depth understanding of the right. However, with regard to freedom of movement, two prior questions need to be answered, namely *whether* asylum-seekers possess this freedom in the first place (and, if so, *which* asylum-seekers) and *when* a restriction is so strict that the right to free movement within the country gives way to the right to liberty. These are the central questions of Chapters 2 and 3.

The present chapter will thus address the second key objective of this study, i.e. to explore the extent to which asylum-seekers fall under the personal scope of the right to free movement. In this regard, the peculiarity of the freedom of movement *vis-à-vis* other rights in general international human rights law is that it is reserved only for persons 'lawfully within in the country' (ICCPR and Protocol 4 ECHR). In the chosen case studies (Spain and Germany), the respective constitutions are even stricter than international law, as they reserve this right for nationals.

The only general human rights instrument that affords the right to free movement to *everyone* is Article 13 of the Universal Declaration of Human Rights. However, the UDHR is not a binding treaty. Admittedly, 'the normative force of the Universal Declaration and other declarations is recognised in principle also in national laws, in various UN reports and statements of governments',[322] and therefore the content of (at least) certain provisions of the Declaration has become binding through customary international law.[323] However, even though, according to some authors, there is 'strong evidence that freedom of movement, and freedom to choose residence and domicile, as set out in Article 13 (…), are norms of customary law',[324] the broad personal scope enshrined in the Declaration has been lost in the

[322] Meron 1991, p. 83.

[323] See however Hannum (1995, p. 346), who observes that there is not enough consensus on the binding force of the UDHR to be able to draw firm conclusions. See more generally, on the legal value of UN General Assembly resolutions, Roldán Barbero 1990.

[324] Schabas 2021, p. 242. See also the statement of the former Sub-Commission on the Prevention of Discrimination and Protection of Minorities, according to which 'freedom of movement within the State is widely accepted both in theory and in practice' (UN Doc. E/CN.4/Sub.2/1987/10). C.f. Hannum (1996, p.

process of norm generation of the customary rule. Indeed, the fact that all general human rights treaties reserve this right for those 'lawfully' within the territory indicates that the term 'everyone' of Article 13 UDHR has not become part of customary law. For this reason, the UDHR will not be discussed further.

For its part, the Refugee Convention—which could be classified a 'specialist human rights treaty'[325]—grants the right to free movement to 'refugees unlawfully in the country' (Article 31(2) RC) and to refugees 'lawfully in [the] territory' (Article 26 RC). The latter category also includes refugees who entered or were present in the territory unlawfully but whose status has been 'regularised' within the meaning of Article 31(2).[326] Even though freedom of movement is protected under both provisions, each of them offers a different set of safeguards—as will be analysed in Chapter 4—, which is why knowing which refugees fall under the personal scope of each article is not a trivial matter.

As noted by Ziebritzki, 'the discussion about when presence is "lawful" within the meaning of Art. 26 is almost as old as the Convention itself'.[327] In recent decades, the debate has revolved around whether the submission of an asylum application 'regularises' the status of unlawfully present migrants, bringing asylum-seekers within the scope of Article 26 and of the other articles reserved for 'lawfully present' refugees.[328] The importance of this issue lies in the fact that it has become increasingly difficult for present-day asylum-seekers to reach a safe country of refuge through regular channels. This is the consequence of measures taken by States in the Global North such as the ever-increasing requirements for obtaining visas, measures to penalise transport companies that carry people without valid visas (carrier sanctions), border security measures and the externalisation of border protection to third countries.[329]

The contestation over the scope of Article 26 RC 'reflects the Convention's relative lack of enforcement apparatus'.[330] Moreover, as has been shown in Chapter 1, the drafters of the Convention held different views on which refugees should be considered 'lawfully present'.

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346), who affirms that there is not enough consensus in State practice to draw firm conclusions on the status of Article 13 UDHR under international customary law.

[325] McAdam 2006, p. 14. For Clark and Crépeau (1999, p. 391) the Refugee Convention is an 'early human rights treaty'. In contrast, for Chetail (2012, pp. 21 and 40) the Convention is a 'duty-based rather than a human rights-based instrument' because 'it primarily addresses Contracting States by spelling out their obligations, while the term "rights" directly pertaining to refugees is rarely mentioned'. Interestingly, though, freedom of movement under Article 26 is one of the 'rare examples of true rights or freedoms directly bestowed on refugees by the Geneva Convention' (p. 39, fn. 103).

[326] See Grahl-Madsen 1963, p. 64: 'The expression "refugees lawfully in (the) territory", as used in Article 26 must, however, be seen in conjunction with the provision contained in Article 31(2)'. See also Article 31, para. 9, where he equates 'lawful' with 'regularised', stating that Article 31 applies to refugees whose 'presence is not lawful, or in the words used in the paragraph itself, whose status is not regularised'.

[327] Ziebritzki 2018. Diehl (2021, p. 111) also notes that 'the personal scope of Article 26 is disputed'.

[328] Article 32 (protection against expulsion) and Article 18 (right to self-employment).

[329] Klammer 2022b, p. 687. For further analysis of these measures and its impact on the rights of asylum-seekers, see Moreno-Lax 2017. For his part, Spijkerboer (2018) uses the concept of 'global mobility infrastructure' to refer to the physical structures, services and laws that enable some people to move across the globe at high speed, low risk, and low cost, while excluding others (including asylum-seekers) from doing so . These measures of *non-entrée* and externalisation add to the inherent difficulties that asylum-seekers face in complying with immigration formalities, for which they 'frequently have no time' due to the urgency of their flight (Goodwin-Gil 1986, p. 207).

[330] Costello 2012**,** p. 277.

For these reasons, legal doctrine has been particularly divided on this point. Section 2.2 will systematise this doctrine and divide it into groups according to the different views on *whether* asylum-seekers can be considered 'lawfully present' and, if so, *which categories* of asylum-seekers should be regarded as such. It will also examine the personal scope of Article 31(2), which, while referring to 'refugees unlawfully in the country', offers two possible interpretations as to *which* unlawfully present asylum-seekers fall within its scope.

Throughout Section 2.2, I will often refer to the different provisions contained in Article 31 VCLT ('General rule of interpretation') and Article 32 VCLT ('Supplementary means of interpretation'). These references are, for the most part, my own addition: they reflect my understanding of the method of treaty interpretation that the particular author has applied to interpret the Refugee Convention.

Sections 2.3 and 2.4 will study how the European Court of Human Rights and the Human Rights Committee have interpreted the personal scope of the right to free movement in Article 2(1) Protocol 4 ECHR and Article 12(1) ICCPR, respectively. The purpose of these sections is to come to a conclusion as to whether, in the light of the case law of the Court and the Committee, asylum-seekers fall under the scope of Article 2(1) Protocol 4 ECHR and Article 12(1) ICCPR.

Section 2.5 will focus on the 'principle of conditional lawfulness', according to which States can make the 'lawfulness' of asylum-seekers' status *conditional* on their compliance with restrictions on movement. In this section, I will investigate the source of this principle in the Refugee Convention, the ICCPR and Protocol 4 ECHR, and offer my own analysis of what this principle means in practice and how it should be interpreted so as not to empty the right to free movement of all meaning.

Sections 2.6 and 2.7 correspond to the case studies of Spain and Germany. The domestic law of these States will be assessed through a review of the personal scope of the right in the respective constitutions as interpreted by the competent national courts. Where relevant, other sources of domestic law that may help to identify the personal scope of the right to free movement will also be examined.

Finally, Section 2.8 will, on the one hand, summarise all the findings of this chapter and, on the other, present my own interpretation of the personal scope of the right under the Refugee Convention and critically evaluate the case law of the HRC and the ECtHR.

2.2 The personal scope of the right in the Refugee Convention

This section will explore the legal doctrine relating to the personal scope of the two provisions of the Refugee Convention that enshrine the right to free movement: Article 26 and Article 31(2). It should be emphasised that the primary aim of this section is to offer a comprehensive overview of the various legal positions on the matter, rather than to endorse any particular interpretation. At times, however, I will make personal observations in connection with the doctrine being examined, which will be added in the footnotes to the text.

2.2.1 Who is 'lawfully in' or 'regularised' and thus falls under Article 26 RC?

The diversity in legal approaches shows that there are many possible answers to the question of *who* is entitled to the right to free movement under Article 26 RC. I will classify the legal doctrine on this matter from those authors with a more restrictive view to those adopting a more expansive interpretation. I have identified five different ways of answering this question:

(a) Only recognised refugees
(b) Some asylum-seekers
(c) All asylum-seekers whose asylum application has been admitted
(d) All asylum-seekers, even before their asylum application has been admitted
(e) All migrants who fulfil the refugee definition, even before they apply for asylum

Finally, the position of UNHCR on this issue, which has changed over time, will also be presented.

As a preliminary note, it should be pointed out that there are two authors that I have reviewed but who are not included in any of the above categories, because they do not have a clear position on *when* the status of an unlawfully present asylum-seeker is 'regularised'. On the one hand, Robinson carries out a historical interpretation of Article 31(2) RC (Article 32 VCLT) and asserts that 'the apparent consensus in the Ad Hoc Committee was that "regularized" meant "acceptance of a refugee for permanent settlement" and not the mere issue of a document prior to a final decision as to the duration of his stay'. However, he immediately adds a contextual interpretation of this provision (Article 31(1) VCLT) and argues that:

'It would seem, however, that this interpretation is unnecessarily restrictive because of the wording of Art. 26 which deals, as explained above, with refugees "lawfully in the country".'[331]

Despite rejecting the view that asylum-seekers are only 'regularised' once they are recognised as refugees, he does not provide his own interpretation of when this regularisation occurs.

On the other hand, Weis finds that 'regularisation of status means the grant of a *residence permit*, even if of a *temporary* character'.[332] From his comment, it is not clear whether he considers that unlawfully present asylum-seekers who receive a document that testifies that they have applied for asylum may be regarded as holding a 'residence permit' of a temporary character, or whether a 'temporary residence permit' only refers to documents such as a tourist or student visa.

I will now proceed to examine the arguments of those authors who make their views on the matter more explicit.

[331] Robinson 1953, p. 154.
[332] Weis 1990, p. 220 [emphasis added].

Only recognised refugees

The first category of authors that I have reviewed finds that no asylum-seeker should be regarded as falling within the personal scope of Article 26 RC. These are Maassen, Diehl, Amann and Goodwin-Gil and McAdam.

To begin with the most restrictive view, Maassen contends that neither Article 26 nor Article 31(2) RC accrue to asylum-seekers.[333] Unlike most of the authors analysed here, his reasoning is not related to asylum-seekers' 'lawful' or 'unlawful' presence in the territory, but rather to his rejection of the application of the entire Refugee Convention to this class of migrants. Although he accepts refugee status as being declaratory,[334] he argues that Contracting States of the Convention have the competence to interpret the concept of 'refugee' enshrined in Article 1. This means that the granting of a legal status or a legal position (*Rechtsstellung*) to an asylum-seeker is not linked to the fulfilment of the criteria contained in the refugee definition, but to the *determination* of refugee status by the State. Thus, it is the determination of refugee status which gives a legal position to the asylum-seeker for the first time and allows him to enjoy the rights of the Convention.[335] This interpretation could be classified as a 'contextual' interpretation (Article 31(1) VCLT), as it is based on a systematic reading of the Convention, whereby the substantive rights—including free movement—are linked to his understanding of the refugee definition in Article 1 RC.

Maasen further supports his reasoning with what I would call an 'economic argument'. His concern is that, if the rights in the RC were to be extended to asylum-seekers, 'any alien alleging to be a refugee could claim economic freedoms and other benefits'.[336] He does, however, make an exception to this general rule: asylum-seekers do fall under the scope of Article 33 RC (*non-refoulement*), because this provision is a reflection of the object and purpose of the Convention, i.e. to protect refugees from persecution. If asylum-seekers were expelled to the country where they (allegedly) fear persecution, irreparable harm could be done, and the Convention itself would be meaningless. With regard to the other rights, however, depriving asylum-seekers of them does not lead to 'unreasonable, irreparable harm'.[337]

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[333] Maassen 1997, p. 237.

[334] That is, he accepts that a person is a refugee as soon as she fulfils the criteria contained in the refugee definition in Article 1 RC.

[335] Maassen 1997, p. 47. Interestingly, he also maintains that asylum-seekers do not fall under the personal scope of Article 2 of Protocol 4 ECHR or Article 12 ICCPR (the right to free movement for persons 'lawfully within' the country). His argument is that asylum-seekers 'apply for asylum voluntarily' and, if they disagree with the restriction on movement imposed on them, they can simply withdraw their asylum applications (Maassen 1997, pp. 238-239). This view that migrants who seek asylum do so 'voluntarily' is similar to the argument made by the European Court of Human Rights in the Grand Chamber case *Ilias and Ahmed v. Hungary*, which will be examined in Chapter 3.

[336] Maassen 1997, p. 47.

[337] Maassen 1997, p. 48. Even adopting Maassen's own reasoning, this latter assertion is very problematic. Suppose we accept that expulsion amounting to *refoulement* is the only measure that may cause irreparable harm to the asylum-seeker (and that other measures, such as indefinite detention, do not). Even then, not granting asylum-seekers the right of access to courts —enshrined in Article 16 RC— with the power to review a negative assessment of refugee status may also cause irreparable harm, as the asylum-seeker may be sent to a country where he risks being persecuted due to a faulty assessment of the asylum claim by the administrative authorities.

Amann criticises the aforementioned view, according to which only recognised refugees enjoy the rights of the RC.[338] Nonetheless, she contends that 'regardless of the lawful or unlawful entry' of an asylum-seeker into the territory of a State (i.e. whether or not he complies with border formalities, visa requirement etc.), non-recognised refugees do not fall under the personal scope of Article 26 RC.[339] She carries out a systematic reading of Article 31 RC (the 'context' of the provision, Article 31(1) VCLT), making a distinction between:

(1) 'Illegal entry or presence' (Article 31(1) RC): an asylum-seeker is 'illegal', amongst others, when he remains underground, without the authorities knowing about his presence in the country. He will then be illegal in the sense of criminal law, and may be subjected to penalties if he is discovered. Such penalties may include prosecution, a fine or imprisonment under criminal law.[340]
(2) 'Unlawfully in the country' (heading of Article 31 RC): all asylum-seekers are 'unlawfully in the country' in the sense of the Refugee Convention, because they are only granted a *provisional* right to stay.

Therefore, an asylum-seeker who voluntarily reports his presence to the authorities will be 'legal' under criminal law (and not subjected to the sanctions referred to in Article 31(1)) yet 'unlawful' under the Refugee Convention (and thus liable to restrictions on movement under Article 31(2)). Only when his status is 'regularised' (Article 31(2)), i.e. only when his refugee status is recognised, does the asylum-seeker become 'lawful' in the sense of the RC and enjoy the safeguards of Article 26.[341] Moreover, when a recognised refugee travels to another country with a travel document issued by the host State,[342] he also benefits from the right to free movement within that other country pursuant to Article 26.

Diehl reaches the same conclusion as Amann (i.e. that *all* asylum-seekers are unlawfully present), but through a different train of thought. Rather than a systematic interpretation of Articles 31(1) and 31(2) RC, he makes a systematic interpretation of the two *sentences* in Article 31(2). According to this provision, restrictions can be placed on the movement of unlawfully present refugees until (a) his situation is 'regularised' or (b) he has found admission in another country. When an asylum-seeker finds admission in another country (State B), his legal position in State A is *permanently* clarified (i.e. he loses his legal relationship with State A). Therefore, the equivalent option of leaving the country for good (i.e. to 'regularise' his status in State A) must also constitute a situation in which his legal position is *permanently* clarified. This can only occur with the granting of refugee status.[343] A mere toleration of stay during

[338] Amann 1994. According to the author, this was the 'majority view' at the time that she wrote her book. She rejected this position because of the declarative nature of refugee status: 'If a person can be a refugee before being recognised as such, how could it be that the rights of the Refugee Convention only apply to her *after* being granted refugee status? Moreover, not all the rights in the Refugee Convention are formulated equally' (p. 85).
[339] Amann 1994, p. 144.
[340] *Ibid.*, p. 117. For the meaning of 'penalties', see also Goodwin-Gil 2001, p. 9.
[341] *Ibid.*, p. 122.
[342] *Ibid.*, p. 144. Article 28 RC requires States to issue travel documents to refugees 'lawfully staying' in the territory. For Amann, when the recognised refugee is present in the host State, he is 'lawfully staying' there. When he is travelling to another country carrying his travel document, he is 'lawfully in' the territory of that other State.
[343] Diehl 2021, p. 112.

the asylum procedure, or even a short-term permit such as that of a visitor or a student, does not end the volatile situation in which the asylum-seeker finds himself.[344]

Finally, Goodwin-Gil and McAdam's starting point for ascertaining the personal scope of Article 26 RC differs from that of other authors. They do not give an autonomous meaning to the terms 'lawfully in' and 'regularise' in the Refugee Convention, but look at State practice instead (Article 31(3)(b) VCLT, 'subsequent practice'). Although they concede that 'the ideal of one, true meaning common to all parties (…) remains', they find this ideal elusive, given that the Refugee Convention allows States to retain broad discretion and choice of means.[345] Moreover, absent any internationally agreed meaning of the term 'lawfully in' or any evidence to the contrary in the *travaux préparatoires*, the 'ordinary meaning' (Article 31(1) VCLT) of the term 'lawful' must prevail , which in their view is 'in accordance with domestic law'.[346] Therefore, it falls for each State party to determine, in accordance with domestic law, what is meant by 'lawfully in'.[347]

Once their point of departure has been settled, the authors assert that State practice does not support the view that being allowed to remain on the territory of a State while awaiting the asylum decision amounts to being 'regularised' in that State. Moreover, even if the words 'lawfully in' might at first glance suggest that the benefits of Article 26 are due to any asylum-seeker who holds a temporary permit (e.g. student, visitor or recipient of medical attention), an examination of State practice also leads them to reject this interpretation. Therefore, asylum-seekers do not fall under the personal scope of Article 26 RC, because national approaches confirm that 'in general, the refugee who benefits from free movement [under Article 26] will have been granted a [permanent] residence permit, either following recognition of status or resettlement'.[348]

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[344] *Ibid*., p. 111.

[345] Goodwin-Gil and McAdam 2021, p. 596, fn. 174.

[346] *Ibid*., p. 596. The authors do not however analyse the *travaux préparatoires* to support this assertion.

[347] *Ibid.* This deference to domestic law to interpret a treaty provision has been criticised by other legal commentators. According to these authors, the problem is that domestic laws are too volatile (Edwards 2011b, p. 978), and the term 'lawfully in' in the RC needs to be given a fixed meaning which may or may not coincide with that in domestic law (Marx 2011, p. 1157; Clark and Crépeau 1999, p. 398). Allowing States to withhold rights by simply refusing to consider a refugee as 'lawfully present' would make the rights laid down in the RC meaningless (Slingenberg 2014, p. 111) and undermine the purposes of the Convention (Davy 2011, p. 1305). Moreover, if States could, for example, argue that only refugees holding a residence permit are 'lawfully present', the distinction between 'lawfully present' and 'lawfully staying' would also become futile (Slingenberg 2014, p. 111).

[348] *Ibid.* Hathaway (2021, p. 204, fn. 153) contests Goodwin-Gill and McAdam's reliance on State practice. He argues that, even though (pursuant to the VCLT) State practice may assist in establishing the interpretation of a treaty provision, State practice standing alone cannot give rise to a legal norm which may be relied upon to challenge the applicability of a conflicting treaty stipulation. In my view, however, the main problem with Goodwin-Gill and McAdam's argument is that, on the one hand, they affirm that there is a great 'variety' of State practice that supports their position but, on the other hand, they only quote one judgment from the UK Supreme Court (Goodwin-Gil and McAdam 2021, p. 596, fn. 174). In that case (*ST (Eritrea)* v. Secretary of State for the Home Department [2012] UKSC 12), the Supreme Court declared that Article 32(1) RC (protection from expulsion, which is also reserved for refugees 'lawfully in' the territory) is 'plainly owed to refugees who have been granted asylum'.

Some asylum-seekers

The second category of authors considers that only certain asylum-seekers may benefit from the wider safeguards of Article 26 RC. These authors are Klammer, Battjes, Grahl-Madsen, Slingenberg and Beyani.[349]

For Klammer, as a general principle, only recognised refugees fall under the scope of Article 26. His reasoning, however, is not related to the 'lawful' or 'unlawful' status of asylum-seekers, but to the fact that Article 26 accords the right to free movement 'subject to any regulations applicable to aliens generally in the same circumstances'. In his view, the practical consequence of this clause is that, once the State authorities have received an asylum claim, they need a considerable period to identify another group of non-nationals in a comparable situation to that of the asylum-seeker (Article 31(1) VCLT, the 'object and purpose' of Article 26). Since this period typically coincides with that of the refugee status determination procedure, refugees may only claim their right under Article 26 once the State has recognised them as such. Nonetheless, this general principle has a limit: if the refugee status determination procedure extends beyond a 'reasonable time', then the asylum-seeker can benefit from Article 26. This argument is based on the fact that State parties may not delay access to Convention rights indefinitely by not making a decision on the asylum claim (Article 31(1) VCLT, the 'object and purpose' of the Refugee Convention).[350]

Battjes finds that the 'ordinary meaning' (Article 31(1) VCLT) of the term 'lawfully in' is 'in conformity with domestic law'. He refers to Article 31(4) VCLT, according to which a special meaning shall be given to a term only if it is established that the parties so intended. For Battjes, equating the filing of an application for asylum with 'regularisation' implies assigning a special meaning to a treaty term; yet there is no clear indication that the parties intended to do this.[351] In this sense, then, his point of departure is the same as that of Goodwin-Gil and McAdam: domestic law (Article 31(3)(b), 'subsequent practice') will decide whether or not an asylum-seeker is entitled to the right to free movement under Article 26 RC.

However, while Goodwin-Gil and McAdam consider that—following State practice—only a permanent residence permit under domestic law (i.e. recognition of refugee status) will render the status of the asylum-seeker 'lawful', for Battjes, a *temporary* title to remain under domestic law (such as a visitor or student permit) will suffice. Moreover, he examines EU law (which could be regarded as a regional 'subsequent practice' in the sense of Article

[349] The latter author (Beyani 2000, p. 113) assumes that Article 26 applies to 'those lawfully in the country by virtue of a positive determination of their official status as refugees' and to 'those seeking asylum who have entered the territory of the host State by lawful means prior to the determination of their refugee claim'. However, since he does not give a legal reason for his position, I will not further analyse his work in this section.
[350] Klammer 2022a, p. 621. While this is an interesting proposition, I find an inconsistency in his reasoning. In a different part of the book edited by Hruschka, Klammer (2022b, p. 707) affirms that asylum-seekers who have entered legally to the territory of the State (for instance, with a valid visa) 'may not be subject to restrictions under Article 31(2) RC because they are not unlawfully in the territory'. At the same time, Article 26 would not govern their position because, for the reasons explained above, he finds that, as a rule, only recognised refugees fall under the scope of this provision. If neither Article 31(2) nor Article 26 applied to asylum-seekers who have entered the country legally, the right to free movement of this group would fall outside the scope of the Refugee Convention, which is probably not a result that the author intended to produce with his interpretation.
[351] Battjes 2006, p. 451.

31(3)(b) VCLT) and argues that Article 6 of the Reception Conditions Directive[352] 'regularises' the status of asylum-seekers who have entered the country in an irregular manner. According to this provision, EU Member States must grant asylum-seekers an identification document within three days of the lodging of the asylum claim. Member States may exclude application of this Article

'when the applicant is in detention and during the examination of an application for international protection made at the border or within the context of a procedure to decide on the right of the applicant to enter the territory of a Member State'.

In Battjes' view, this means that 'the document is denied to applicants who are not lawfully present' (because they are in detention or undergoing a border procedure).[353] Once they are released from custody and/or transferred from the border procedure to a regular asylum procedure, they will be given an identification document. Accordingly, in EU Member States, 'the issue of the document that testifies that the applicant's stay is allowed, amounts to "regularisation"'.[354]

For his part, Grahl-Madsen makes a distinction between:

(a) Those asylum-seekers who have complied with migration law requirements, i.e. those who possess proper documentation (such as a passport, visa, student or tourist permit), have observed the formalities at the border and have not overstayed the period for which they have been allowed to stay. These asylum-seekers are always 'lawfully in' the territory: domestic law makes their status 'lawful'. Grahl-Madsen deduces this from 'the aliens law of several contracting States [of the Refugee Convention]' (Article 31(3)(b) VCLT, 'subsequent practice').[355]
(b) Those asylum-seekers who do not fulfil the requirements under domestic migration law are also 'lawfully in' the territory *if* the border authorities dispense them with any or all of them and allow them to stay.[356]

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[352] While in his study he refers to the former 2003 Reception Standards Directive (Council Directive 2003/9/EC), Article 6 of the recast Reception Conditions Directive (Directive 2013/33/EU) maintained the same wording.

[353] Border procedures are a type of asylum procedure generally carried out in transit zones (close to the border of the State or at the airport), during which asylum-seekers are not regarded as having entered the country (the denial of entry constituting a legal fiction) (Cornelisse 2016, p. 74-75). For an analysis of border procedures in the Commission's proposed EU's New Pact on Migration and Asylum, see Cornelisse and Reneman 2021.

[354] Battjes 2006, p. 494-495. However, it can be argued that Article 6 RCD does not entitle States to deny the identification document to *all* unlawfully present applicants. If an asylum-seeker unlawfully enters the country through a land border and applies for asylum later, this does not automatically entail that he will be detained or subjected to a border procedure. Indeed, the Asylum Procedures Directive or APD (Directive 2013/32/EU) only allows for the use of border procedures in specific circumstances (Articles 43, 33 and 31(8) APD). Therefore, these unlawfully present asylum-seekers will also hold an identification document, but this does not necessarily mean that Article 6 RCD 'regularises' their status in the sense of Article 31(2) Refugee Convention.

[355] Grahl-Madsen 1972, p. 357. It is interesting how State practice can be used to support very different arguments. For Grahl-Madsen, State practice leads to the conclusion that asylum-seekers who have any type of permit under domestic law are 'lawfully in'. Although Hathaway agrees with this proposition, he finds that, in addition, 'significant State practice' shows that all asylum-seekers are 'lawfully in' from the moment that they enter the asylum procedure (Hathaway 2021, p. 204, fn. 153). For Goodwin-Gill and McAdam, exactly the opposite follows from State practice: only recognised refugees are 'lawfully in' the territory (*supra* note 348).

[356] *Ibid.* Slingenberg (2014, p. 118) further explains this proposition: 'if the authorities at the border are legally authorised to decide to let a refugee enter, the presence of the refugee is authorised and therefore lawful, even if domestic law prescribes that he has not entered or has no permission to enter in a legal sense'.

(c) Those asylum-seekers who have been detained at the border are not 'lawfully in' the territory until the authorities have released them and allowed them to stay in the territory.[357]
(d) Those asylum-seekers who have entered or are present in the country without an authorisation (either from domestic migration law or from the border authorities) are not 'lawfully present'. Their migratory status is only 'regularised' if they are recognised as refugees by the State. However, 'if the authorities of a given country first recognise an illegal entrant as a bona fide refugee, and only later grant him permission to reside in the country, his status is not regularised in the sense of Article 31(2) until the latter decision has been taken'.[358]

Thus, for an unlawfully present refugee to 'regularise' his status, he needs the State to recognise his refugee status *and* to grant him a residence permit. Typically, both actions will coincide in time, but if they do not, only the latter will 'regularise' the status of the recognised refugee. To justify this argument, Grahl-Madsen gives two reasons. The first one is based on a statement of the UK representative in the Conference of Plenipotentiaries during the drafting process of the RC (Article 32 VCLT, the *travaux préparatoires*), according to which

'for the Ad Hoc Committee that phrase [regularised] had meant the acceptance by a country of a refugee for *permanent settlement*, not the mere issue of documents prior to a final decision as to the duration of his stay'.[359]

The second reason is based on the nature of the asylum procedure (Article 31(1) VCLT, the 'object and purpose' of the Refugee Convention). Grahl-Madsen argues that 'the permission to await the outcome of their procedure (more or less) in liberty can be seen as never intended to affect the alien's status, but merely to avoid needless detention'.[360]

For her part, Slingenberg agrees with the classification made by Grahl-Madsen, but adopts a less restrictive approach with regard to the last category of asylum-seekers. For her, the migratory status of asylum-seekers who have unlawfully entered or stayed in the territory is 'regularised' as soon as their refugee status is recognised.[361] Moreover, she also contends that unlawfully present asylum-seekers who have not received a final decision within *three years* of the lodging of their asylum application are entitled to the benefits of Article 26 RC.[362] She supports this argument on Battjes' proposition that the Refugee Convention sets a time limit of three years for refugee status determination procedures.[363]

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[357] Grahl-Madsen 1972, p. 361. Hathaway (2021, p. 199, fn. 133) finds this conclusion tenable, even though it is 'not based on decisions reached during the drafting process'.
[358] Grahl-Madsen 1963, p. 107.
[359] UN Doc. A/CONF.2/SR.14, 22 November 1951, quoted in Grahl-Madsen 1963, p. 107 [emphasis added].
[360] Grahl-Madsen 1972, p. 362. This is a rather peculiar statement, given that the main reason why asylum-seekers are allowed to await the outcome of their procedure in the territory of the State is that State authorities have an obligation to respect the principle of *non-refoulement* (see below, note 367). Avoiding needless detention would be a secondary reason.
[361] Slingenberg 2014, p. 119.
[362] Slingenberg 2014, p. 132. Note that this is a similar argument to that made by Klammer (*supra* note 350), for whom asylum-seekers will become 'lawfully in' the territory if the asylum procedure extends beyond a 'reasonable period'.
[363] Battjes (2006, p. 468) derives this time limit from Article 7(2) RC and Article 17(2) RC. According to the former provision, refugees enjoy exemption from legislative reciprocity after three years of (simple) residence. Pursuant to Article 17(2), States may no longer apply restrictive measures to refugees for the protection of the

In addition to these minor differences with Grahl-Madsen, Slingenberg gives further grounds to uphold the claim that unlawfully present asylum-seekers may only be regarded as 'regularised' once they have been recognised as refugees. First, she delves deeper into the *travaux préparatoires* of the RC (Article 32 VCLT) and finds two further proofs which support this view (in addition to the assertion of the UK representative in the Conference of Plenipotentiaries). On the one hand, the President of the Conference affirmed that the power to detain [or restrict the movement of an asylum-seeker] under Article 31(2) 'would end when the State, after examining the appropriate files, recognised him as a *bona fide* refugee free from restrictions'.[364] On the other hand, the initial version of Article 31(2) provided that restrictions on movement 'shall only be applied until such time as it is possible to make a decision regarding their legal admission to the reception country'.[365] This shows that the Ad Hoc Committee equated 'regularisation' with a decision regarding legal admission into the country (i.e. recognition of refugee status).[366]

The second and most important argument that she provides is that formal permission to await the outcome of the asylum procedure is only a way to secure compliance with the principle of *non-refoulement* or with asylum seekers' right to an effective remedy. This 'toleration of presence' does not amount to a *positive authorisation* to stay. Such a positive authorisation is required for an asylum-seeker to be 'lawfully in' the territory for two reasons:

(a) The 'context' of Article 31 RC (Article 31(1) VCLT): this provision speaks of refugees who are present 'without authorisation' (para. 1) and of those whose status is not regularised (para. 2). This means that, in order for a refugee to be lawfully in a country, his presence has to be authorised or his status regularised, both of which imply a *positive action*.
(b) The 'object and purpose' of the RC (Article 31(1) VCLT): if mere observance of Article 33 RC (the principle of *non-refoulement*), by tolerating the presence on the territory, would suffice to make the presence of an asylum-seeker 'lawful', this would run counter to the *incremental system* laid down in the RC implying a difference between refugees simply 'present' and refugees 'lawfully present' in the territory.[367]

All asylum-seekers whose asylum application has been admitted

The third category of authors finds that all asylum-seekers may benefit from Article 26 RC as soon as their asylum application has been admitted into the asylum procedure, regardless of whether they entered the country with or without authorisation. Hathaway is the author who elaborates on this argument the most. Three further authors belonging to this group are Costello, Maple and McDonough.[368]

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labour market after three years of (simple) residence. Slingenberg (2014, p. 132, fn. 144) also quotes Edwards (2011a, p. 965), according to whom asylum-seekers should be considered to be *de facto* lawfully staying in the territory where the status determination procedures have been suspended or subjected to long delays.

[364] UN Doc. A/CONF.2/SR.14, 22 November 1951, quoted in Slingenberg (2014, p. 119, fn. 88).

[365] UN Doc. E/AC.32/L.26, 2 February 1950.

[366] Slingenberg 2014, p. 119, fn. 88.

[367] Slingenberg 2014, p. 114.

[368] Edwards (2011c, p. 14) also follows this view. However, her argument is based on her interpretation of the personal scope of Article 12 ICCPR. She contends that the case law of the Human Rights Committee leads to

To begin with Hathaway's view, he contends that an asylum-seeker is 'lawfully in' the territory when he has

'provided the authorities with the information that will enable them to consider his or her entitlement to refugee status—in particular, details of personal and national identity, and the facts relied upon in support of the claim for admission'.[369]

To support his position, the author gives five types of arguments:

(1) Three statements in the *travaux préparatoires* (Article 32 VCLT):
   (a) In the Ad Hoc Committee, the French delegate affirmed that 'a person who was not yet in possession of a residence permit *but who had applied for it and had the receipt for application* was in a regular position. Only those persons who had not applied for it or whose applications had been refused, were in an irregular position'.[370]
   (b) Also in the Ad Hoc Committee, the US delegate concluded that 'persons subjected to these restrictions should nevertheless be considered, for purposes of the future convention, to have been regularly admitted'.[371]
   (c) At the Conference of Plenipotentiaries, the President of the Conference mentioned that, in many countries, there were 'a number of intermediate stages' between 'those legally admitted and those who had entered clandestinely'. For instance, 'certain countries allowed refugees to remain in the territory for a limited period'.[372] Hathaway interprets this assertion as meaning that, for the President of the Conference, 'lawful presence' included refugees subject to 'intermediate stages', such as asylum-seekers awaiting the outcome of the refugee status determination procedure.[373]

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the conclusion that asylum-seekers fall under the scope of Article 12 ICCPR, and that the term 'lawfully in' in Article 26 of the Refugee Convention must be given the same meaning as the term 'lawfully within' in the Covenant. Having recourse to another treaty to interpret the Refugee Convention is possible pursuant to Article 31(3)(c) VCLT, which reads: 'there shall be taken into account, together with the context: (…) any relevant rules of international law applicable in the relations between the parties'. However, since I am going to provide my own interpretation of the case law of the Human Rights Committee in Section 2.3, I have excluded Edward's arguments from the present analysis.

[369] Hathaway 2021, p. 198.

[370] UN Doc. E/AC.32/SR. 15, 6 February 1950, quoted by Hathaway (2021, p. 198) [emphasis added]. Battjes (2006, p. 451) contests Hathaway's reliance on this statement, because '[the French delegate] did not address the question of what meaning should be attributed to the term "lawful" in the Refugee Convention; rather, he explained which categories of refugees would be regarded as "regularly admitted" under French domestic law. The mentioned statement was not acclaimed as the proper meaning of the term "lawful" in the Refugee Convention'. I agree with Battjes' view.

[371] UN Doc. E/AC.32/SR.15, 6 February 1950. When quoting the statement of the US delegate, Hathaway (2021, p. 198) replaces the words 'persons subjected to these restrictions' with the words 'refugees who travel without pre-authorisation to a State party, but who are admitted to a process intended to assess their suitability for admission to a state' (i.e. unlawfully present asylum-seekers). In my view, however, the statement of the US delegate should be read in connection with the previous question made by this same delegate: he had asked the French representative whether, under French law, an alien *regularly admitted* to the country could be forced to reside in a given area (UN Doc. E/AC.32/SR.15, 6 February 1950). Therefore, I believe that the statement of the US delegate should be read as meaning that a refugee *regularly admitted* to the country (e.g. with a tourist permit or express authorisation by the border authorities) will be 'lawfully in' the country *even if he is subjected to restrictions on movement*.

[372] UN Doc. A/CONF.2/SR.14, 22 November 1951.

[373] Hathaway 2021, p. 198, f. 131. Interestingly, however, Slingenberg (*supra* note 364) quotes another statement of the President of the Conference of Plenipotentiaries which leads her to conclude that the President believed exactly the opposite, namely that only recognition of refugee status 'regularises' the position of an asylum-seeker in an irregular situation. These divergences between the authors show the slippery nature of the *travaux*

(2) State practice and practice of the European Union (Article 31(3)(b) VCLT, 'subsequent practice'): Hathaway quotes two cases of the Full Federal Court of Australia, two cases of the South African Supreme Court of Appeal, one case of the Irish Court of appeal and the judgment of the Court of Justice of the European Union *Arslan*, where the Court stated that 'an asylum seeker (…) has the right to remain in the territory (…), and cannot therefore be considered to be 'illegally staying'".[374]
(3) The 'ordinary meaning' (Article 31(1) VCLT) of the term 'lawfully present' : Hathaway states that it is difficult to see 'on the basis of the plain meaning of the words' that a person granted official permission to be present while her asylum claim is being assessed is not lawfully present.[375]
(4) The need to respect the five levels of attachment in the Refugee Convention (jurisdiction, simple presence, lawful presence, lawful stay and durable residence) (Article 31(1) VCLT, the 'object and purpose' of the Refugee Convention). He believes that a definition of 'lawfully in' which requires the asylum-seeker to hold a permanent residence permit 'conflates lawful presence with lawful stay, thereby eliminating one of the Convention's five levels of attachment'.[376]
(5) The weight of scholarly opinion[377] and the views of UNHCR.[378]

Costello quotes Hathaway to support her view that an asylum-seeker is 'lawfully in' the territory when he has 'met the host State's requirements to have her or his entitlement to protection evaluated'.[379] For her, 'the central premise informing Articles 26 and 31 of the Refugee Convention is that asylum-seekers once admitted to the asylum procedure are regularised'.[380] She finds that the fact that several European governments contest the

préparatoires of the Refugee Convention and the difficulties in drawing on them to interpret the personal scope of Article 26 RC.

[374] Hathaway 2021, p. 200. Nonetheless, he recognises that State practice is not unanimous. In this regard, he quotes the case law of the *Bundesverfassungsgericht*, which has consistently held that Article 26 RC accrues only to recognised refugees. See Judgments of the Federal Constitutional Court 80, 182 (6 June 1989), para. 187 and 96, 10 (10 April 1997), para. 58. He also quotes as counter-examples of his own position the aforementioned judgment *ST (Eritrea)* v. Secretary of State for the Home Department [2012] UKSC 12, a subsequent judgment from the UK Court of Appeal and a decision of the Full Federal Court of Australia (Hathaway 2021, p. 203, fn. 152). The fact that Hathaway quotes two judgments of the Full Federal Court of Australia to support his view and another judgment of the same court as a counter-example shows the complexity of the issue.

[375] Hathaway 2021, p. 205.

[376] It is interesting to observe how other authors use a similar argument to support a different interpretation of the term 'lawfully in'. Slingenberg states that considering all asylum-seekers admitted into the asylum procedure as 'lawfully present' (even those who have entered irregularly into the country) would 'run counter to the *incremental system* laid down in the Refugee Convention, implying a difference between refugees simply present and lawfully present' (*supra* note 367) [emphasis added]. For his part, Diehl (2021, p. 112) argues that 'if Article 31(2) grants less freedom of movement than Article 26, then Article 26 cannot apply to the same group of persons. The *gradual classification* must be respected' [emphasis added]. This leads him to conclude that only recognised refugees fall under the scope of Article 26.

[377] In the same way that Hathaway claims that Goodwin-Gil and McAdam place too much emphasis on State practice (*supra* note 348), these two authors criticise Hathaway for implying that 'scholarly opinion rather than State practice, in all its variety, should govern the interpretation of lawful presence' (Goodwin-Gil and McAdam, p. 596, fn. 174). I find this an unfair criticism, given that Hathaway gives more examples of State practice to support his position than Goodwin-Gil and McAdam do to support theirs.

[378] See *infra*, note 396.

[379] Costello 2017, p. 44.

[380] Costello 2017, p. 48.

applicability of Article 26 to asylum-seekers is a 'distortion of the scope of the Refugee Convention'.[381]

Maple agrees with Goodwin-Gill and McAdam in their observation that, in practice, States appear to focus more on national legislation to determine who is 'lawfully in' the territory for the purposes of the Refugee Convention (i.e. a person is lawfully within a State when she has conformed to national law). However, he does not use 'subsequent practice' (Article 31(3)(b) VCLT) as a means to interpret the personal scope of Article 26 RC, but rather draws from Hathaway's argument related to the levels of attachment in the Refugee Convention (Article 31(1) VCLT, the 'object and purpose' of the Convention) to support the view that asylum-seekers are entitled to the safeguards of Article 26 as soon as their application is admitted. He contends that this interpretation is especially appropriate to help solve the problems that asylum-seekers face in African countries, which potentially have the 'severest restrictions on freedom of movement' in the world.[382]

Finally, McDonough builds on Hathaway's interpretation and argues that, because EU Member States record asylum-seekers' fingerprints, register their reside and carry out formal asylum procedures, this further proves (Article 31(3)(b) VCLT, 'subsequent practice') that asylum applicants are 'regularised' once admitted into the procedure, since all these factors create sufficiently strong ties between them and the host State.[383]

All asylum-seekers, even before their asylum application has been admitted

The fourth group of authors takes the reasoning of the latter group one step further to argue that all asylum-seekers are 'lawfully in' the territory as soon as they present themselves to the authorities, even before the State has admitted the asylum application into the procedure and started to examine the merits of the claim. These authors are Noll and Zieck.

For Noll, 'regularisation' means '*any* decision implying at least temporary non-removal'.[384] In my view, this interpretation encompasses a broader category of asylum-seekers than the one offered by Hathaway and others. Indeed, States already take a decision not to remove an asylum-seeker from its territory before deciding whether or not his asylum application is admissible. For instance, in Spain, migrants who apply for asylum are given a white document, which attests that the police cannot remove the person from the territory. After a certain time, if their application is found to be admissible, they are granted a red card which proves their status as asylum-seekers awaiting the resolution on the merits of their claim.

Noll's argument is based on the 'ordinary meaning' and 'context' of Article 31(2) of the Refugee Convention (Article 31(1) VCLT): for him, the term 'status' in this provision (i.e. 'until their *status* in the country is regularised') does not refer to the status of being a refugee, because Article 31 RC is specifically concerned with the problem of asylum-seekers who are in an irregular situation due to their unlawful entry or presence, not with refugee status. He considers that being 'unlawful' necessarily means being 'removable'. Since asylum-seekers are

[381] Costello 2012, p. 275.
[382] Maple 2016, p. 7.
[383] McDonough 2009, p. 538.
[384] Noll 2011, p. 1272 [emphasis added].

non-removable pursuant to Article 33 RC from the very beginning, 'the grant of this intermittent protection transmutes the irregular status in which the unlawfully entering or staying [asylum-seeker] found himself'.[385]

Zieck also fits into the category of authors for whom asylum-seekers are 'lawfully in' the territory from the moment that they present themselves to the authorities; given that she quotes Noll when interpreting the term 'regularised' in Article 31(2).[386] She finds that the term 'lawfully in' means 'presence that is not unlawful'.[387] To support this view, she quotes a sentence written by Grahl-Madsen that refers to Article 18 RC (Article 31(1) VCLT, the 'context' of Article 26). This provision enshrines the right to self-employment of refugees 'lawfully in' the territory. According to Grahl-Madsen, its personal scope 'comprises all refugees who are physically present in the territory, provided that their presence is *not unlawful*. It includes short-time visitors and even persons merely travelling through the country'.[388]

All migrants who fulfil the refugee definition, even before they apply for asylum

Finally, among all the authors analysed here, Marx gives the broadest interpretation of the personal scope of Article 26. For him, an asylum-seeker is lawfully in the territory 'as soon as he or she is present in the territory of the State'.[389] Unlike Noll, he does not refer to the need for the authorities to make a 'decision implying at least temporary non-removal'.[390] Thus, it seems that he does not consider it necessary for the asylum-seeker to present himself to the authorities and ask for asylum before he can enjoy the protection of Article 26. If the asylum-seeker fulfils the definition of 'refugee' in Article 1 of the Refugee Convention, he will be 'lawfully present' (Article 31(1) VCLT, the 'context' of Article 26). He grounds this interpretation on the fact that refugee status is declaratory, i.e. that 'a refugee does not become a refugee because of recognition, but is recognised *because* he or she is a refugee' (Article 31(1) VCLT, 'object and purpose' of the Refugee Convention).[391]

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385 Noll 2011, p. 1273.
386 Zieck 2018, p. 77.
387 Zieck 2018, p. 81.
388 Grahl-Madsen 1963, p. 45, quoted in Zieck 2018, p. 81 [emphasis added]. It is interesting to see how Grahl-Madsen is quoted by different authors in support of four different interpretations of the personal scope of Article 26 RC. As we have seen, Slingenberg (*supra* note 366) builds on Grahl-Madsen's doctrine to make the argument that 'lawful' equates to a *positive rule of law* —while Zieck quotes him to defend the exact opposite view (i.e. that 'lawful' is equal to *presence which is not unlawful*). For his part, Hathaway (2021, p. 204, fn. 153) finds that 'Grahl-Madsen's conclusion mirrors the approach advanced here' (i.e. that asylum-seekers are regularised as soon as their application enters the asylum procedure). He quotes another statement by Grahl-Madsen: 'a refugee's presence may, on the face of it, be illegal according to some set of rules (e.g. aliens legislation), yet legal within a wider frame of reference (e.g. international refugee law)'. Finally, Amann (1994, p. 145, fn. 357) uses Grahl-Madsen's doctrine to support the position that only recognised refugees are 'lawfully in' the territory. She affirms that '[Grahl-Madsen] states that in the period up to a State decision in accordance with Article 31(2), the refugee's position can be described neither as "lawfully" nor as "unlawfully" and that only with the positive decision is the refugee's position really declared lawful'. In my view, the most plausible interpretation of Grahl-Madsen's doctrine is the one presented above: he acknowledged that some asylum-seekers could be lawfully present but, if they had entered the country in an irregular manner, they would only be regularised if the State recognised them as a refugee *and* granted them a permanent residence permit.
389 Marx 2011, p. 1156.
390 *Supra* note 384.
391 Marx 2011, p. 1156. Maple (2016, p. 7) disagrees with Marx, considering that his interpretation 'dismisses the different levels of attachment' of the rights enshrined in the Refugee Convention.

The views of UNHCR

To conclude Section 2.2.1, the views of UNHCR on the personal scope of Article 26 deserve a separate sub-section from that of legal doctrine, given the key role that UNHCR plays in providing interpretative guidance on the Refugee Convention and in promoting a harmonised application of its provisions by State parties.[392]

The UN Agency has not always held the same position on who qualifies as being 'lawfully in' the country. In its first report on the matter, UNHCR took a similar approach to Grahl-Madsen and Slingenberg: presence is 'lawful' when the asylum-seeker has complied with the domestic regulations concerning possession of passports or other travel documents, border formalities have been observed and he is not overstaying the prescribe period; or, alternatively, when the authorities have officially dispensed with these formalities.[393] In 2001, the Agency opened the way for a more expansive interpretation of 'lawfully in' when it stated that, *at a minimum*, the 1951 Convention provisions that are not linked to lawfulness, such as the right to free movement under Article 31(2), would apply to unlawfully present asylum-seekers 'in so far as they relate to humane treatment and respect for basic rights'.[394]

In 2007, UNHCR made a third-party submission to the European Court of Human Rights in *Saadi v. UK*, where it affirmed (like Hathaway and others) that Article 26 governs the position of asylum-seekers 'once domestic law formalities for access into the determination procedures have been complied with'. The Agency argued that this interpretation is consonant with the 'object and purpose' (Article 31(1) VCLT) of Article 31(2), which is to encourage regularisation of unlawfully present refugees.[395] The organisation has maintained this position since then.[396] In 2014, it added that this interpretation is consonant not only with the purpose of Article 31(2) but also with the object and purpose of the whole RC, which is 'to assure the widest possible exercise by [refugees] of the rights contained therein'.[397] It also considered that this interpretation is 'confirmed by the drafting history of the Convention' (Article 32 VCLT).[398] To support this assertion, it quoted the statement by the French delegate in the Ad Hoc Committee.[399]

There is, however, one isolated instance in which UNHCR followed the view (comparable to that of Noll and Zieck) that asylum-seekers are 'regularised' even before their application has been admitted to the procedure. Indeed, in its third-party submission to the High Court of Kenya in the case *Kituo Cha Sheria and Others v. The Attorney General*, the Agency stated that

'[u]nder international refugee law, both refugees and asylum-seekers, in respect of the latter this includes those who are registered as asylum-seekers as well as those *who have announced their intention to*

[392] Chetail 2012, p. 64.
[393] UNHCR 1988, p. 4.
[394] UNHCR 2001a, p.1.
[395] UNHCR 2007a, para. 27.
[396] For instance, in its Annotated Comments to the recast Reception Conditions Directive (Directive 2013/33/EU) the Agency affirmed that 'Article 26 of the 1951 Refugee Convention provides for the right to freedom of movement and choice of residence for refugees *and asylum-seekers*, *regardless of whether they entered the territory with or without authorisation*' (UNHCR 2015b, p. 13) [emphasis added]. See also UNHCR 2011a, para. 4.1.3; UNHCR 2012, p. 13; UNHCR 2015a, p. 8; UNHCR 2016, p. 3.
[397] UNHCR 2014a, p. 48.
[398] UNHCR 2014a, p. 48, fn. 81.
[399] *Supra* note 370.

seek asylum but who have yet to be registered officially because of, for example, administrative delays, are considered "lawfully in" the territory for the purposes of benefiting from [Article 26].'[400]

Finally, in its third-party submission in *Saadi v. UK*, the UNHCR suggested the existence of an additional requirement for asylum-seekers to fall under the personal scope of Article 26: not only did their asylum application have to be admitted, but they also needed to comply with the requirements of Article 31(1) RC (the non-penalisation clause). Indeed, it considered that asylum-seekers whose application has been admitted to the asylum procedure are only 'regularised' 'if the other criteria in Article 31 are met'.[401] However, UNHCR has never again referred to this requirement, and we may thus conclude that it does not support this proposition any longer.[402] This reflection takes us to the second section of this chapter, where the non-penalisation clause will enter the scene.

2.2.2 Do 'criminalisable asylum-seekers' have a right to free movement? The relationship between Article 31(1) and 31(2) of the Refugee Convention

After examining the various positions concerning the terms 'lawfully in' and 'regularised', the next step is to delve deeper into the personal scope of the right to free movement enshrined in Article 31(2) RC. This provision states that 'The Contracting States shall not apply to the movement of *such refugees* restrictions other than those which are necessary (…)'. The question then arises: which refugees is this article referring to? Is it limited only to refugees who fall under the scope of Article 31(1), or does it apply to *all* refugees unlawfully present in the territory? To explore this issue, it is necessary first to explain the personal scope of Article 31(1) RC, which prohibits States from penalising refugees under criminal law for their illegal entry or presence, such as by imposing a fine or imprisonment.[403]

Following Article 31(1):

'The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.'

Thus, an asylum-seeker who is unlawfully present in the territory may not be penalised under criminal law for his illegal entry or presence if:

(1) He is *coming directly* from a territory where his life or freedom was threatened: there seems to be a consensus that this term only excludes asylum-seekers who have been accorded refugee status or temporary asylum in a transit State to which they can safely return.[404]
(2) He presents himself *without delay* to the authorities: this is not a strict temporal requirement. It means that the asylum-seeker willingly submits to the authorities of the

[400] UNHCR 2013, p. 14 [emphasis added].
[401] UNHCR 2007a, para. 26.
[402] UNHCR 2011a, para. 4.1.3; UNHCR 2012, p. 13; UNHCR 2015a, p. 8; UNHCR 2016, p. 3. Interestingly, when Hathaway (2021, p. 201, fn. 143) quotes UNHCR's submission in *Saadi v. UK*, he omits the phrase 'if the other criteria in Article 31 are met', which might indicate that he also does not think that this is relevant for the UNHCR any longer.
[403] Goodwin-Gil 2001, p. 9.
[404] Noll 2011, p. 1257; UNHCR Expert Roundtable 2001, p. 255; Hathaway 2021, p. 498.

State, i.e. that there is a genuine intent to do so as soon as possible, taking into account the language, cultural and other barriers that many asylum-seekers face in the process of seeking asylum. It is, in essence, a requirement of good faith.[405]

(3) He shows *good cause* for his illegal entry or presence: the asylum-seeker must explain why it was not possible for him to obtain authorised entry, for instance through a visa application. This explanation should demonstrate either that authorised entry was impossible to attain or that it was not possible to obtain it in time to avoid persecution.[406]

In the interest of simplicity, I will refer to asylum-seekers who do *not* comply with one of these conditions as 'criminalisable asylum-seekers', given that they may be subjected to penalties under criminal law. Conversely, those who are unlawfully present in the territory but have met these requirements will be referred to as 'non-criminalisable asylum-seekers'.

Similar to the debate surrounding the personal scope of Article 26, legal scholars also disagree on whether criminalisable asylum-seekers enjoy the right to free movement under Article 31(2) of the Refugee Convention.

According to several authors, *only* asylum-seekers who comply with the requirements of Article 31(1) (non-criminalisable asylum-seekers) fall under the scope of Article 31(2). They interpret the term 'such refugees' in Article 31(2) as only alluding to those who fall under the scope of the non-penalisation clause in the previous paragraph.[407] Hathaway supports this by referring to the 'ordinary meaning' (Article 31(1) VCLT) of the term 'such refugees',[408] while Zieck focuses on the 'object and purpose' (Article 31(1) VCLT) of Article 31 of the Refugee Convention. She argues that the goal of this provision is to incentivise unauthorised asylum-seekers to present themselves before the authorities, and that '[i]t is not plausible to expect States to observe the safeguards of Article 31(2) RC to those who are neither lawfully present nor present themselves to the authorities'.[409]

These authors assume that States can restrict the movement of individuals as part of their sovereign power. Article 31(2) limits that power by granting a right to free movement to asylum-seekers[410] (which can only be restricted if it is 'necessary'[411]). Therefore, since criminalisable asylum-seekers do not fall under the scope of Article 31(2), the consequence is that the State may restrict their movement without having to justify that this restriction is

[405] Noll 2011, p. 1259; Robinson p. 152.
[406] Robinson 152; Grahl-Madsen 1963, pp. 103-104; Noll 2011, p. 1261.
[407] Goodwin-Gil 1986, p. 208; Goodwin-Gil 2001, p. 10; Beyani 2000, p. 112.
[408] He notes that the French text '*ces refugiés*', contrasting with '*tels réfugiés*' used in Articles 8 and 19 of the Refugee Convention, points to an especially proximate connection between the class defined by Article 31(1) and the rights set by Article 31(2) (Hathaway 2021, p. 522, fn. 1146).
[409] Zieck 2018, p. 70. Moreover, in her view, substantive coherence between the paragraphs also leads to this conclusion: Article 31(1) identifies the beneficiaries of the immunity from penalties for illegal entry or presence, and Article 31(2) continues to spell out what else States should refrain from doing *regarding the same persons*.
[410] Zieck 2018, p. 70: 'Art. 31 is a restriction of the *usual powers* regarding limiting freedom of movement' [emphasis added].
[411] Battjes 2006, p. 499: '[A]pplication to refugees who came directly from a persecution State (and presented themselves without delay to the authorities of the host State, and showed good cause for their illegal entry) is allowed only if "necessary" [in the sense of] Article 31(2) RC'. The meaning of the term 'necessary' will be explored in Chapter 4.

'necessary'. The UNHCR Expert Roundtable on Article 31 RC, which was organised in 2001, came to the same conclusion.[412]

For their part, Costello, Klammer and Noll have a different point of departure. They assume that free movement is the default position for any refugee, and that State authorities can only restrict the movement of asylum-seekers *because* Article 31(2) permits them to do so. Based on this premise, they argue that the personal scope of Article 31(2) must be broader than that of Article 31(1), and that criminalisable asylum-seekers do enjoy the protection of Article 31(2). According to them, the opposite interpretation would lead to a contradictory result where the State would be allowed to impose penalties on criminalisable asylum-seekers under the first paragraph but not to restrict their movement under Article 31(2).[413] Conversely, only the 'relatively privileged' category of non-criminalisable asylum-seekers would be subject to additional restrictions under Article 31(2),[414] which they find 'manifestly absurd'.[415] To avoid this inconsistency, they interpret the term 'such refugees' in Article 31(2) as referring to the heading of Article 31 of the Refugee Convention (Article 31(1) VCLT, the 'context' of the provision), which covers 'refugees unlawfully in the territory' and therefore includes both criminalisable and non-criminalisable asylum-seekers.[416]

Grahl-Madsen also posits that Article 31(2) RC encompasses all asylum-seekers unlawfully in the territory. However, unlike the aforementioned authors, his argument is based on the *travaux préparatoires* (Article 32 VCLT). He observes that the first sentence of Article 31(2) achieved its final form in the Ad Hoc Committee —i.e. in the early drafts of the provision—, while the non-penalisation clause in Article 31(1) was later added by the Conference of Plenipotentiaries. He further states that there is no indication in the *travaux* to suggest that the Conference intended to restrict the applicability of Article 31(2) in the same manner as that of paragraph 1.[417]

Finally, Zieck proposes a middle ground between both approaches. She points out that, in situations where there is a mass influx of refugees, it may not be possible for individual asylum-seekers to immediately present themselves to the authorities. Therefore, she suggests that—*only* in cases of mass influx—asylum-seekers should be presumed to be eligible for the

412 UNHCR Expert Roundtable 2001, p. 254.
413 Costello 2017, p. 44; Klammer 2022, p. 707; Noll 2011, p. 1268.
414 Costello 2017, p. 44
415 Noll 2011, p. 1268.
416 Costello 2017, p. 44; Klammer 2022, p. 707; Noll 2011, p. 1268. Hathaway (p. 522, fn. 1146) criticises this interpretation as being driven by an 'instrumentalist concern' aimed at granting the benefits of Article 31(2) to as many refugees as possible.
417 Grahl-Madsen 1963, p. 105. I do not agree with this argument, since the President of the Conference of Plenipotentiaries affirmed: '[P]aragraph 2 of the original text of [Article 31] meant that Contracting States should not apply to the *refugees referred to in paragraph 1* restrictions of movement other than those which were necessary' (UN Doc. A/CONF.2/SR.14, 22 November 1951). For his part, Hathaway (2021, p. 522, fn. 1146) notes that the joint Belgian-American redrafting of Article 31 considered by the Ad Hoc Committee read: 'Provided that such refugees present themselves without delaty to the authorities and show good cause for their entry, the High Contracting Parties shall not impose penalties (…). The High Contracting Parties nonetheless reserve the right to apply to *such refugees* necessary police measures regarding their accommodation, residence, and movement (...)' (UN Doc. E/AC.32/L.25, 2 February 1950).

benefits of Article 31(2) RC. This presumption can be rebutted if it is later determined that they do not meet the conditions of Article 31(1).[418]

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To conclude Section 2.2 on the personal scope of the right in the Refugee Convention, it is evident that many different meanings have been ascribed to the terms 'lawfully in' (Article 26), 'regularised' (Article 31(2)) and 'such refugees' (Article 31(2)). Nonetheless, the 'lowest common denominator' among all authors is that, at the very least, asylum-seekers who are unlawfully present in the territory but comply with the requirements of the non-penalisation clause (non-criminalisable asylum-seekers)[419] are entitled to the right to free movement under Article 31(2) of the Convention.[420]

2.3 The personal scope of the right in the ICCPR

The next two sections of this chapter will turn to the interpretation of the personal scope of the right to free movement as provided by the Human Rights Committee and the European Court of Human Rights.

While the Refugee Convention addresses the right to free movement for both refugees 'lawfully in' and 'unlawfully in' the territory, there is only one provision in the ICCPR regulating this right for persons 'lawfully within' the territory. This further narrows the opportunities for asylum-seekers to come under the scope of the right to free movement under the ICCPR compared to the Convention. Article 12(1) ICCPR reads:

'1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.'

The Human Rights Committee has been 'very cautious'[421] when interpreting the personal scope of this article. In its General Comment No. 27 on the right to free movement, the Committee affirmed that 'the question whether an alien is lawfully within the territory of a State is a matter governed by domestic law'. In what may be seen as drawing an analogy with Article 31(2) RC, the Committee added that 'an alien who entered the State illegally, but whose status has been *regularised*, must be considered to be lawfully within the territory for the purposes of Article 12'.[422]

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[418] I find this solution intriguing. However, I see a potential issue with it. Once the State has granted an asylum-seeker the benefits of Article 31(2) RC, it could be challenging to retrospectively determine whether the reason for his failure to immediately present himself to the authorities after arrival was due to the chaotic situation resulting from the mass influx or because he had an intention to remain underground. It would thus prove difficult for the State to rebut the presumption of the applicability of Article 31(2) RC.

[419] That is, those who have not been accorded refugee status or temporary asylum in a country to which they may safely return, have voluntarily submitted to the authorities in good faith and have explained why it was not possible for them to obtain authorised entry.

[420] Except for Maassen (*supra* note 333), who finds that neither Article 31(2) nor Article 26 applies to asylum-seekers, because asylum-seekers are only entitled to the right not to be *refouled* under Article 33 RC.

[421] Clark 2004, p. 596

[422] General Comment No. 27, para. 4. Note that only *unlawful* migrants are excluded from the right to free movement. This means that lawful migrants may not be excluded from the personal scope of Article 12. For instance, in its Concluding Observations relating to Armenia (CCPR/C/79.Add.100 (1998)), the Committee

The HRC thus leaves the matter wholly to the discretion of national law: an asylum-seeker will be 'lawfully within' the territory once he has complied with the requirements for entry into the territory laid down in domestic law, or where he has entered irregularly but the authorities have regularised his status. When exactly that regularisation occurs (e.g. after the admission of the asylum application or after recognition of refugee status) is also a question for domestic law to decide.[423]

Despite giving deference to domestic law, the HRC does have a role to play in offering guidance on the personal scope of Article 12 ICCPR. When an individual communication regarding the right to free movement of a migrant reaches the HRC, in order to decide on the admissibility of the complaint, the Committee first needs to examine whether the domestic law of the defendant State considers that migrant to be 'lawfully within' the territory. As such, I will now analyse the two decisions (technically termed 'views') in which the Committee has undertaken this task, so as to draw some conclusions.

The first view of the HRC on this topic was issued in the case *Celepli v. Sweden*.[424] It concerned a Turkish man who had received an expulsion order in 1984 due to allegations of his involvement in terrorist activities. This resulted in the loss of his lawful status under the Swedish Alien Act applicable at the time.[425] However, the expulsion order could not be enforced due to fears that he, as a Kurd, would be exposed to political persecution in Turkey (*non-refoulement*) and 'a decision was taken to allow the author to stay'.[426]

The Committee noted that

'the author's expulsion was ordered on 10 December 1984, but that this order was not enforced and that the author was allowed to stay in Sweden (…). The Committee is of the view that, following the expulsion order, the author was *lawfully in the territory* of Sweden, for purposes of article 12, paragraph 1, of the Covenant (…)'.[427]

In General Comment No. 27, the Committee cited *Celepli v. Swerden* as an example of a case where the unlawful status of a migrant had been 'regularised'.[428] In sum, the HRC concluded

expressed concern that the Armenian Constitution guaranteed freedom of movement only to Armenian citizens (Taylor 2020, p. 333, fn. 55).

[423] Hathaway finds that the HRC does not fully defer the determination of 'lawfulness' to domestic law. He cites General Comment No. 27, in which the Committee affirms that domestic law 'may subject the entry of an alien to the territory of a State to restrictions, *provided they are in compliance with the State's international obligations*' [emphasis added by Hathaway]. From this last statement, he concludes that 'a State's general right to determine the scope of lawful presence is thus constrained by the impermissibility of deeming presence to be unlawful in circumstances when the Refugee Convention and other norms of international law deem presence to be lawful' (Hathaway 2021, p. 206). However, I believe that the Committee's reference in this sentence ('the State's international obligations') is not to the personal scope of Article12, but rather to the *safeguards* that restrictions on movement must comply with, as enshrined in Article 12(3) ICCPR (e.g. that they are 'provided by law'; see Section 4.4 of Chapter 4 for an analysis of these safeguards).

[424] *Celepli v. Sweden*, Communication No. 456/1991, 18 July 1994.

[425] Section 30 of the Aliens Act (Utlänningslag 1980:376) provided that an alien who is suspicious of belonging to a terrorist group shall be *rejected* ('avvisa', which in Swedish means to reject, repudiate, to turn somebody away).

[426] Statement by the Swedish Government in its submissions to the Committee, *Celepli v. Sweden,* para 4.3

[427] *Celepli v. Sweden*, para. 9.2 [emphasis added].

[428] General Comment No. 27, p. 1.

that Mr. Celepli fell under the personal scope of Article 12—albeit with some nuances that will be analysed below[429]—and declared the case admissible.

A very similar situation arose in *Karker v. France*, a decision concerning a Tunisian recognised refugee in France who was subjected to an expulsion order, as he was suspicious of supporting an Islamic organisation that employed violent methods. Like Mr. Celepli, he also lost his lawful status. The expulsion order was however not enforced and he was allowed to stay. In its considerations, the Committee simply assumed without further discussion that Article 12 was applicable.[430]

From these two cases, it can be inferred that the Committee takes a flexible approach to the concept 'lawfully within the territory'. It is clear that a migrant will be considered 'lawful' only if domestic law regards him as such: Sweden did not deny that Mr. Celepli was lawfully within the territory under Swedish law, nor did France with regard to Mr. Kanker.[431] Nonetheless, for the Committee to conclude that the applicants were 'lawfully within the territory', it was sufficient that the authorities, in compliance with domestic law, had allowed them to stay in order to avoid violating the principle of *non-refoulement*. We could say that the stay of Mr. Celepli and Mr. Karker was 'tolerated' because, even though the authorities initially wished to expel them, they were faced with a *fait accompli*. The same is arguably true for unlawfully present asylum-seekers, whose stay States are generally obliged to tolerate in order to comply with the principle of *non-refoulement*.[432]

Therefore, my reading of the HRC's decisions is that asylum-seekers do fall under the personal scope of Article 12 ICCPR if, alternatively:

(a) They enter the State in accordance with domestic law (e.g. with a visa and observing border formalities);
(b) They irregularly enter the State but the authorities tolerate their stay to prevent breaching the principle of *non-refoulement*; provided that domestic law provides them with some form of a right to stay. In these cases, the Committee will equate this 'toleration of stay' with a 'regularisation' of the status of the asylum-seeker in the sense of General Comment No. 27.

While conclusion (b) might be perceived as not contributing much to the argument—domestic law has, after all, the last word on the matter—, it will acquire a different light once I compare it with the approach of the European Court of Human Rights.

Finally, two Concluding Observations of the HRC are worth mentioning in which the Committee referred to the internal movement of asylum-seekers. The Committee renders these types of observations in response to the periodic reports submitted by particular States.

[429] See Section 2.5.2
[430] *Karker v. France*, Communication No. 833/1998, 26 October 2000, para 9.2.
[431] In *Celepli v. Sweden* (para. 4.5), Sweden expressly recognised that Mr. Celepli was lawfully within the territory. In *Karker v. France* (para. 4.5), France 'acknowledge[d] that the compulsory residence order limits Mr. Karker's freedom of movement within the meaning of article 12 of the Covenant'. In other words, France conceded that the applicant was lawfully within the territory, and that he thus fell under the scope of Article 12(1).
[432] Slingenberg 2014, p. 120.

In its Concluding Observations concerning Lithuania in 1997, the Committee 'expresse[d] its concern that restrictions are imposed on the freedom of movement of asylum-seekers', and recommended that 'provisions which restrict freedom of movement in a manner incompatible with article 12 of the Covenant should be repealed'.[433] Similarly, in its Concluding Observations relating to Denmark in the year 2000, the Committee 'note[d] that asylum-seekers in Denmark are often restricted or discouraged from choosing a residence in specific municipalities or from moving from one municipality to another'. It went on to recommend that 'Denmark should ensure that any such measures are applied in strict compliance with article 12 of the Covenant'.[434]

It could be argued that, if the Committee asked these two States to comply with Article 12 in relation to movement restrictions on asylum-seekers, it is because it views all asylum-seekers as being included in the personal scope of Article 12 (i.e. as 'lawfully within the country'), *regardless of domestic law*. However, one should not derive general interpretations of the Covenant from the Committee's responses to State reports. When the HRC considers individual complaints and renders its views, it applies procedures comparable to those of international courts.[435] In contrast, the examination of State reports is not a quasi-judicial procedure.[436] Moreover, unlike the views, the Concluding Observations do not limit themselves to address violations of the ICCPR—many of the issues taken up by it concern matters of general policy.[437] Therefore, the Concluding Observations are not a mechanism to identify and sanction violations[438] and, as opposed to its views, do not generate a comprehensive jurisprudence on how the obligations under the Covenant should be interpreted.[439]

2.4 The personal scope of the right in Protocol 4 to the ECHR

Mirroring the language of Article 12(1) ICCPR, Article 2(1) of Protocol 4 ECHR also circumscribes the scope of the right to free movement to individuals 'lawfully within' the territory. This provision reads:

'1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.'

Some migrants in an irregular situation have attempted to use this provision in order to challenge a refusal of entry or a deportation order. However, the European Court of Human

[433] UN Doc. CCPR/C/79/Add.87, para 15.
[434] UN Doc. CCPR/CO/70/DNK, para 16.
[435] Ulfstein 2012, p. 98.
[436] Kälin 2012, p. 48.
[437] *Ibid.*, p. 59.
[438] *Ibid.*, p. 60.
[439] Ulfstein 2012, p. 115. For its part, General Comments have a similar rank to the Committee's views, given that the General Comments are, for the most part, a summary of the Committee's views. Buegenthal (2001, p. 386) notes that 'the General Comment has become a distinct juridical instrument, enabling the Committee to announce its interpretations of different provisions of the Covenant in a form that bears some resemblance to the advisory opinion practice of international tribunals'. He also observes that these General Comments are relied upon by the Committee when publishing Concluding Observations on particular States, indicating a sort of hierarchy between these two instruments. Clark (2004, p. 597) also points out that General Comments are authoritative interpretations of the ICCPR.

Rights has consistently held that Article 2(1) 'does not guarantee the right of a foreigner to enter or reside in a particular country, and it is inapplicable to the situation of a foreigner who has no residence permit'.[440]

As to when a person is 'lawfully within the territory', in a similar manner to the HRC, the ECtHR (following the former European Commission) has found in several cases that 'it is for the domestic law and organs to lay down the conditions which must be fulfilled for a person's presence in the territory to be considered "lawful"'.[441] Hence, the Court does not give an autonomous Convention meaning to the term 'lawful' and, like the HRC, 'leaves the definition of lawful presence entirely to domestic law'.[442] However, in the specific cases considered by it, the Court must ascertain whether the domestic law of the defendant State did, in fact, recognise the applicant as a lawfully present individual. As such, I will review the cases where the applicant was an asylum-seeker in order to derive conclusions from them.

In *Paramarathan v. Germany* and in *Omwenyeke v. Germany*, the applicants were asylum-seekers who had been granted a provisional residence permit under German law known as *Aufenthaltsgestattung*. This permit is only intended to allow the person to be present in the territory 'for the purpose of the asylum procedure'.[443] Moreover, the word '*gestatten'* means 'to allow', but also 'to not mind'. This indicates that the *Aufenthaltsgestattung* is a permit with the sole purpose of tolerating the presence of the asylum-seeker during the asylum procedure in German territory. Despite this, in both judgments, the Commission and the Court found that this level of toleration was sufficient for the asylum-seeker to be considered 'lawfully within' the territory,[444] thereby adopting a flexible approach similar to that of the HRC.

This approach can also be observed in *Aygün v. Sweden* and in *U and S v. Germany*. The former case involved a rejected asylum-seeker with a deportation order in Sweden, whose expulsion remained unenforced due to the risk of political persecution in Turkey. The second case concerned a rejected asylum-seeker in Germany who had submitted a subsequent asylum application and was issued provisional permission to stay (*Duldung*). In both instances, the State was arguably only 'tolerating' the presence of the asylum-seeker: the first case is similar to *Celepli* and *Karker*, analysed above; as to the second case, the term '*Duldung*' translates to

[440] *Yildirim v. Romania*, no. 21186/02, 20 September 2007, The Law, para. 3; *Sissojeva and Others v. Latvia*, no. 60654/00, 9 November 2000, The Law, para. 2.
[441] *Paramarathan v. Germany*, no. 12068/86, 1 December 1986, The Law, para. 1; *U. and S. v. Germany*, no. 11825/85, 1 December 1986, The Law, para. 1; *Aygün v. Sweden*, no. 14102/88, 9 October 1989, The Law, para. 1; *Omwenyeke v Germany*, no. 44294/04, 20 November 2007, The Law, para. 1; *Sissoyeva and Others v. Latvia*, no. 60654/00, 9 November 2000, The Law, para. 2; *Balta v. France*, no. 19462/12, 16 January 2018, para. 25.
[442] Slingenberg 2022b, p. 8. The author notes that, even when the Court finds that an applicant is 'lawfully within the territory' (such as *Tatishvili v. Russia*, no. 1509/02, 22 February 2007), it does so on the basis of domestic law (in that case because the applicant had a special legal status in Russia, that of a citizen of the former USSR).
[443] Article 55(1) Asylum Act (BGBI. I p. 2477, last amended on the 9-7-2021).
[444] *Paramarathan v. Germany*, The Law, para. 1: 'aliens provisionally admitted (…) pending proceedings to determine whether or not they are entitled to a residence permit under the relevant provisions of domestic law, can (…) be regarded as lawfully in the territory (…)'; *Omwenyeke v. Germany*, The Law, para. 1: 'his stay on German territory was provisionally authorised'.

'toleration' in German. The Commission and the Court, once again, deemed that this level of toleration was enough for regarding the asylum-seeker as 'lawfully within' the territory.[445]

It appears, however, that the Court has adopted a more restrictive interpretation in recent cases. It is important to note that these recent judgments do not concern the right to free movement under Article 2(1) Protocol 4 ECHR. Nonetheless, they may provide an insight into trends in the Court's interpretation of the legal status of asylum-seekers, as they relate to a similar issue to the right to free movement: the right to liberty of migrants, which can be constrained 'to prevent [their] effecting an *unauthorised* entry into the country' (Article 5(1)(f) ECHR).

From a formalistic perspective, it could be argued that the meaning of 'unauthorised' under Article 5(1)(f) need not be the same as that of '[un]lawful' under Article 2(1) Protocol 4 ECHR, since each provision uses different terms. Nonetheless, a contextual interpretation of Article 2(1) Protocol 4, pursuant to Article 31(1) VCLT, seems to favour resolving the dichotomy of 'lawfully/unlawfully within the territory' in the same manner as the dichotomy 'authorised/unauthorised entry'. Such an interpretation would bring consistency to the Convention system and avoid seemingly incoherent situations where an asylum-seeker could be 'authorised' for the purposes of detention but 'unlawful' for the purposes of the right to free movement or vice versa. Moreover, the parallelism between the case law of the ECtHR under Article 5(1)(f) and under Article 2(1) of Protocol 4 seems to indicate that the Court interprets both concepts in the same way: while, as shown above, the Court leaves it for national law to determine when a person is to be considered 'lawful' under Protocol 4, in the cases on Article 5(1)(f) the Court has also stated that 'the question as to when the first limb of Article 5 ceases to apply, because the individual has been granted formal authorisation to enter or stay, is largely dependant on national law'.[446]

In the rulings analysed, the Court had to evaluate whether domestic law considered asylum-seekers as 'unauthorised' in the sense of Article 5(1)(f). The first of the cases in which the Court turned to a more restrictive approach than in *Omwenyeke* was *Suso Musa v. Malta* (2013). In this judgment, the Court examined a Maltese law stipulating that an applicant for international protection 'shall be allowed to enter or remain in Malta pending a final decision of his application'. Subsequently, in *Aboya Boa Jean v. Malta* (2019) the Court analysed a newly adopted law which contained a provision with the same wording. Similarly, in *M.H. and Others v. Croatia* (2022), the Court assessed a Croatian law according to which 'a[n] [asylum] seeker shall have the right to stay in Croatia from the day of expressing an intention to seek international protection until the decision on his or her application becomes enforceable'. In both *Suso Musa* and *M.H.*, the Court held:

[445] *Aygün v. Sweden*, The Law, para. 1; *U and S v. Germany*, The Law, para. 1: 'aliens who are, as the present applicant, provisionally allowed to remain (…) can (…) be regarded as being lawfully in the territory (…)'.
[446] *Mahamed Jama v. Malta*, no. 10290/13, 26 November 2015, para. 138, judgment quoted in my previous work on the right to liberty (Ruiz Ramos 2020).

'It *may well be* that what was intended was for the provision to *reflect international standards* to the effect that an asylum seeker may not be expelled pending an asylum claim (...), without necessarily requiring that an individual be granted *formal authorisation to stay* or *to enter* the territory.'[447]

In *Abdoya Boa Jean v. Malta* the Court used more conclusive language, stating that

'Regulation 16(2) of the Procedural Standards Regulations *reflects* international standards to the effect that an asylum seeker may not be expelled pending an asylum claim without necessarily requiring that an individual be granted formal authorisation to stay or to enter the territory.'[448]

Thus, in my view, the Court now makes a distinction between:

a) The right of an asylum-seeker to remain in the territory under domestic law: even if domestic law provides for this right, it is only a reflection of the principle of *non-refoulement* ('international standards'), and it is not sufficient for an individual to be considered 'lawfully within the territory' for the purposes of Article 2(1) Protocol 4 ECHR. It is a toleration of the presence of the individual but not a 'formal authorisation'.
b) A formal authorisation to stay under domestic law: in the case of asylum-seekers, this authorisation can either derive from a residence permit under domestic law, such as a work or student permit, or, if the asylum-seeker has arrived irregularly to the territory, from the recognition of refugee status. Indeed, unlike irregularly arriving asylum-seekers, recognised refugees are not simply tolerated in the territory. The intention of the State when granting refugee status is not only to uphold the principle of *non-refoulement* but also to facilitate the integration of the individual into society and provide him with a stable legal status. Thus, it seems that, for the Court, only asylum-seekers with a valid residence permit under domestic law and recognised refugees are 'lawfully within' the territory for the purpose of Article 2(1) Protocol 4 ECHR.

Therefore, unlike its previous approach in *Omwenyeke*, the Court does not consider that an asylum-seeker is 'lawfully within the territory' if his stay is simply tolerated—even if domestic law allows him to stay in order to protect him from *refoulement*. Instead, there must be some form of formal authorisation akin to a permanent or semi-permanent residence permit. This interpretation contrasts to the more flexible approach of the Human Rights Committee analysed above.

On a different note, an asylum-seeker will also be considered to be 'lawfully within the territory' in the sense of Article 2(1) of Protocol 4 ECHR if he possesses a 'formal authorisation to enter'.[449] While the Court does not provide a specific definition of this term, it can be inferred that an asylum-seeker will have a 'formal authorisation to enter' if he complies with border formalities, such as presenting a valid passport or visa, and demonstrating sufficient income.

However, if the border crossing point is at an airport rather than on land, that lawful status will not be attained until the asylum-seeker leaves the airport and enters mainland territory. This conclusion may be derived from the judgment *Piermont v. France*. In that case, the

[447] *Suso Musa v Malta*, no. 42337/12, 23 July 2013, para. 98; *M.H. and Others v. Croatia*, nos. 15670/18 and 43115/18, 23 July 2022, paras. 243-244 [emphasis added].
[448] *Abdoya Boa Jean v. Malta*, no. 62676/16, 2 April 2019, para. 60 [emphasis added].
[449] *Suso Musa v Malta*, para. 98; *M.H. and Others v. Croatia*, paras. 243-244; *Abdoya Boa Jean v. Malta*, para. 60.

applicant, a German national and Member of the European Parliament, travelled to New Caledonia at the invitation of local elected representatives. After passing through immigration control, where the border police stamped her passport, another police officer stopped her and served her with an order excluding her from the territory. The reason stated was that the applicant was involved in political activism in favour of Polyneasian independence and against French nuclear testing in the region, and was therefore 'likely to cause public disorder'. The ECtHR ruled that the applicant could not rely on Article 2(1) Protocol 4 because she was not yet 'lawfully within the territory', given that

'at an airport (…) a passenger remains liable to checks for as long as he remains within the perimeter. In this instance Mrs. Piermont was stopped just after her passport had been stamped and the impugned order was served on her *before she had left the airport*, since she was still held in an office under the police guard'.[450]

Finally, the question arises as to the status of an asylum-seeker who presents himself at an official border crossing point but does not meet the formal requirements for entry. In the judgment *M.K. and Others v. Poland* the Court made an interesting statement in this regard. The case concerned three Russian nationals of Chechen origins who arrived at an official Polish border crossing and made multiple attempts to lodge an application for asylum. However, the Polish authorities refused to register their claims and issued administrative decisions turning them away to Belarus. When examining whether Poland had breached Article 3 ECHR (the principle of *non-refoulement*), the Court stressed that

'pending an application for international protection, a State *cannot deny access* to its territory to a person presenting himself or herself at a border checkpoint who alleges that he or she may be subjected to ill-treatment if he or she remains on the territory of the neighbouring State'.[451]

While this paragraph could be interpreted as meaning that States have an obligation to regularise the status of all asylum-seekers who present themselves at the border, this ruling needs to be read in conjunction with the aforementioned findings in *Suso Musa*, *M.H.* and *Abdoya Boa Jean*: granting access to an asylum-seeker for the sole purpose of protecting him against *non-refoulement* does not 'necessarily require[e] that an individual be granted formal authorisation to (…) enter the territory'.[452] Thus, the obligation 'not to deny access' cannot be equated to an obligation to grant a 'formal authorisation to enter'. For example, border authorities might direct an asylum-seeker to an asylum border procedure in a transit zone close to the border or at an airport, where he will be protected against *refoulement* but, at the same time, will not be considered as lawfully present on the territory.[453] Therefore, an asylum-seeker who presents himself at the border without complying with border formalities is not

[450] *Piermont v. France*, no. 15773/89 and 15774/89, 27 April 1995, para. 49.
[451] *M.K. and Others v. Poland*, nos. 40503/17, 42902/17 and 43643/17, 23 July 2020, para. 179 [emphasis added]. The Court sets one exception to this rule: the asylum-seeker may be denied access and removed to a third State if the authorities 'examine thoroughly the question of whether or not there is a real risk of the asylum-seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against *refoulement*' (para. 173). For a more detailed analysis of the judgment, see Gatta 2020.
[452] *Suso Musa v Malta*, para. 98; *M.H. and Others v. Croatia*, paras. 243-244; *Abdoya Boa Jean v. Malta*, para. 60.
[453] In EU law, asylum border procedures are regulated in Article 43 of Directive 2013/32/EU (Asylum Procedures Directive). During a border procedure, asylum-seekers are not considered to have formally entered the country (the refusal of entry constituting a legal diction) (Cornelisse 2016, pp. 74-75). See Cornelisse and Reneman 2021 for an examination of border procedures in the proposed New Pact on Migration and Asylum.

automatically 'lawfully within the territory' in the sense of Article 2(1) Protocol 4, unless domestic law provides otherwise.[454]

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To summarise Sections 2.3 and 2.4, it is important to highlight that (1) both the HRC and the ECtHR leave it for domestic law to decide when an asylum-seeker is 'lawful'; (2) in their assessment of domestic law, both the Committee and the Court will find that an asylum-seeker is 'lawful' if he has a formal authorisation to enter or stay; (3) the ECtHR does not consider that a mere article in domestic law granting the asylum-seeker the right to stay during the asylum procedure amounts to 'regularising' his status, while the HRC does.

2.5 The principle of 'conditional lawfulness'

Thus far, I have examined the situations in which an asylum-seeker may be entitled to the right to free movement under the Refugee Convention, the ICCPR and Protocol 4 to the ECHR. However, a further point needs to be analysed here, as it significantly impacts the issue of including and excluding asylum-seekers from the personal scope of this right. Indeed, these three international treaties allow States to make the 'lawfulness' of the person's migratory status *conditional* on complying with restrictions on movement. This means that if a lawfully present asylum-seeker leaves the area assigned to him, he will lose his lawful status and thus cease to fall under the personal scope of the right to free movement. I will refer to this rule as the 'principle of conditional lawfulness'. First, I will systematically examine the legal sources of this principle, and then provide my own analysis of its meaning and how I believe it should be interpreted.

2.5.1 The source of the principle in the Refugee Convention

The principle of conditional lawfulness in the Refuge Convention may be derived from the *travaux préparatoires* (Article 32 VCLT), as there are several instances in which the drafters referred to it.

During the discussions in the Ad Hoc Committee, the Venezuelan delegate raised a concern regarding refugees who were admitted to his country *on the condition that* they work and reside on a particular farm. He wondered what legal consequences would arise if the refugee were to leave the farm and move to the town. In his view, despite the refugee having infringed the conditions of his admission, the State would find itself powerless to take action against him because he would be 'lawfully in the country' and thus enjoy the protection of the right to free movement under Article 26 of the Convention.[455] The delegate of the International Refugee Organisation (IRO) also addressed this issue and proposed the following solution:

'[Refugees admitted conditionally in a State] were legally in the country as long as they observed the conditions governing their stay there; if they violated those conditions, their position of course would

[454] It should be recalled that the Court's starting point in examining the personal scope of Article 2(1) of Protocol 4 is that 'it is for the domestic law and organs to lay down the conditions which must be fulfilled for a person's presence in the territory to be considered "lawful"' (*Balta v. France*, para. 25).
[455] UN Doc. A/CONF.2/SR.14, 22 November 1951.

become that of refugees illegally present in the country [and would thus cease falling under the scope of Article 26]'.[456]

The Ad Hoc Committee adopted this position in its reports to the Conference of Plenipotentiaries on two occasions. Referring generally to the expression 'lawfully within the territory', which appears in various articles of the Convention, it stated that

'The expression "lawfully within their territory" throughout this draft convention would exclude a refugee who, while lawfully admitted, has over-stayed the period for which he was admitted or was authorized to stay *or who has violated any other condition attached to his admission or stay*.'[457]

Specifically in relation to the personal scope of Article 26, the Committee

'decided that it was not always necessary to insert in the text definitions of expressions used. However, since some question was raised as to the phrase "lawfully in the territory", the Committee expressed the view that, in any event, a Contracting State may consider that a refugee is no longer lawfully in its territory if he is in contravention of terms imposed as a condition of his admission or sojourn.'[458]

There was also a proposal by the Working Group of the Ad Hoc Committee to include a reference to the conditions of entry in the text of Article 26. The proposal read: 'the Contracting States shall accord to refugees lawfully in the territory the right to choose their place of residence and to travel freely within their territory, subject to any regulation governing aliens generally *and to the conditions under which such refugees were admitted*'.[459] Although this explicit reference was not ultimately included in the text, in my view, the Committee made it clear in the aforementioned documents that this is how it interpreted Article 26 RC.[460]

On a different note, support for this principle can be found in legal doctrine. Weis, who played a significant role in the preparation of the Convention,[461] derives from the *travaux* that 'Article 26 (...) does not affect the conditions imposed on refugees for their admission'.[462] Grahl-Madsen confirms that if a refugee who reports himself or is apprehended at the border without proper documentation is explicitly admitted into the country, he is lawfully present 'so long as he complies with the conditions fixed for his sojourn'.[463] Slingenberg also argues that an asylum-seeker who has been allowed to enter to the country by border authorities is

[456] UN Doc. E/AC.32/SR.21, 9 February 1950.
[457] UN Doc. E/1618; E/AC.32/5 (Annex II, Article 10), 17 February 1950 [emphasis added].
[458] UN Doc. E/A.32/8; E/1850, 25 August 1950. See however Hathaway (2021, p. 876, fn. 362) and Zieck (2018, p. 84) find that the travaux do not support the conclusion that States may impose conditions on the entry of refugees.
[459] UN Doc. E/AC.32/L.32, 1950.
[460] On the contrary, Hathaway (2021, p. 876, fn. 362) and Zieck (2018, p. 84) find that this omission must mean that the drafters did not support the proposal according to which States may attach conditions to the lawful entry or stay of refugees.
[461] Weis 1990, p. 5.
[462] Weis 1990, p. 149.
[463] Grahl-Madsen 1972, p. 348. He also refers to the *travaux préparatoires* (E/AC.32/SR.15 and A/CONF.2/SR.1) and asserts that 'in some countries certain classes of aliens (e.g. migrant workers) may only be admitted *on the condition that* for a given period they confine themselves to specified occupations or specified regions of the country' (Grahl-Madsen 1963, p. 65) [emphasis added].

lawfully present 'provided that such refugees do not violate any requirements imposed on them as a condition for their admission'.[464]

Furthermore, there is some support for this principle in State practice (Article 31(3)(b) VCLT). For instance, the US District Court for New Jersey interpreted that the term 'lawfully in the territory' in the Refugee Convention would 'exclude a refugee who, while lawfully admitted, had violated *any other condition* attached to his admission or stay'.[465]

It should be underlined that not all authors share this view. Marx makes a distinction between human rights law and the Refugee Convention, arguing that under human rights treaties, migrants who infringe the conditions laid down in immigration law for their entry or stay are not lawfully within the territory. This is because human rights law takes account of the sovereign power of States to control the entry of non-nationals. He argues that, in contrast, the Refugee Convention has a different logic that does not entitle States to impose conditions for the entry of refugees.[466] In a similar vein, Hathaway suggests that States cannot condition access to refugee protection on the refugee's preparedness to accept constraints on freedom of movement because refugees, unlike most non-citizens, have a right to claim protection in a State party *under the terms of the Refugee Convention*.[467] Given that, in his view, the Refugee Convention grants all asylum-seekers (whose application has been admitted to the procedure) the rights attached to 'lawfully present' refugees (such as the right under Article 26), this means that restrictions on movement cannot function as a condition of entry to the territory.

2.5.2 The source of the principle in the ICCPR and in Protocol 4 ECHR

The Human Rights Committee, in its General Comment on the Position of Aliens under the Covenant (No. 15), expressed the view that 'consent for entry may be given *subject to conditions* relating, for example, *to movement*, residence and employment'.[468] Such conditions were present in the two relevant cases before the Committee (*Celepli v. Sweden* and *Karker v. France*). As explained above, in both instances, the applicants' expulsion was not enforced, which, according to the HRC, made their stay 'lawful' in the sense of Article 12(1) ICCPR. However, the lawfulness of their migratory status was made conditional on their compliance with a restriction on movement. Mr. Celepli had to remain within the boundaries of the municipality of Haninge and, at a later point, within those of the county of Stockholm. Similarly, Mr. Karker was ordered not to leave the department of Finistère.[469] In *Celepli*, the Committee nuanced its conclusion that the applicant's status was lawful:

'The Committee is of the view that, following the expulsion order, the author was lawfully in the territory of Sweden, for purposes of article 12, paragraph 1, of the Covenant, *only under the restrictions* placed upon him by the State party.'[470]

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[464] Slingenberg 2014, p. 118.
[465] Kan Kim Lin v Rinaldi 361 F. Supp. 177, 186 (1973); aff'd., 493 F.2d (1974) [emphasis added].
[466] Marx 2011, p. 1156-1157.
[467] Hathaway 2021, p. 391 [emphasis added].
[468] General Comment No. 15, para. 6 [emphasis added].
[469] *Celepli v. Sweden*, para. 2.1; *Karker v. France*, para. 2.1.
[470] *Celepli v. Sweden*, para 9.2. [emphasis added].

This finding coincided with the Swedish Government's submission, who argued that the applicant's stay after the issuance of the expulsion order was 'only lawful under the *condition* that it did not extend beyond the borders of first the Haninge community and, later, the borders of the county of Stockholm'.[471]

However, in my view, the Committee did not correctly apply its own interpretation of Article 12(1) to the particular case of Mr. Celepli. If his status remained 'lawful' only as long as he complied with the condition of staying in Haninge or Stockholm, the logical conclusion would have been for the Committee to declare the application inadmissible, given that Mr. Celepli had been sentenced on several occasions by national courts for not complying with these restrictions on movement.[472] The Committee nonetheless declared the application admissible and analysed the merits of the claim, i.e. whether the State had justified the limitation in accordance with Article 12(3) ICCPR.[473]

Turning to Protocol 4 ECHR, the ECtHR in *Omwenyeke v. Germany*—building on several decisions of the former European Commission[474]—has also endorsed the principle according to which non-nationals

'can only be regarded as "lawfully" in the territory *as long as they comply with the conditions* to which their admission and stay are subjected.'[475]

Although the Court did not directly quote it in its ruling, this was, in fact, the interpretation of the term 'lawfully within the country' adopted by the drafters of Protocol 4, who stated:

'The Committee [of Experts] agreed that an alien admitted under certain conditions of entry (not necessarily conditions about residence or movement) which he transgresses or fails to comply with, can no longer be regarded as being 'lawfully' in the country.'[476]

In the specific case of *Omwenyeke*, as noted above, the Court considered that the 'tolerated status' of the applicant under German domestic law (*Aufenthaltsgestattung*) was sufficient for his presence to be considered 'lawful'. However, the German State had not simply granted the applicant permission to remain: it had attached to it the condition that he must stay in the city of Wolfsburg.[477] Therefore, if Mr. Omwenyeke wished to challenge the conformity of the restriction on movement with the safeguards of Article 2(3) of Protocol 4, he would

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[471] *Celepli v. Sweden*, para. 7.1. [emphasis added].
[472] *Celepli v. Sweden*, para. 7.4.
[473] See Chapter 4 for an examination of the part of the decision relating to Article 12(3) ICCPR. On the other hand, in *Karker v. France*, the Committee did not refer to whether or not the lawful migratory status of the applicant in France had been made conditional on his compliance with the restriction on movement. The Committee's silence on this matter may be attributed to the fact that, in its submissions to the Committee, France had acknowledged that the residence order fell within the scope of Article 12 ICCPR, without arguing that the lawfulness of the status was territorially limited to the department of Finistère.
[474] *Paramarathan v. Germany*, The Law, para. 1: 'aliens provisionally admitted to a certain district of the territory of a State, pending proceedings to determine whether or not they are entitled to a residence permit under the relevant provisions of domestic law, can only be regarded as 'lawfully' in the territory as long as they comply with the conditions to which their admission and stay are subjected; *Aygün v. Sweden*, The Law, para. 1 and *U and S v. Germany*, The Law, para. 1: 'aliens who are, as the present applicant, provisionally allowed to remain in a certain district of the territory can only be regarded as being 'lawfully' in the territory as long as they comply with the conditions to which their admission and stay are subjected'.
[475] *Omwenyeke v. Germany*, The Law, para. 1 [emphasis added].
[476] Council of Europe Doc. DH/Exp (62) 17, 3 September 1962.
[477] *Omwenyeke v. Germany*, The Law, para. 1.

have had to stay in Wolfsburg for his complaint to be admissible before the European Court. He did not, however, comply with this condition and left the city several times. Unlike the HRC in *Celepli*, the Court in *Omwenyeke* did apply the principle of conditional lawfulness to the particular case, concluding that

'when outside this city he was therefore not "lawfully" within German territory (…), unless he had previously obtained leave to leave the district (…). As he had not obtained such leave for the journeys outside the city of Wolfsburg in respect of which he had been convicted, he had not been 'lawfully' within the territory of Germany at those times and could not therefore rely on the right to liberty of movement under Article 2 of Protocol No. 4.'[478]

Finally, it is worth referring to legal doctrine which confirms the findings of the HRC and the ECtHR. Quoting *Celepli v. Sweden*, Schabas affirms that 'the lawful residency of non-nationals may be limited to a part of a State's territory'[479] Additionally, Harris, O'Boyle and Warbrick explain that the term 'lawfully within the territory' in Article 2 of Protocol 4 to the ECHR was inserted to 'take into account the sovereign power of States to control the entry of aliens. Article 2 does not apply to an illegal entrant, whilst an alien who infringes the conditions attaching to his entry into a State's territory is not lawfully within it'.[480]

2.5.3 Analysis of the principle

Hathaway argues that, from a legal perspective, making the lawful status of non-nationals conditional on their compliance with restrictions on internal movement is difficult to justify, since this approach is based on the premise that individuals may elect to decline rights that are explicitly defined as inalienable. Drawing an analogy with the prohibition of inhuman treatment and the prohibition of slavery under Articles 7 and 8 of the ICCPR, he states:

'It is difficult to imagine anyone making the argument that a non-citizen could agree to become a slave, or to be subjected to cruel or inhuman treatment, in exchange for permission to enter a foreign state's territory. Yet under the Covenant, the only legal difference between these rights and Art. 12 is that the latter is derogable during time of national emergency, not a distinction which is relevant to the question of renouncing inalienable rights'.[481]

I find this argument convincing from the perspective of human rights law theory. However, as shown above, this is not the approach taken by the HRC and the ECtHR, and the *travaux*

[478] *Omwenyeke v. Germany*, The Law, para. 1.
[479] Schabas 2019, p. 304. Hathaway (2021, p. 881, fn. 389) criticises Schabas: 'Schabas suggests, without any analysis, that the lawful residency of non-nationals may be limited to a part of a State's territory'. However, I do not believe that his statement is made without any analysis, given that he quotes the relevant paragraphs of *Celepli v. Sweden* in which the Human Rights Committee states this principle.
[480] Harris *et al.* 2018, p. 944. The decision in *Omwenyeke* has been criticised by several authors. See Pelzer and Pichl (2016, p. 100); Stahmann (2016, para. 4) and McDonough (2009, p. 522). Tsourdi (2016, p. 13, fn. 45) qualifies the Court's decision as 'very restrictive'.
[481] Hathaway 2021, p. 881, fn. 389. See also Ashford's concept of 'subsistence exchange contracts', which she defines as the situation where destitute individuals agree to forego their negative human rights in exchange for basic subsistence. She contends that such contracts are not truly 'voluntary', as refusal would leave destitute individuals in unsustainable conditions (Ashford 2015, pp. 515-534). Slingenberg (2023) applies this concept to the situation of asylum-seekers living in the Greek reception and identification centres, where they must return every evening if they wish to be provided with shelter. Returning to these centres every day, she argues, is involuntary, as the alternative option would imply a situation of severe destitution in the Greek islands. Therefore, asylum-seekers are forced to trade away their freedom in return for basic subsistence.

préparatoires of the Refugee Convention indicate that this treaty also entitles States to impose restrictions on movement as a condition of entry. Does this conditionality empty the right to free movement of any meaning? According to Van Dijk *et al.*, 'a right the enjoyment of which completely depends on the discretion of the authorities is not a right, but only a favour'.[482] To avoid this emptying of the right, I suggest that a clear distinction be made between:

a) Restrictions on movement placed *as a condition* for lawful entry or stay (Restrictions Type A).
b) Restrictions on movement that are *not a condition* for lawful entry or stay (Restrictions Type B)

If a lawfully present asylum-seeker[483] is subjected to a Restriction Type A, he will only fall under the personal scope of Article 26 RC, Article 12(1) ICCPR and Article 2(1) Protocol 4 ECHR as long as he remains within the assigned area. If he wishes to rely on one of these provisions to challenge the legality or proportionality of the measure before a national court, the ECtHR or the HRC, he will have to stay in the assigned area from the moment of his arrival until the end of the court or Committee proceedings. This has also been pointed out by De Bruycker *et al.*:

'[A]sylum seekers cannot contest such restrictions on the basis of Article 2, Protocol Nr. 4 to the ECtHR once they have violated their terms due to the irregular character of their stay. This interpretation greatly restricts the protective scope of this article. However, the Court has not yet pronounced itself on a case brought by an applicant who had obeyed such restrictions, thus would be "lawfully within the territory", but would contest whether they pursue a legitimate aim or are necessary or proportionate.'[484]

It is to be noted that, even if an asylum-seeker subjected to a Restriction Type A leaves the assigned area without permission and loses his lawful status, he will still be able to challenge the measure under Article 31(2) of the Refugee Convention before a national court, as the right to free movement under this provision accrues to unlawfully present refugees.

On the other hand, if a lawfully present asylum-seeker is subjected to a Restriction Type B, he will be able to challenge the measure under Article 26 RC, Article 12 ICCPR and Article 2 Protocol 4 ECHR, *regardless of whether or not he remains* within the assigned area. This is the fundamental difference between Restrictions Type A and Type B.

The question then arises: how to distinguish between them? In order to do so, it will be necessary to examine the particular case, taking into account whether domestic law explicitly states that violating the restriction on movement results in the loss of 'lawful' status.

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[482] Van Dijk, van Hoof, van Rijn and Zwaak 2006, p. 941. Arenas Hidalgo (2005, p. 864) finds that the restrictions on movement as a condition of entry cannot be so broad as to prevent or disproportionately restrict the protected right. Therefore, unlike Van Dijk *et al.*, she considers that these conditions are 'not merely a question of State grace'.

[483] Under the Refugee Convention, whether (and when) the asylum-seeker is 'lawfully in' the country will depend on the theoretical approach chosen for interpreting this term (see all the different approaches above). Under the ICCPR, for the asylum-seeker to be lawfully present, it is sufficient that his stay is tolerated in compliance with the principle of *non-refoulement* and that domestic law regards that 'tolerated presence' as a lawful presence. Under Protocol 4 ECHR, something more than this is required (see above).

[484] De Bruycker, Bloomfield, Tsourdi and Pétin 2015, p. 33.

However, if this is not explicitly stated, my view is that Restrictions Type A is characterised by a *direct link* between the permission to enter or stay and the restriction on movement, while Restrictions Type B do not have such a direct link. To identify the type of restriction, the following factors could serve as guidance:

(a) The wording of the domestic law and/or decision of the authorities that makes the entry or stay of the asylum-seeker lawful;
(b) Whether the same provision in the domestic law that makes the presence of the asylum-seeker 'lawful' also imposes the restriction, or whether the limitations on movement are foreseen in a different provision;
(c) Whether the decision of the authorities that makes the presence of the asylum-seeker 'lawful' is the same or different from the decision that imposes the restriction on movement.

For example, in *Omwenyeke v. Germany*, the applicant entered Germany unlawfully and applied for asylum. The authorities granted him a provisional residence permit (*Aufenthaltsgestattung*) based on Article 56(1) of the Asylum Law (*AsylGesetz*).[485] In the Court's view, this provisional residence permit was sufficient for his stay to be 'lawful' (although the case law has become more restrictive since then, as mentioned earlier). Article 56(1) reads:

'The provisional residence permit is territorially restricted to the district of the Aliens Office in which the institution responsible for reception of the alien is located.'[486]

There is a direct link between the *provisional residence permit* and the restriction on movement. The residence permit itself is territorially restricted, making it a Restriction Type A. The Court in *Omwenyeke* also identified this restriction as one that made the asylum-seeker's lawful status conditional on his compliance with the measure (i.e. not leaving the city of Wolsburg), which is why it considered the application inadmissible, as the applicant had not stayed in the city.

Another example of a Restriction Type A can be found in *Celepli v. Sweden*. In that case, the expulsion order was not enforced and '*instead*, the Swedish authorities prescribed limitations and conditions concerning the Kurds' place of residence. Under these restrictions, the author was confined to his home municipality (…)'.[487] It is clear that this was a decision to allow Mr. Celepli to stay *in his municipality*, rather than a decision to tolerate his presence in the whole country with subsequent restrictions on his movement. Hence, there was a direct link between the permission to stay and the restriction on movement.

On the other hand, consider the following example to illustrate a Restriction Type B: At Madrid-Barajas airport, a third-country national is allowed entry under a three-month tourist visa in accordance with the Schengen Border Code.[488] He leaves the perimeter of the airport

[485] Asylum Act (BGBI. I p. 2477, last amended on the 9-7-2021).
[486] Personal translation.
[487] *Celepli v. Sweden*, para. 2.1. [emphasis added].
[488] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). *OJ L 77, 23.3.2016, p. 1–52*. A third-country national is a person who does not have the nationality of one of the Member States of the European Union, nor the nationality of one of the countries associated with the EU (Article 2(6) of the Code).

and goes to the city of Madrid. Following the ECtHR's interpretation in *Piermont v. France* the third-country national would at that moment already be considered 'lawful' for the purposes of Article 2(1) Protocol 4 ECHR. One week later, he requests asylum at the immigration office in Madrid, which renders a decision requiring him to remain within the province of Madrid during the asylum procedure. This restriction is based on Article 27(2) of the 2022 Decree on Reception Conditions of Asylum-Seekers.[489] This measure would be classified as a Restriction Type B, as it is not linked to the authorities' decision to allow him to enter the country at Barajas airport. Both decisions, as well as the legal basis for each of them (Schengen Borders Code and the Decree on Reception Conditions), are different. At least during the three-month period of validity of his tourist visa, he would be able to challenge the restriction on his freedom of movement under Article 2 of Protocol 4 ECHR before a national court and before the ECtHR, *even if he leaves Madrid without authorisation*.[490]

Finally, to make the distinction between both types of restrictions clearer, I believe that, if the authorities intend to impose a Restriction Type A, *they should clearly inform the asylum-seeker* that his lawful status—for the purposes of the right to free movement under the different treaties—will be made dependant on his compliance with the restriction on movement. If, in the words of Hathaway, the asylum-seeker is expected to 'bargain away'[491] his human right to free movement, he should be fully aware of this and provide his informed consent.

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In summary, in Section 2.5 I have argued that (1) despite being at odds with the inalienable nature of human rights, the *travaux* of the Refugee Convention and the case law of the HRC and the ECtHR indicate that States are entitled to require asylum-seekers to waive their right to free movement in exchange for lawful entry (an entitlement that I have termed 'the principle of conditional lawfulness); and (2) a distinction should be made between restrictions imposed *as a condition* for lawful entry or stay and those that are *not a condition* for lawful entry or stay. This distinction could help to mitigate the negative impact that the principle of conditional lawfulness has on the protection of freedom of movement of asylum-seekers.

2.6 Case study: Spain

Moving away from the international legal realm and into the first of our case studies, this section will examine whether or not asylum-seekers fall under the personal scope of the right

[489] Royal Decree 220/2022, of 29 March, which approves the regulations governing the reception system for international protection (BOE No. 76, 30/03/2022).

[490] Another example that illustrates my argument is Article 12 of the German Residence Act (Residence Act (BGBI. I p. 166, last amended on the 20-4-2023). Article 12 refers to the issuance of *temporary residence permits*, which are those granted to researchers, students, skilled workers seeking employment and persons taking a language course in Germany, among others. Paragraph 2 of this articles reads: 'The visa and the temporary residence permit may be issued and extended *subject to conditions* (…).' If a student is granted a temporary residence permit with the condition that he remains within a particular area, this would qualify as a Restriction Type A. If, however, the student is initially granted a temporary residence permit without any geographic restrictions attached to it, but later the authorities issue an order restricting his movement (for instance, because he has become a danger for public order), that would be categorised as a Restriction Type B. In such a case, the student would be able to challenge the measure before the ECtHR or the HRC even if he violates the restriction on movement.

[491] Hathaway 2021, p. 881, fn. 389

to free movement in the Spanish Constitution and/or in Spanish secondary law. It will be recalled that the reason for choosing Spain as a case study is that, for many years, asylum-seekers in the Spanish exclaves of Ceuta and Melilla—and, more recently, those in the Canarly Islands—have been prevented from moving to the Iberian Peninsula. This situation has given rise to a rich body of domestic case law that allows us to have a deep understanding of the personal scope of the right to free movement of asylum-seekers in one of the national legal systems in the European continent.

This section will be divided into four parts: (1) a brief exploration of the preparatory works of the Spanish Constitution; (2) a review of the early domestic case law on the matter; (3) an examination of Spanish secondary legislation on migration and asylum; and (4) an analysis of the 2020 and 2021 rulings of the Spanish Supreme Court regarding the restrictions on movement in Ceuta and Melilla.

2.6.1 The reasons why the right was reserved for 'Spaniards' in the Constitution

On a textual reading of the Spanish Constitution, not only asylum-seekers but all migrants are excluded from the personal scope of the right to free movement. Article 19 of the Spanish Constitution (CE) states that

'*Spaniards* have the right to choose their place of residence freely, and to move about freely within the national territory'.

Upon reviewing the preparatory works of the Constitution, it becomes evident that concerns related to migration control were crucial in the drafters' decision to exclude non-nationals from the scope of this right. The Centrist Party (UCD) proposed the current wording of this provision, citing several reasons, which can be reduced to three: (1) the labour argument, positing that allowing migrants to choose their place of work and residence would disrupt the labour market; (2) the cultural argument, claiming that migrants from countries with a 'really different political and cultural environments' from that of Europe would cause 'serious inconveniences'; and (3) the pull factor argument, suggesting that granting this right to everyone could attract migrants from 'an agitated Third World'.[492]

The arguments put forth by the drafters show that, in Spain, the right to free movement has been driven by a deterrence logic from the very beginning; and that the rationale behind strict control of *internal* free movement of migrants mirrors that of a policy of closed *external* borders. Indeed, these arguments are very similar to those employed by States to implement closed-border policies. For instance, Boehmer and Peña demonstrate that border policies tend to be more restrictive towards culturally and economically dissimilar neighbouring States.[493]

[492] Diario de sesiones del Congreso de los Diputados núm. 70. Comisión de Asuntos Constitucionales y Libertades Públicas, sesión núm. 9, 19th of May 1978, pp. 2530-2533. Available at www.congreso.es/public_oficiales/L0/CONG/DS/C_1978_070.PDF
[493] Boehmer and Peña 2012, p. 282.

2.6.2 The personal scope of the right in early domestic case law

Unlike in other European countries, the Spanish legal system has two distinct courts at its highest level: the Supreme Court and the Constitutional Court. The Supreme Court is the highest organ in the Spanish judicial hierarchy. Its function is to protect citizens against possible errors or arbitrariness of the judiciary and to achieve uniformity in the application of the law. Lower court judgments may be appealed before it 'on cassation', i.e., on points of law. For its part, the Constitutional Court is distinct from the judicial power. Its role is to control the constitutionality of laws, serve as a guarantor of fundamental rights and arbitrate legal conflicts between the central State and the Autonomous Communities.[494]

The Supreme Court initially sanctioned the complete exclusion of migrants from the personal scope of the right to free movement. In its 1980 judgment on Article 19 CE, it accepted the lower court's argument that 'it is clear that if one cannot freely enter a territory, one cannot pretend to have a right to choose one's place of work and residence within it'.[495] The Court's argument was more legalistic than that of the founding fathers: it stated that the absence of a right to enter a country[496] implies the lack of a right to move within it. Nevertheless, the logic behind both arguments remained the same, as they both linked migration control at the external border to the control of migrant already present in the State.

The tide began to turn in favour of the right of non-nationals to move within the country with a ruling by the Constitutional Court[497] in 1993. Despite opposition from the Government, who favoured a textual reading of Article 19, the Court carried out a contextual interpretation of this provision, linking it to Article 13 CE on the rights of non-nationals. The Court recalled that Article 13 only excludes non-nationals from the personal scope of political rights.[498] Therefore, since freedom of movement is not a political right, 'foreigners *can* be holders of [this right]'.[499] Note that the Court did not affirm that Article 19 obliges Spanish authorities to grant the right to movement to migrants: it merely stated that this provision does not prohibit the legislator from doing so. The highest interpreter of the Constitution thus gave the legislator considerable leeway to decide whether or not to include non-nationals in the personal scope of the right.[500] While adopting a more protective

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494 Ruiz Robledo 2018, pp. 134-140.

495 Judgment of the Supreme Court 1593/1980, 25 June, quoted in Piñar Mañas 1980, p. 201.

496 Although there is a right to leave one's own country under international human rights law (Article 12(2) ICCPR), this is an 'incomplete right insofar as it is not paired with the State's duty to admit those who exercise the right to leave' (Abrisketa 2017, p. 152).

497 The Supreme Court is the highest organ in the Spanish judicial hierarchy. Its function is to protect citizens against possible errors or arbitrariness of the judiciary and to achieve uniformity in the application of the law. Lower court judgments may be appealed before it 'on cassation', i.e., on points of law. For its part, the Constitutional Court is distinct from the judicial power. Its role is to control the constitutionality of laws, serve as a guarantor of fundamental rights and arbitrate legal conflicts between the central State and the Autonomous Communities (Ruiz Robledo, 2018:134-140).

498 Article 13(2) reads: 'Only Spaniards shall be entitled to the rights recognised in Article 23 (…)', which enshrines the right to participate in public affairs and to access on equal terms to public office.

499 Judgment of the Constitutional Court 94/1993, 22 March (para. 2).

500 The reason for this 'middle ground' adopted by the Court (between a textual reading of Article 19 and a universalist interpretation of that provision) stems from the Court's wish to (partially) respect the wish of the drafters of Article 19, who only referred to 'Spaniards'. Moreover, for the Court, the right to movement is not inherent to human dignity, so it accepts the possibility of it not being granted to migrants if the legislator so decides. See Judgments of the Constitutional Court 107/1984, 23 November and 115/1987, 7 July. For further analysis, see Tajadura Tejada (2004).

approach to the internal mobility of migrants than the Supreme Court, the Constitutional Court explicitly stated that the legislator's discretion in this field was 'undoubtedly wide'.[501]

2.6.3 The Law on the Rights and Freedoms of Aliens and the Law on the Right to Asylum

And so, what did the legislator do with their 'constitutive power'[502] over the right to free movement of migrants? At the start of the twenty-first century, he passed the Law on the Rights and Freedoms of Aliens (LRFA),[503] which grants the right to free movement and choice of residence to '*aliens who are in Spain in accordance with the provisions of Title II of this Law*' (Article 5). The provisions of Title II list the requirements for lawful entry into Spanish territory and distinguish between two categories of lawful migratory status: 'situation of stay' (such as students) and 'situation of residence' (such as migrants with a work permit).[504]

The question then arises as to whether filing an asylum application is a recognised way of acquiring lawful status under Title II of the LRFA. One provision of this Title refers to recognised refugees. It states that 'a favourable decision on an application for asylum (…) shall confer the right of *residence*'.[505] It is therefore clear that recognised refugees are in a 'situation of residence' and are thus present in Spain 'in accordance with the provisions of Title II', which makes them holders of the right to free movement under Article 5 LRFA.

However, the only reference in Title II to asylum-seekers is Article 25(3) LRFA. This provision states that the general conditions of entry, such as possession of a valid passport or visa and financial means, 'shall not apply to aliens who, upon entering Spain, claim the right to asylum, the granting of which shall be governed by a specific law'. Article 25(3) could be interpreted in two opposing ways:

(1) Since asylum-seekers do not have to comply with the general entry requirements, the submission of an asylum application is sufficient for a person to be considered '[present] in accordance with Title II', and thus to enjoy the right to free movement under Article 5 LRFA.
(2) Asylum-seekers are neither classified as being in a 'situation of stay' nor as being in a 'situation of residence', as there is no mention of their right of residence. Moreover, Article 25(3) refers the regulation of their migratory status back to a 'specific law'. Therefore, asylum-seekers are not '[present] in Spain in accordance with Title II' and Article 5 does not apply to them.

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[501] Judgment of the Constitutional Court 94/1993, 22 March (para. 3). The Court, however, also acknowledged that Spain had ratified ICCPR, which grants the right to free movement to 'everyone lawfully within the territory of a State' (Article 12(1)). Therefore, any national law regulating the right to free movement would have to respect this provision, given that Article 10(2) CE mandates that constitutional rights must be read in light of human rights treaties. Nevertheless, for the Constitutional Court, the Constitution itself leaves it for the legislator to decide whether or not to grant this right to non-nationals.
[502] Tajadura Tejada (2004, p. 881) uses this term to refer to the legislator's power to include or exclude non-nationals from the personal scope of a constitutional right.
[503] Organic Law 4/2000, of 11 January, regarding the rights and freedoms of foreign nationals living in Spain and their social integration (BOE n. 10, 12/01/2000). The previous law on the rights of migrants was Organic Law 7/1985 (BOE n. 158, 3/07/1985).
[504] Articles 25 and 29 LRFA.
[505] Article 34(3) LRFA [emphasis added].

Since the LRFA does not make it clear whether or not asylum-seekers are entitled to freedom of movement, we need to look at the 'specific law' referred to in Article 25(3) LRFA. This law is currently the 2009 Law on the Right to Asylum (LRA). However, this the LRA fails to regulate the freedom of movement of asylum-seekers; it merely confirms that *beneficiaries* of refugee or subsidiary protection status have the right to free movement, mirroring the LRFA.[506] Thus, the legislator did not fill the gap left by the Constitution regarding the right to free movement of asylum-seekers and, perhaps inadvertently, perhaps on purpose, paved the way for the Spanish Government to create an invisible border between the Peninsula and Ceuta, Melilla and the Canary Islands.

2.6.4 The expansion of the personal scope of the right by the Spanish Supreme Court

The first time that a Spanish court specifically addressed the issue of the personal scope of the right to free movement *of asylum-seekers* (as opposed to non-nationals in general) was in 2010, in relation to the obstacles that the Spanish police placed in their way when they tried to move from Ceuta and Melilla to the Peninsula. In its ruling, the High Court of Andalucía concluded that asylum-seekers do have the right under national law to move and reside freely across Spanish territory. Adopting an expansive interpretation of Article 25(3) LRFA, it held that, since this provision exempts asylum-seekers from having to comply with the conditions for entering Spanish territory, they are '[present] in accordance with Title II' and therefore fall under the personal scope of Article 5 LRFA.[507]

Despite this ruling, the practice on the ground continued, and the only way for asylum-seekers to exercise their right to free movement was to challenge each restrictive measure individually in court: between 2010 and 2019, some twenty-six further judgments were rendered by the High Courts of Andalucía and Madrid, all of which granted the applicants access to the Peninsula.[508] In these cases, the Spanish Government attempted to create the legal fiction that, for asylum-seekers, crossing the 'internal border' from Ceuta and Melilla towards the Peninsula was equivalent to crossing an external border of the EU. This can be seen, for instance, in one of its submissions to the High Court of Madrid in 2017, where the Government argued that the applicant 'had not complied with Article 6 Schengen Borders Code' (which regulates the conditions for entering the *external* Schengen borders).[509] To the Government's second argument that the Spanish police were authorised to deny migrants

[506] Article 36(1)(f) of the Law 12/2009, of 30 October, regulating the right of asylum and subsidiary protection (BOE n. 263, 31/10/2009).
[507] Judgment of the High Court of Justice of Andalucía 12085/2010, 25 October 2010.
[508] Judgments rendered between 2010 and 2017 are quoted in CEAR 2018, p. 23. Judgments rendered by the High Court of Justice of Madrid between 2018 and 2019 can be read in this document compiled by CEAR: https://bit.ly/394ZkGF
[509] Judgment of the High Court of Justice of Madrid 877/2017, 18 December 2017. It is true that Spain maintains identity checks of passengers between Ceuta/Melilla and the Peninsula (Declaration made on the occasion of the Accession Agreement of 25 June 1991 of the Kingdom of Spain to the Convention implementing the Schengen Agreement of 19 June 1990). However, these police controls are regulated solely under Spanish law; they do not constitute Schengen border checks. Therefore, Ceuta and Melilla *are* part of Schengen, and the only *external* Schengen borders are those between Ceuta/Melilla and Morocco (Acosta Sánchez 2022, p. 9).

'entry into Spain', the High Court replied that this was an 'unacceptable argument in which the term *Spain* is identified with that of *peninsular territory*'.[510]

The authorities' disregard for the jurisprudence of the High Courts for almost a decade shows the political importance attached to controlling migration *within* the Spain's borders, which outweighs respect for the rule of law. It was only in 2019 that the Government attempted to legitimise the practice in Ceuta and Melilla by referring some of the rulings of the High Court of Madrid to the Supreme Court, presumably in the hope that the Court would maintain the approach it had taken in the 1980s (where it concluded that all migrants were excluded from the right to free movement under Article 19 CE). In its submission to the Supreme Court, the Government once again tried to create the legal fiction that the border between Ceuta/Melilla and the Peninsula is an external border of Spain. The State Attorney referred to the identity card that asylum-seekers carry with them when crossing from Ceuta/Melilla to the Peninsula. The Attorney referred to a judgment of the Court of Justice of the EU, following which such identity cards may not be used to enter the Schengen area, because they are excluded from the concept of 'residence permit' in Article 15(b) of the Schengen Borders Code.[511]

The Government's litigation backfired, as the Supreme Court not only reversed its initial approach, but also adopted a more expansive interpretation of the Constitution than the Constitutional Court. Indeed, in its four rulings in 2020 and 2021, the Supreme Court confirmed the conclusions of the High Court of Madrid in favour of the freedom of movement of asylum-seekers. However, the Government did not comply with the judgments that had resulted from its own litigation strategy, making its disrespect for the rule of law particularly blatant.[512]

The legal reasoning followed by the Supreme Court was similar in its four judgments.[513] The Court began its judgments with a restrictive interpretation of the LRFA. It considered that this law does not assimilate asylum-seekers and other migrants '[present] in the country in accordance with Title II of the Law'. Therefore, unlike the High Court of Andalucía, the Supreme Court held the view that Article 5 LRFA does not apply to them.

The Court proceeded to analyse whether the freedom of movement of asylum-seekers may be directly derived from the Constitution. In its appeal to the Supreme Court, the Government had used the same argument as in its submissions to the Constitutional Court

[510] Judgment of the High Court of Justice of Madrid 877/2017, 18 December 2017.
[511] Judgments of the Supreme Court 2497/2020 and 2662/2020, 29 July 2020; 422/2021, 10 February 2021 and 1552/2021, 14 April 2021. The CJEU judgment quoted by the State Attorney was Judgment of 14 June 2012, *ANAFE*, C-606/10, EU:C:2012:348.
[512] In its April 2021 ruling, the Supreme Court itself confirmed that 'despite the [2020 judgments], the Administration has maintained the controversial restriction on movement' (Points of Law n. 3).
[513] The main legal reasoning may be found in Judgment 2497/2020 (Points of Law n. 3 and 4) and Judgment 2662/2020 (Points of Law n. 2 and 3). While the judgments only refer to the practices in Ceuta and Melilla, the same reasoning may be applied to the restrictions in the Canary Islands, since the Court gives a general interpretation of the right to free movement of asylum-seekers under Spanish law. In fact, there has been litigation to stop the restrictions in the Canary Islands, in which the applicants have quoted the Supreme Court judgments. See for instance the interim measures adopted in the Judgment of the Contentious-Administrative Court of Las Palmas de Gran Canaria n. 5, 14 April 2021, available at https://bit.ly/3LZ9k33

in 1993, i.e. that Article 19 CE grants the right to free movement only to 'Spaniards'.[514] In response to this argument, the Supreme Court went beyond what the Constitutional Court had ruled 27 years earlier. While the latter had found that migrants *can* be holders of the right to free movement under Article 19 CE if the legislator so decided, the Supreme Court interpreted that non-nationals *are* direct holders of this constitutional right. The legislator can limit it, but may not decide on its personal scope. Based on a systematic interpretation of the Constitution, the Court reasoned that Article 13 CE recognises that migrants are holders of constitutional rights; since asylum-seekers are migrants, they are entitled to the constitutional right to free movement under Article 19.

These arguments would have been sufficient to uphold the right of asylum-seekers to move to the Peninsula. However, the Supreme Court decided to go further, asserting that this right stemmed not only from Article 19 CE, but also from the Law on the Right to Asylum. Using an expansive interpretation of the law, the Court inferred this right from Article 18(2)(d) LRA, which states that asylum-seekers have an obligation to 'communicate their domicile in Spain and any change thereof'. By means of a 'logical criterion',[515] the Court concluded that if asylum-seekers are obliged simply to *communicate* changes in their place of residence (without having to apply for authorisation in each case), this can only be because they have the right to choose and change their domicile anywhere on Spanish territory. Furthermore, Articles 31 and 32 LRA allow the asylum-seeker to maintain the family unity and to work. According to the Court, these rights would be meaningless if they were limited to a specific city. Therefore, the Supreme Court has resolved the ambiguities left by Spanish migration and asylum law and settled the question of the personal scope of the right to free movement of asylum-seekers under Spanish law.

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Overall, the Spanish case study shows how the same norm can be interpreted in different ways by different courts, or even by the same court at different points in time. Moreover, the 2020/2021 decisions of the Supreme Court may be seen as an example of judicial activism. By reinterpreting the clearly defined personal scope of Article 19 CE ('spaniards'), the Court 'furthered its activity in a law-making direction and offered authoritative interpretations of the law, different from that of other actors at the top of the constitutional structure which are institutionally devoted to law-making'.[516] The fact that it derived the right to free movement of migrants directly from Article 19 CE and not only from secondary law (as the lower courts had done) may have been intended to send a political signal to the Government in response to the authorities' continued disrespect for the lower courts' rulings. As will be seen, this degree of judicial activism has not taken place in Germany, but domestic courts have not left the freedom of movement of asylum-seekers completely unprotected.

[514] The Government thus disregarded the previous findings of the Constitutional Court, according to which Article 19 needs to be interpreted in the light of Article 12 ICCPR (see *supra*, note 501).
[515] Judgment of the Supreme Court 2662/2020, Point of Law No. 2.
[516] Zamboni 2022, p. 21.

2.7 Case study: Germany

As mentioned in the introduction of this study, Germany serves as a compelling case for analysing the right to free movement of asylum-seekers under a domestic legal system due to the existence of the *Residenzpflicht* regime, under which asylum-seekers are forced to remain in a particular *Land* or municipality. German domestic law presents a distinct set of issues in comparison to the Spanish legal order, but resembles it in that it does not straightforwardly extend the right to free movement and choice of residence to asylum-seekers. Similar to the Spanish Constitution, the *Grundgesetz* (GG) reserves the right to free movement in Article 11 for 'Germans'. However, unlike its Spanish counterpart, the Federal Constitutional Court (*Bundesverfassungsgericht*) has not derived a right to free movement of migrants from that provision but from a different article of the Constitution, namely the right to free development of one's personality enshrined in Article 2(1) GG. The fact that the right to free movement of nationals is protected by a different provision than that of migrants is relevant because, as will be examined in Chapter 4, Article 11 offers stronger safeguards than Article 2(1) GG.

With the distinction between these two constitutional provisions in mind, this section will be divided into four parts: (2.7.1) the reasons that led the drafters of the Constitution to reserve this right for 'Germans' in Article 11; (2.7.2) an analysis of the domestic case law on the personal scope of Article 11; (2.7.3) a review of the case law in which the Federal Constitutional Court inferred a right to free movement of non-nationals from Article 2(1); and (2.7.4) an exploration of whether Article 11 could be extended to migrants through other norms in the German legal order.

2.7.1 The reasons why the right was reserved for 'Germans' in Article 11 GG

Article 11 of the German Constitution reads:

'(1) All Germans shall have the right to move freely throughout the federal territory.

(2) This right may be restricted only by or pursuant to a law, and only in cases in which the absence of adequate means of support would result in a particular burden for the community, or in which such restriction is necessary to avert an imminent danger to the existence or the free democratic basic order of the Federation or of a *Land*, to combat the danger of an epidemic, to respond to a grave accident or natural disaster, to protect young persons from serious neglect or to prevent crime.'

What were the reasons behind the exclusion of non-nationals from the personal scope of this right? This question will be answered through an examination of the debates that took place in the Parliamentary Council (*Parlamentarischer Rat*) during the drafting process of the Constitution. Particular attention will be paid to the position of refugees during the debates.

In the first draft of the Constitution, the right to free movement was not listed as one of the fundamental rights. As discussed in Chapter 1, this was also a common feature of the drafting processes of international human rights texts: the status of free movement as a human right was disputed and, unlike other rights, was not straightforwardly added to the different instruments. This contrasts with the Spanish Constitution, where this right was included

from the beginning.[517] One of the constitutional fathers (Zinn, from the social-democratic party or SPD) explained that the absence of the right in the proposed constitutional draft was due to the fact that 'because of the situation of refugees and the housing market, one can hardly speak of freedom of movement'.[518] Zinn was referring to the context after the Second World War, a time when Germany was facing housing shortages and receiving large numbers of refugees.[519]

These refugees were for the most part ethnic Germans who, in the final stages and aftermath of the Second World War, fell victim to the systematic policies of mass expulsion in Eastern and East-Central Europe. These policies were fuelled by border changes and the desire for revenge against Germans after the fall of Nazi Germany. The number of ethnic Germans who either fled or were expelled from this region reached some fifteen million, and most of them—about eight million in 1950—landed in the three western occupied zones that later became the Federal Republic of Germany.[520] The concerns expressed by Zinn during the preparatory works of Article 11 GG thus fit into a context where 'German and occupation authorities alike worried about the possible consequences of this mass influx of the dispossessed into a thoroughly devastated land'.[521]

In the end, the Parliamentary Council decided to include the right to free movement in the Constitution, but the debate on the problems posed by ethnic German refugees continued: this time it was discussed whether the right should be granted to *all Germans* or only to 'Federal citizens' (*Bundesangehörigen*). If the latter term was chosen, ethnic German refugees—who did not have the citizenship of the Federal Republic upon arrival—would not be entitled to the right. Some drafters believed that depriving ethnic Germans of this right would facilitate the management of the large influx of refugees.[522] This approach was supported by the drafter Mangoldt, from the Christian-democratic party (CDU), who explained his proposal with the following words:

'[If we grant this right to all Germans,] we would be taking on duties that we are unable to fulfill. We would be giving the 16 million Germans living east of our borders the opportunity to exercise their right to free movement and to choose their place of residence within the Federal territory without further ado.'[523]

He then nuanced his position by adding:

'[The use of the term *Bundesangehörigen*] is not intended to exclude the possibility of refugees finding accommodation and a home on our side (…) [but] it would be practically impossible to grant every citizen of the Eastern States with German origins the right to take up residence anywhere in the Federal territory. (…). Moreover, under current national law, [ethnic German] refugees become citizens of the State within three months and are thus considered to be Federal citizens after that time. It will be the task of the legislator to create the appropriate powers for the administrative

[517] See *supra*, note 492.
[518] Leibholz and Mangoldt 1951, p. 128.
[519] Pagenkopf 2021, p. 464.
[520] Ahonen, 2003, p. 2.
[521] Ahonen, 2003, p. 2.
[522] Pagenkopf 2021, 465.
[523] Leibholz and Mangoldt 1951, p. 129.

authorities, so that all those who seek refuge and a home with us can become Federal citizens as soon as possible and enjoy the benefits of Article 11.'[524]

Other drafters disagreed. Seebohm, from the German Party (DP), felt that ethnic German refugees would have great difficulties if they were required to obtain a new citizenship in order to choose a home. For his part, Schmid (SPD) argued that granting the right to free movement only to Federal citizens

'would create a rift between the Germans living in the East and those living in the West, a rift that would gain constitutional strength. The right to free movement would then become political (…). What we are creating here is not a separate Western State, but only a form in which the German people organise themselves. There are Germans on both sides of the Iron Curtain and it is highly questionable that we should exclude them from enjoying freedom of movement.'[525]

The majority of the Parliamentary Council favoured a broader personal scope of the right to free movement, and the term 'Germans' was chosen in the final version of Article 11. It is therefore clear from the preparatory work of the Constitution, as well as from Article 116 GG, [526] that the term 'Germans' includes both German citizens and persons of German ethnic origin—but without German citizenship—who fled Eastern European countries.

There are several interesting points about these debates for the purposes of this study:

First, the influx of refugees—even if they were ethnic German refugees who could quickly become citizens—was at the centre of the debate on the incorporation of the right to free movement into the German Constitution. Views on the free movement of refugees were very diverse. Zinn and Mangoldt took a State-centred perspective and feared that the free movement of such a large number of refugees would make it difficult for the authorities to accommodate and organise them and, more generally, would pose a problem for the reconstruction of the country after the war. Seebohm, for his part, looked at the situation from the point of view of the individual and considered that a lack of free movement would create difficulties for refugees trying to settle in the country. Finally, like the first two drafters mentioned, Schmid also thought about protecting the interests of the State but, unlike them, this led him to defend the right to free movement for ethnic German refugees as a means of creating a sense of unity among all Germans and perhaps opening the door to a future German reunification.

Secondly, when Mangoldt proposed excluding ethnic German refugees from the right to free movement, he made it clear that this would not affect their right to enter the country. He thus made a clear distinction between the right to internal freedom of movement and the

[524] Leibholz and Mangoldt 1951, p. 130.
[525] Leibholz and Mangoldt 1951, p. 130-131.
[526] This Article reads: (1) Unless otherwise provided by a law, a German within the meaning of the GG is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the boundaries of 31 December 1937 as a refugee or expellee of German ethnic origin or as the spouse or descendant of such person. (2) Former German citizens who, between 30 January 1933 and 8 May 1945, were deprived of their citizenship on political, racial or religious grounds and their descendants shall, on application, have their citizenship restored. They shall be deemed never to have been deprived of their citizenship if they have established their domicile in Germany after 8 May 1945 and have not expressed a contrary intention.

right to enter the country, unlike some drafters of the ICCPR[527] and of the Spanish Constitution,[528] whose reason for excluding irregular migrants (in the ICCPR) or all migrants (in the Spanish Constitution) from the personal scope of the right to *internal* free movement was that this could be interpreted as granting non-nationals a right to cross the *external* border.

Finally, the discussion revolved around whether to grant the right to all ethnic Germans or only to citizens of the Federal Republic, but no mention was made of the right of non-Germans to the right to free movement. Similar to the drafting processes of several international instruments, where the position of irregular migrants was completely ignored,[529] it was taken for granted in the preparatory debates of the German Constitution that non-Germans did not have a constitutional right to free movement.

2.7.2 The personal scope of the right under Article 11 GG in domestic case law

There have been attempts in legal doctrine to extend the protection of Article 11 GG to migrants, based on arguments related to human dignity (Article 1 GG) and the equality of all persons before the law (Article 3 GG), as well as on the idea that there is a core human right to freedom of movement derived from supra-positive law.[530] Efforts have also been made before the courts to argue that the rights reserved for 'Germans' in the Constitution should be extended to non-nationals after a certain period of time.[531] Other authors have rejected these propositions as being methodologically inadmissible because 'the constitutional legislator deliberately did not formulate the constitutional right to free movement as a human right'.[532]

Like the latter line of legal doctrine, the Federal Constitutional Court has rejected the argument that the rights reserved for Germans apply to migrants by virtue of their human rights core. In a case concerning freedom of occupation—which is also reserved for Germans under Article 12(1) GG—, the Court held that

'[E]ven the self-evident fact that aliens are bearers of human rights cannot lead to an application of Article 12(2) to this group of persons if the express decision of the Constitution to grant freedom of occupation only to German citizens is not to be undermined.'[533]

More specifically with regard to the right to free movement under Article 11 GG, there are three cases in which both the Federal Constitutional Court and the Federal Administrative Court have reaffirmed that this provision is reserved for nationals.[534] This is a different approach from the Spanish Supreme Court, which, as shown above, has extended the personal scope of this right beyond its textual wording.

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[527] See Chapter 1.
[528] See *supra*, note 493.
[529] See Chapter 1.
[530] Dürig (BNN Grundrechte II, p. 505), quoted in Kunig and Graf von Kielmansegg (2021), p. 917.
[531] Ziewok 1997, p. 516.
[532] Durne 2013, p. 43 and p. 47.
[533] Judgment of the Federal Constitutional Court 78, 179 (10 May 1988), para. 49.
[534] Quoted in Kunig and Graf von Kielmansegg (2021), p. 917.

The applicants in the first case were Turkish and Yugoslavian nationals living outside Germany who challenged the imposition of waiting periods for joining their Turkish and Yugoslavian family members residing in Federal territory. The Federal Constitutional Court examined whether Article 6 GG, on the right to family life, established a fundamental right of entry and residence for foreign spouses and family members for the purpose of joining their foreign relatives living in the Federal Republic. One of the arguments used by the Court to deny this possibility was that 'it would be difficult to reconcile with Article 11 GG. Article 11 guarantees the right of access to and residence in the Federal territory *only to German nationals*'.[535]

The second case concerned a Greek national who had arrived in Germany in 1962 with a residence permit subject to the condition that he could only work as an employee. He became unemployed and applied for a self-employmet permit, which was refused. He challenged this decision in court. The Federal Administrative Court had to interpret Article 2(1) of the Aliens Act (in force at the time), according to which a residence permit could only be granted if the presence of the migrant did not impair the interests of the Federal Republic. The Court stated that the administration should have a broad discretion in the process of balancing the public interests with those of the foreigner. This discretion was based on the fact that Article 2(1) of the Aliens Act did not grant migrants a legal right of residence. To strengthen this argument, the Court referred to the personal scope of Article 11 GG, '*which only guaranteed the right to free movement to Germans*'.[536]

As can be seen, in these two cases, the courts were not actually referring to the right to *internal* movement but to the right to enter German territory, which, according to the case law of the Federal Constitutional Court, is also guaranteed to Germans by Article 11 GG.[537]

The third case did relate to internal free movement, but the judicial interpretation of the personal scope of Article 11 did not differ from the other two rulings. The applicants were a family who had been granted a residence permit on humanitarian grounds, the validity of which was limited to the territory of the *Land* Baden-Württemberg. In its judgment, the Federal Administrative Court once again declared that '*aliens cannot invoke the fundamental right to freedom of movement under Article 11, which is guaranteed only to Germans*'. [538]

2.7.3 The personal scope of the right under Article 2(1) GG

In addition to Article 11, freedom of movement is also protected under Article 2(1) GG, which guarantees the right to free development of one's personality. According to this article:

'Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.'

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[535] Judgment of the Federal Constitutional Court 76, 1 (12 May 1987), para. 125 [emphasis added].
[536] Judgment of the Federal Administrative Court 56, 254 (27 September 1978). In *Entscheidungen des Bundesverwaltungsgerichts* 1979, Berlin: Carl Heymanns Verlag, p. 258.
[537] Judgment of the Federal Constitutional Court 2, 266 (7 May 1953).
[538] Judgment of the Federal Administrative Court 100, 335 (19 March 1996). In *Entscheidungen des Bundesverwaltungsgerichts* 1997, Berlin: Carl Heymanns Verlag, p. 342. This judgment will be further analysed in Chapter 4.

In 1957, the Federal Constitutional Court interpreted this provision as enshrining a right to *general freedom of action* which, in turn, encompasses freedom of movement within the country.[539] So how does the right to free movement under Article 2(1) relate to the right under Article 11 GG?

In that same judgment, the Court acknowledged that, in addition to the general freedom of action guaranteed by Article 2(1), there are other specific rights in the GG that protect the freedom of human activity in certain areas of life which are particularly exposed to interference by public authority, based on 'historical experience'. Some of these '*specific civil liberties*' (*Freiheitsrechte*) include freedom of religion, freedom of opinion, freedom of occupation and *freedom of movement under Article 11*, amongst others. The general freedom of action under Article 2(1) GG is subsidiary to all these freedoms.[540]

This means that when a measure that encroaches upon a person's freedom is challenged in court, the courts first need to establish whether there has been an interference with one of the specific civil liberties. Only if that is not the case, will the obstruction to freedom be examined in the context of Article 2(1).[541]

The subsidiary nature of Article 2(1) plays a particularly relevant role in the case of migrants, as several constitutional rights are reserved for Germans: freedom of assembly, freedom of association, freedom of movement and occupational freedom.[542] Article 2(1), on the other hand, applies to *every person*. When a court examines the constitutionality of a measure taken against a migrant, it will be faced with the impossibility of analysing it in the light of one of these four specific civil liberties, due to their restricted personal scope. Then, subsidiarily, it will have to test the interference of the measure with the *general freedom of action* under Article 2(1). For this reason, the general freedom of action has been described as having a 'catch-all function'.[543]

In 1973, the Federal Constitutional Court first referred to this 'catch-all function' of Article 2(1) specifically in relation to the right to free movement under Article 11 GG. As noted in legal doctrine, it was through this judgment that the Court 'derived the right to freedom of movement of aliens from Article 2(1)'.[544] The Court stated that

'[t]he fundamental right under Article 2(1) GG to the free development of the personality is also available to aliens in the Federal Republic as a general human right. The restriction of the fundamental right to freedom of movement to Germans and to the territory of the Federal Republic of Germany

[539] Judgment of the Federal Constitutional Court 6, 32 (16. January 1957), paras. 12-13. The logic behind this interpretation is that the Court understands the concept 'free development of personality' to include both an 'internal' and an 'external' aspect. It rejects the view that Article 2(1) protects only the 'internal' development of the individual's personality, i.e. 'the core area of the personality that constitutes the essence of man as a spiritual-moral person'. To support its position, the Court first carries out a contextual interpretation of the concept of 'free development of personality' in Article 2(1), together with the limitations laid down in the same Article, and states that 'it is incomprehensible how the [internal development of one's personality] could violate the moral law, the rights of others or even the constitutional order of a liberal democracy'. Secondly, the Court gives a historical interpretation of the article, pointing out that, in its original drafting, the provision read: 'everyone may *do* what they want'.
[540] *Ibid.*, para. 14.
[541] Kunig and Graf von Kielmansegg 2021, p. 113.
[542] Arts. 8, 9, 11 and 12 GG.
[543] Kunig and Graf von Kielmansegg 2021, p. 110.
[544] Pagenkopf 2021, p. 466.

(Article 11 GG) does not preclude the application of Article 2(1) GG to the residence of persons [i.e. persons in general, including aliens] in the Federal Republic of Germany.'[545]

2.7.4 No extension of the guarantees of Article 11 GG through other norms

Even if Article 11 GG reserves freedom of movement for nationals, this does not prevent the legislator from extending the personal scope of the right to free movement to migrants. For example, Article 12(1) of the Residence Act[546] provides that the residence title is issued 'for the Federal territory'. However, holders of such a residence title do not derive their right to free movement from Article 11 GG but from the Residence Act (an ordinary law), which means that the guarantees of Article 11 GG do not apply to them.[547] Nevertheless, any ordinary law that imposes limitations on the movement of migrants will have to respect the safeguards of Article 2(1) GG.[548]

On the other hand, some *Länder* Constitutions extend the right to free movement to non-nationals: Bavaria, Berlin, Bremen and Hessen.[549] For instance, Article 109 of the Bavarian Constitution provides that 'all inhabitants of Bavaria enjoy full freedom of movement. They have the right to reside and settle in any place, to acquire real estate and to engage in any line of business.' This does not mean that migrants living in these *Länder* can invoke the safeguards of the right to free movement enshrined in Article 11 GG. However, since Article 2(1) GG guarantees general freedom of action to everyone, the freedom of movement of non-nationals under the regional Constitutions must be read in the light, and within the limits, of Article 2(1) GG.[550]

Logically, the right to free movement contained in the regional constitutions extends only within the respective *Land* (i.e. within Bavaria, Berlin, Bremen and Hessen). Although it is beyond the scope of this study to examine the provisions in these four constitutions, it is worth noting that they could provide a relevant avenue for challenging the *Residenzpflicht* before the courts in Bavaria, as in this region the movement of asylum-seekers is restricted to an area smaller than the *Land*.[551]

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In sum, the Federal Constitutional Court has adopted a more restrictive reading of the right to free movement than the Spanish Supreme Court. As previously discussed, Article 19 of the Spanish Constitution reserves freedom of movement for 'Spaniards', but the Spanish Supreme Court has extended the personal scope of this right to asylum-seekers through a contextual interpretation of the Constitution. In contrast, the Federal Constitutional Court

[545] Judgment of the Federal Constitutional Court 35, 382 (18 July 1973), para. 61.
[546] Residence Act (BGBI. I p. 166, last amended on the 20-4-2023).
[547] Durner 2013, p. 43.
[548] Dienelt 2020, para 9. The safeguards of Article 11 and 2(1) GG will be examined in Chapter 4. That Chapter will also scrutinise and compare the safeguards provided by different ordinary laws that restrict freedom of movement within German territory.
[549] Kunig and Graf von Kielmansegg 2021, p. 918.
[550] Ziekow 1997, pp. 524-525.
[551] Anwalt.Org, 'Wie ist die Residenzpflicht im Asylgesetz geregelt?'. Available at: https://www.anwalt.org/residenzpflicht/

has applied a textual interpretation to Article 11 GG (which is reserved for 'Germans'), thus excluding all migrants from it. Nevertheless, by reading a 'general freedom of action' into the concept of 'free development of [one's] personality' in Article 2(1) GG, the Court has granted some protection to the freedom of movement of asylum-seekers, even if, as will be seen in Chapter 4, this protection is not equivalent to that of nationals.

2.8 Conclusions

2.8.1 Summary of findings

While this may not sound like as a very satisfying outcome, the conclusion of this chapter is that there is no simple answer to the question of *whether* and *which* asylum-seekers fall under the personal scope of the right to free movement. Each legal regime deals with this issue in a different manner and, even within the same regime, the answer may vary depending on the court or author consulted. This diversity of interpretations links back to the concept of 'multi-sourced equivalent norms' referred to in the introduction of this study: 'even identically phrased norms entail different normative consequences resulting from the distinct political, normative and institutional environments in which they function'.[552] To further complicate matters, under international law, States may make the lawful entry of asylum-seekers conditional on their compliance with restrictions on movement, a principle that I have termed 'the principle of conditional lawfulness'. In light of these findings, this section aims to provide an overview of where the law currently stands.

To begin with, refugee law doctrine offers, broadly speaking, five different perspectives on the question of the personal scope of Article 26 RC, which applies only to 'refugees lawfully in [the] territory':

(a) Only recognised refugees: from the 15 authors examined, 4 of them reject any possibility for asylum-seekers to become holders of the right to the right to free movement under this provision. The two main interpretative methods employed by them are the context of Article 26 (Maasen) and of Article 31(2) (Amann, Diehl) and State practice (Goodwin-Gil and McAdam). Maasen also uses an economic argument to reinforce his position.
(b) Some asylum-seekers: Klammer finds that asylum-seekers do not normally fall within the scope of Article 26, unless the asylum procedure extends beyond a 'reasonable period', in which case their status is 'regularised'. For Beyani, Battjes, Grahl-Madsen and Slingenberg, as a general rule, only asylum-seekers who have entered the country with explicit authorisation of the State can benefit from Article 26. Two of these authors make an exception: for Slingenberg, unlawfully present asylum-seekers who have waited more than three years for their asylum application to be processed are 'regularised', while for Battjes, those unlawfully present asylum-seekers in EU Member States who receive an identity document are also 'regularised'. The methods of interpretation used by these authors range from the object and purpose of the Convention and of Article 26, the ordinary meaning of the term 'lawfully in', State practice, the *travaux préparatoires* and the context of the right to free movement within the Refugee Convention.

[552] Broude and Shany 2011, p. 8.

(c) All asylum-seekers whose asylum application has been admitted to the procedure: Hathaway is the main author supporting this view. He uses a variety of interpretative methods: State practice, the ordinary meaning of 'lawfully in', the object and purpose of the Refugee Convention, the weight of scholarly opinion and statements from UNHCR. Hathaway's view is followed by Costello, Maple and McDonough.
(d) All asylum-seekers, even before their application has been admitted to the procedure: Noll and Zieck adopt this approach. The methods they employ for their argument are the ordinary meaning of the terms 'status' and 'unlawful' in Article 31 and the context of Article 26 within the Convention.
(e) All migrants who fulfil the refugee definition, even before they apply for asylum: this is the position supported by Marx, based on the context of Article 26 and the object and purpose of the Convention.

UNHCR's position has evolved over time from regarding only explicitly authorised asylum-seekers as 'lawfully in' to considering all asylum-seekers awaiting a substantive decision on their asylum application to fall within the scope of Article 26. In one instance, the Agency went further and argued that all asylum-seekers are lawfully present even before their application has been admitted.

With regard to the personal scope of Article 31(2) RC, the debate revolves around whether 'criminalisable asylum-seekers'—i.e. those who do not benefit from the non-penalisation clause of Article 31(1) RC—can benefit from the limits that Article 31(2) places on the State's ability to impose restrictions on the freedom of movement. While most authors answer this question in the negative, Costello, Klammer, Noll and Grahl-Madsen take the opposite view. Both sides of the argument use the *travaux préparatoires* of this provision as an interpretative method, but while the first group also supports their view in the ordinary meaning of the term 'such refugees', the context of Article 31(2) and the object and purpose of Article 31, the second group refers to the context of the term 'such refugees' to strengthen their argument. Finally, Zieck suggests a middle ground between the two positions in cases of mass influx of asylum-seekers.

In the second place, in order to determine the scope of Article 12(1) ICCPR and Article 2(1) Protocol 4 ECHR in line with the case law of the HRC and the ECtHR, I have argued that a distinction must be made between:

(a) Asylum-seekers with a 'formal authorisation to enter', i.e. those who have crossed the border in accordance with domestic law (e.g. by presenting their visa): they are 'lawfully within' the country, although in the case of Protocol 4 ECHR, lawful status is only acquired once the asylum-seeker has left the airport and entered mainland territory.
(b) Asylum-seekers with a 'formal authorisation to stay', i.e. those present in the country with a residence permit under domestic law, such as a work or student permit: these will be lawful under the ICCPR and Protocol 4 ECHR.
(c) Asylum-seekers who have entered the country unlawfully but whose presence is 'tolerated' in order to protect them from *refoulement*, and domestic law equates this 'toleration of stay' with 'regularisation': these asylum-seekers will be lawful under the ICCPR but unlawful under Protocol 4 ECHR.

Thirdly, in my view, the *travaux* of the Refugee Convention and the case law of the HRC and the ECtHR indicate that the 'principle of conditional lawfulness'—whereby asylum-seekers may be required to waive their right to free movement in exchange for lawful entry—is part of positive law. To prevent this principle from emptying the right to free movement of any meaning, I have proposed that a distinction be made between restrictions on movement that are placed *as a condition* for lawful entry or stay (Restrictions Type A) and restrictions that are *not a condition* for lawful entry or stay (Restrictions Type B). If an asylum-seekeer is subjected to the first type of restrictions, he will have to stay in the area assigned to him in order to challenge the legality or proportionality of the measure before a national court, the ECtHR or the HRC. If, on the other hand, he is subjected to the second type of restrictions, he will be able to challenge the measure regardless of whether or not he complies with the restriction on movement. I have made some suggestions on how to distinguish between the two, and have argued that, if an asylum-seeker is to be subjected to a Restriction Type A, the authorities should clearly inform him about the conditional nature of his 'lawful' status.

Finally, the case studies of Spain and Germany have shown that the question of whether asylum-seekers fall within the scope of the right to free movement is not only complex under international law, but also under domestic legal systems. The constitutions of both countries (Article 19 CE and Article 11 GG) reserve this right for nationals. However, domestic courts have played an important role in recognising the constitutional protection of the free movement of asylum-seekers. While the Spanish Supreme Court has adopted an expansive interpretation of Article 19 CE, including asylum-seekers within its scope, the *Bundesverfassungsgericht* has derived a right to free movement for asylum-seekers from Article 2(1) GG (free development of personality).

2.8.2 Concluding thoughts

In this concluding section, I will provide my own interpretation of the personal scope of Articles 26 and 31(2) under the Refugee Convention, as well as some reflections on the case law of the HRC and the ECtHR.

As to the personal scope of Article 26, my position is closer to that of Grahl-Madsen, Slingenberg and (partly) Klammer. Taking Article 31(1) of the Vienna Convention on the Law of Treaties as a means of interpretation, I believe that:

(a) The term 'lawfully in [the] territory' should be given an autonomous meaning, rather than leaving it up to domestic law to decide. Allowing States to withhold rights by simply refusing to consider a refugee as 'lawfully in' would undermine the 'object and purpose' of the Refugee Convention,[553] namely to 'assure refugees the widest possible exercise of (…) fundamental rights and freedoms'.[554]
(b) Asylum-seekers who have entered or stayed irregularly in the host State are not 'lawfully in' for the purpose of Article 26. To me, the most relevant arguments for this are the following:

[553] Davy 2011, p. 1305.
[554] Preamble of the Convention.

a. A reading of Article 26 in light of Article 31 RC (the 'context' of the provision): this article speaks of refugees who are present 'without authorisation' (para. 1) and of those whose status has not been 'regularised' (para. 2). This means that, in order for a refugee to be 'lawfully in' a country, his presence must be authorised or his status regularised, both of which require a *positive action*.[555]
b. A reading of Article 26 in conjunction with Article 33 RC (the 'context' of the provision): when asylum-seekers are present on the territory of a State without explicit authorisation, the authorities are faced with a *fait accompli*, as they are obliged to 'tolerate' their presence in order not to violate the principle of *non-refoulement*. Tolerating their presence is therefore not equivalent to giving them a positive authorisation to stay.[556]
c. The 'object and purpose' of the asylum procedure: the purpose of admitting an asylum claim into the asylum procedure is to determine whether the person meets the definition of 'refugee' under Article 1 RC, not to regularise his migration status.

(c) States may not indefinitely delay access to Convention rights by not making a decision on the asylum claim, as this would be contrary to the 'object and purpose' of the Refugee Convention.[557] Thus, unlawfully present asylum-seekers who have been awaiting the outcome of the procedure for more than three years are 'regularised'. The three-year period can be derived from Articles 7(2) and 17(2) RC (the 'context' of Article 26).[558]
(d) Asylum-seekers who present themselves at the border without complying with entry requirements (e.g. not holding the required visa) are 'lawfully in' if the border authorities exempt them from complying with these requirements, since this exemption involves a positive action by the authorities. The asylum-seeker will thus be 'lawfully in' 'even if domestic law prescribes that he has not entered or has no permission to enter in a legal sense'.[559]

This interpretation is, in my view, the most legally tenable in light of the VCLT. It is also a compromise between the most restrictive interpretations of some scholars (who find that only recognised refugees are lawfully present) and the most progressive ones adopted by others (who find that all or nearly all asylum-seekers are lawfully present).

Regarding the personal scope of Article 31(2) RC, I align with the perspective of Costello, Klammer and Noll: I believe that freedom of movement within the country is the default position for any refugee, and that State authorities can only restrict the movement of asylum-seekers *because* Article 31(2) RC allows them to do so. I therefore agree that criminalisable asylum-seekers also fall under the scope of this provision, as the opposite interpretation would lead to a contradictory result, whereby the State would be allowed to impose penalties

[555] Slingenberg 2014, p. 114.
[556] Slingenberg 2014, p. 120; and Grahl-Madsen (1972, p. 362): 'the permission to await the outcome of their procedure (…) can be seen as never intended to affect the alien's status'.
[557] Klammer 2022a, p. 621.
[558] According to the former provision, refugees enjoy exemption from legislative reciprocity after three years of (simple) residence. Pursuant to Article 17(2), States may no longer apply restrictive measures to refugees for the protection of the labour market after three years of (simple) residence (Battjes 2006, p. 468; Slingenberg 2014, p. 132).
[559] Slingenberg 2014, p. 118; Grahl-Madsen 1972, p. 357.

on criminalisable asylum-seekers under Article 31(1) RC but not to restrict their movement under Article 31(2). I find it plausible that the term 'such refugees' in Article 31(2) refers to the heading of Article 31 of the Refugee Convention (the 'context' of that second paragraph), which reads 'refugees unlawfully in the country of refuge' and therefore covers both criminalisable and non-criminalisable asylum-seekers.[560]

With regard to the ICCPR and the ECHR, I would like to take issue with the fact that the Committee and the Court defer to domestic law rather than adopting an autonomous interpretation of the term 'lawfully within'. In a similar vein to the argument presented above, allowing States to deny the right to free movement by simply refusing to consider a person as 'lawfully within' undermines the 'object and purpose' (Article 31(1) VCLT) of the ICCPR and the ECHR, i.e. the promotion of 'universal respect for, and observance of, human rights and freedoms'[561] and the 'maintenance and further realisation of human rights and fundamental freedoms'.[562] I find this approach particularly problematic when considering that (unlike in the Refugee Convention) there is no other article in these treaties protecting freedom of movement for irregular migrants; and that the 'principle of conditional lawfulness' makes the protection offered by these treaties quite precarious.

Moreover, at least in the case of the ECtHR, the Court's deference to domestic law is an example of the 'migration exceptionalism' or 'two-tier human rights system' to which I have referred in the introduction of this study. Indeed, in cases unrelated to migration, the Court generally gives a meaning to the terms of the Convention that is independent from that of national jurisdictions. The Court has called these terms 'autonomous concepts' and defined them as those which 'must be interpreted as having an autonomous meaning in the context of the Convention and not on the basis of their meaning in domestic law'.[563] Examples of such concepts include, inter alia, 'civil rights and obligations', 'possessions', 'association' and 'home'.[564] Even terms which could be regarded as referring back to the meaning that they have in the national law of the State concerned, such as 'tribunal' or 'criminal charge', have been given an autonomous Convention meaning.[565]

In contrast, deference to the definition of a term in domestic law is evident in migration-related jurisprudence, not only in the case law on the concept 'lawfully within' under Article 2(1) of Protocol 4, but also in other lines of case law. For example, in her book, Spalding examines the case law on Article 6 ECHR (the right to a fair trial). This provision applies only to proceedings that concern a 'criminal charge' or 'civil rights and obligations'. The author demonstrates that the Court has refused to classify any immigration decision (such as exclusion orders from the territory) as 'criminal charge' simply because states usually do not

[560] Costello 2017, p. 44; Klammer 2022, p. 707; Noll 2011, p. 1268. While my interpretation of the personal scope of Article 26 is more restrictive than that of Hathaway, my view on the personal scope of Article 31(2) RC is more protective of free movement than his.
[561] Preamble of the International Covenant on Civil and Political Rights.
[562] Preamble of the European Convention on Human Rights.
[563] *RL v. Netherlands*, EComHR, Decision of 18 March 1995, unreported, quoted in Letsas 2007, p. 43.
[564] Letsas 2007, p. 43.
[565] Harris *et al.* 2018, p. 20. These authors also point out that even the terms 'in accordance with the law' and 'prescribed by law' have a mixed national law and Convention meaning: the Court requires that there be a national law basis for what is done and that the national law is imbued with a Convention idea of the essential qualities of the law.

classify exclusion orders as 'criminal', while such approach has not been followed in its general jurisprudence on Article 6.[566] Similarly, Article 5 ECHR (the right to liberty) only applies when an individual has been 'deprived of his liberty'. As will be shown in Chapter 3, the Court gives great weight to national law in order to determine what the term 'deprivation of liberty' means in migration-related cases, but provides an autonomous interpretation of the concept in other cases.

Finally, with respect to the 'principle of conditional lawfulness', I am aware that my proposal to distinguish between two types of restrictions is only a form of what is sometimes called 'damage control'[567]: accepting that the principle exists, and trying to find a way to reduce its impact on the right to free movement. More deeply, however, I believe that the HRC and the ECtHR should abandon this principle, taking account of Hathaway's argument that it is contrary to the inalienable nature of human rights, as it is based on the premise that individuals can choose to decline rights in exchange for access to the territory.[568] The principle is especially problematic when considering that the 'choice' of asylum-seekers and other vulnerable migrants to relinquish their right to free movement in exchange for entry will not be a real one, since refusing to agree to this condition would often leave them in unsustainable conditions. Such situations where destitute individuals agree to forego their negative human rights in exchange for basic subsistence are what Ashford calls 'subsistence exchange contracts'.[569]

This chapter has fulfilled the second key objective of this study, namely to explore the extent to which asylum-seekers fall under the personal scope of the right to free movement. All in all, it has shown that, at least some asylum-seekers, under some legal regimes, enjoy legal protection of their freedom of movement within the host country.

[566] Spalding 2022, p. 85.
[567] Bratanova van Harten 2022, p. 19.
[568] Hathaway 2021, p. 881, fn. 389.
[569] Ashford 2015, pp. 515-534. Slingenberg (2023) applies this concept to the situation of asylum-seekers living in the Greek reception and identification centres, where they must return every evening if they wish to be provided with shelter. Returning to these centres every day, she argues, is involuntary, as the alternative option would imply a situation of severe destitution in the Greek islands. Therefore, asylum-seekers are forced to trade away their freedom in return for basic subsistence.

Chapter 3 – The material scope of the right: when does a 'restriction on movement' become 'detention' of asylum-seekers?

3.1 Introduction

This chapter will explore how the right to free movement operates in space, or in other words, the *material scope* of this right. Like Chapter 2, it is related to the *applicability* of the right to free movement, but rather than focusing on *who* is (and who is not) entitled to this freedom, it will examine *when* the right applies—and, in particular, when the right ceases to apply. In international and European human rights law, when a person's movement is restricted to such an extent that she may be considered to be *deprived* of her freedom, the right to free movement within the country gives way to the right to liberty. The ICCPR (Article 12/Article 9) and the ECHR (Article 2 of Protocol 4/Article 5) contain separate provisions for these rights, while the Refugee Convention regulates freedom of movement and the right to liberty under the same provision (Article 31(2) RC). However, the boundaries between both rights are not clear-cut: there is no precise number of square metres or square kilometres that defines the limits between a restriction on the right to free movement and a restriction on the right to liberty. Classifying places of confinement of asylum-seekers as either a deprivation of liberty or a restriction on movement is not merely a theoretical exercise, since the right to liberty offers greater protection than freedom of movement.

On the one hand, the right to liberty under the ICCPR and the ECHR applies to 'everyone', which means that there is no question of whether or not asylum-seekers fall under its scope. In other words, States are not free to exclude asylum-seekers from the radar of the right to liberty simply by categorising them as 'unlawfully present' migrants under domestic law. Nor can the 'principle of conditional lawfulness' be applied to the right to liberty.[570]

On the other hand, even if States decide that asylum-seekers fall under the personal scope of freedom of movement under the ICCPR or Protocol 4 to the ECHR, the safeguards offered by the right to liberty are higher than those afforded by the right to free movement. While a detailed comparison between the content of the two rights is beyond the scope of this study, the most relevant difference is that Article 5(4) ECHR and Article 9(4) ICCPR provide asylum-seekers with a right to take proceedings before a court, which must make a decision 'without delay' (*habeas corpus*). In contrast, in *Celepli v. Sweden*, the HRC stated that 'article 12 ICCPR does not contain a right to appeal against a decision restricting a person's liberty of movement'.[571] While the ECtHR has held that Article 2(1) of Protocol 4 ECHR includes a right to institute proceedings against a restrictive measure before an independent court,[572] the urgency of the proceedings inherent in *habeas corpus* is not present in the judicial review of a restriction on movement. As for Article 31(2) RC, even though this provision applies to both types of measures, the UNHCR ExCom Conclusions on Detention and State

[570] See the conclusions of Chapter 2.
[571] *Celepli v. Sweden*, para. 7.3.
[572] *Landvreugd v. The Netherlands*, no. 37331/97, 4 June 2002, para. 65; *Olivieira v. The Netherlands*, no. 33129/96, 4 June 2002, para. 58. See Chapter 4 for a closer examination of the safeguards provided by the right to free movement under the different treaties.

practice point to a stronger protection of the right to liberty than of the right to free movement.[573]

Moreover, in the case of asylum-seekers confined in Greek reception centres—such as the recently established Closed Controlled Access Centres—, Article 5 is the only option for them to challenge the measure before the ECtHR, since Greece is not a State party to Protocol 4.[574]

For these and other reasons,[575] classifying a confinement measure as a *deprivation* of liberty is significantly more favourable for asylum-seekers in terms of human rights protection.[576] But how to prove that a confinement measure amounts to detention? Which elements need to be taken into account?

As explained in the introduction of this study, this chapter will focus only on the case law of the European Court of Human Rights, and will therefore not examine the Refugee Convention, the ICCPR or the Spanish and German case studies.[577] According to well-established case law of the ECtHR on the applicability of Article 5 ECHR, 'the difference between deprivation of and restriction upon liberty is one of degree or intensity, and not of nature or substance'. To determine such a distinction, the starting point must be 'his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question'. This was first stated in two landmark judgments of 1976 and 1980, namely *Engel and Others v. Netherlands*[578] and *Guzzardi v. Italy*.[579] These cases concerned, respectively, punitive measures taken within the military that involved limitations on the movement of servicemen and the confinement of a Mafia member in a district of a small Italian island as a measure of special supervision.

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[573] Conclusion relating to the detention of Refugees and Asylum-Seekers No. 44 (XXXVII), Executive Committee of the High Commissioner´s Programme, 13 October 1986. Document approved by the UN General Assembly in resolution No. 12A(A/41/12/Add.1). This document never mentions the words 'restriction on movement' but only refers to detention. As will be argued in Chapter 4 (Section 4.2.1), it is likely that States at the ExCom carefully drafted the report with this language to make it clear that the *numerus clausus* safeguard applies only to detention measures and not to less stringent policies. Regarding State practice, the Court of Wellington affirmed that restrictions on movement under Article 31(2) RC 'should be able to be imposed more freely' than detention and that 'the necessity standard is variable depending on the nature of the restriction on freedom of movement' (*Attorney General v. Refugee Council of New Zealand Inc.*, para. 265).

[574] See Section 1.2 of the introduction to this study.

[575] Other differences between both rights include a full proportionality test under Article 9 ICCPR (*A. v. Australia*), which is not required by the HRC under Article 12(1) ICCPR (see Section 4.4 of Chapter 4), and a specific provision under the ICCPR (Article 10) protecting individuals against inhuman detention conditions. In Spain, the Constitutional Court has found that the proportionality assessment must be more strictly applied when a person is detained than when her movement is simply restricted (Judgment of the Constitutional Court 169/2001, 14 August 2001, Point of Law n. 2).

[576] There is one exception to this: while it is settled case-law that States do *not* have an obligation to look for alternatives to *detention* under Article 5(1)(f) ECHR (detention for the purpose of controlling irregular migration or expelling migrants), Chapter 4 (Section 4.3.3) will show that the Court does seem to require States to look for less intrusive measures than a *restriction* on movement under the case law related to Article 2(3) of Protocol 4 ECHR. For a critical evaluation of the case law under Article 5(1)(f) regarding the necessity test, see, inter alia, Cornelisse 2010. See also my analysis of the necessity test in asylum detention cases in Ruiz Ramos 2020.

[577] See Sections 5 and 7.3.2 of the introduction.

[578] *Engel and Others v. The Netherlands*, 8 June 1976, Serias A no. 22, para. 59; *Guzzardi v. Italy*, 6 November 1980, Serias A no. 39, para. 92.

[579] *Guzzardi*, para. 93.

Since then, the 'range of criteria' to which the Court refers has been gradually defined, interpreted and reinterpreted in the case law. This has been done in contexts as diverse as the confinement of mentally ill persons in psychiatric hospitals, the holding of suspected criminals in police stations and offices of the prosecutor, limitations on the movement of demonstrators, kidnappings, house arrests, and even more rare contexts such as the confinement of drug smugglers in a military ship or the stranding of a suspected terrorist in a small village following a UN Security Council resolution. Most importantly for this chapter, the Court has developed a set of criteria to determine the applicability of Article 5 ECHR in cases of confinement of asylum-seekers and other migrants in places such as airport transit zones and reception centres, starting with the landmark case of *Amuur v. France*.[580] These criteria were made explicit by the Court the two 2019 Grand Chamber judgments *Ilias and Ahmed v. Hungary* and *Z.A. and Others v. Russia*.[581]

This chapter aims to respond to the third key objective of this study, namely to examine the criteria to distinguish between restrictions on movement and detention; and compare the criteria applied in cases involving the confinement of asylum-seekers and other migrants with those employed in 'domestic cases'. The jurisprudence of the Court will thus be divided into two groups: migration-related cases and domestic cases. The first group will include cases in which the freedom of asylum-seekers and other migrants was limited in a migration-specific context, but the specific facts of the case did not allow for a straightforward classification of the measure as 'restriction' or 'detention'. It will therefore cover cases of migration-related confinement taking place in transit zones and reception centres. Cases falling into the second category will be those relating to the admissibility of an Article 5 ECHR complaint where the applicant was a national or a migrant held in a non-migration specific context, such as a police station.

The five research questions of this chapter, each corresponding to one of its sections, are the following:

(1) What were the criteria used by the Grand Chamber of the ECtHR in *Ilias and Ahmed v. Hungary* and *Z.A. and Others v. Russia* in the Article 5 applicability test? (Section 3.2);
(2) What were the criteria applied by the Court prior to *Ilias* and *Z.A.* in migration-related cases? Were the principles listed in these two Grand Chamber judgments a summary of previous rulings or did they represent a new development in the case law? (Section 3.3);
(3) What were the criteria used by the Court before *Ilias* and *Z.A.* in domestic cases? (Section 3.4);
(4) Do the criteria of *Ilias* and *Z.A.* make it more difficult for asylum-seekers to claim that a confinement measure amounts to detention than the factors used in domestic cases? (Section 3.5);
(5) If question (4) is answered in the affirmative, has the Court maintained the low level of protection of *Ilias/Z.A.* in the Article 5 applicability test of subsequent migration-related judgments up to June 2023? (Section 3.6).

[580] *Amuur v. France*, 25 June 1996, Reports 1996-III.
[581] *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, 21 November 2019; *Z.A. and Others v. Russia* [GC], nos. 61411/15, 61420/15, 61427/15 and 3028/16, 21 November 2019.

Research question (1) will provide me with a starting point for analysing the rest of the case law. Question (2) will give me a temporal overview and a better understanding of the criteria in migration-related cases. For their part, questions (3), (4) and (5) will allow me to observe whether the 'migration exceptionalism' or the 'two-tier human rights system' present in other areas of the Court's case law can also be found in the jurisprudence on the applicability of Article 5 ECHR.[582] Finally, Section 3.7 will provide some concluding reflections on the findings of the chapter.[583]

3.2 The definition of detention in 'migration-related cases' following *Ilias and Ahmed* and *Z.A. and Others*

Ilias and Ahmed v. Hungary and *Z.A. and Others v. Russia* were the first judgments in which the Court systematised the principles governing the distinction between a restriction and a deprivation of liberty in migration-related cases. Both judgments were issued by the Grand Chamber on the 21st of November 2019, and are classified as 'key cases' in HUDOC. This makes them, at the time of writing (July 2023), the most authoritative source in European human rights law to guide national judges (and the Court itself) in assessing the applicability of Article 5 ECHR when confronted with the situation of an asylum-seeker or another type of migrant who has been held in an airport or border transit zone, a migrant reception centre[584] or a refugee camp.[585] It is for this reason that these two judgments will serve as a point of reference for the analysis made in this chapter. This section will explain the facts of the cases and systematise the guiding principles they set out. It will then evaluate in detail some of the most complex principles.

3.2.1 The facts of *Ilias* and *Z.A.*

Mr. Ilias and Mr. Ahmed, two Bangladeshi nationals, arrived in Hungary from Serbia on the 15th of September 2015 with the intention of seeking asylum. At that time, the only legal way for asylum-seekers to reach Hungary other than by air was to enter the 'transit zones' of Röszke and Tompa, two barb-wired and fully guarded container camps located on Hungarian territory near the border with Serbia. Asylum-seekers could only apply for asylum in these transit zones and had to await the outcome of the admissibility procedure within the zone. The only possible way to leave the transit zone was in the direction of Serbia, but exiting the camps before the admissibility decision was made had the effect of terminating the asylum application.[586] Only vulnerable applicants were transferred to an open reception facility.[587]

[582] See section 6.2 of the introduction of this study.
[583] See Section 7.3.2 of the introduction of this study for an explanation of why the methodology followed in this chapter to review the case law of the Court slightly differs from that of chapters 2 and 4.
[584] See *Ilias*, para. 217 and *Z.A.*, para. 138, where the Court refers to 'the context of confinement of foreigners in airport transit zones and reception centres for the identification and registration of migrants'.
[585] See *Ilias*, para. 221 and *Z.A.*, para. 141, where the Court refers to applicants who request admission to that State's territory and seek asylum.
[586] Article 66(2) of Act no. LXXX of 2007 on Asylum.
[587] See the report of the Hungarian Helsinki Committee (HHC 2019).

The process of selecting who could enter the transit zones worked through informal cooperation between the Hungarian and Serbian authorities. Asylum-seekers in Serbia were accommodated in temporary reception centres by the Serbian Commisariat for Refugees (SCR). Once there, those wishing to enter Hungary were placed on a waiting list drawn up by the SCR. The list was given to community leaders—themselves asylum-seekers—selected by the SCR, who forwarded the list to the Hungarian authorities in the transit zones. The Hungarian authorities then checked the list, decided on the names of the people to be admitted in the transit zones and sent it back to the SCR through the mediation of the community leaders.[588]

The applicants in *Ilias and Ahmed* were granted permission to enter the Röszke transit zone to request asylum. Within hours, their asylum claims were declared inadmissible. Following appeal, Mr. Ilias and Mr. Ahmed spent 23 days in the transit zone while the proceedings unfolded. On the 8th of October 2015, a final decision was taken rejecting the admissibility of their applications and ordering their expulsion. They were subsequently escorted out of the transit zone.[589]

The applicants alleged before the ECtHR that Hungary had breached Article 5 ECHR by illegally detaining them in the transit zones. In response, the Government argued that the applicants had not been deprived of their liberty in the transit zones and that Article 5 was therefore inapplicable. The Court agreed with the Government and found that the applicants had not been deprived of their liberty.[590]

The case of *Z.A. and Others v. Russia* was quite different. It concerned four non-Russian nationals who found themselves stranded in the transit zone of Moscow's Sheremetyevo Airport at different times in 2015. Three of the applicants (Mr. Z.A., Mr. M.B. and Mr. Yasien) had attempted to travel by air from Russia to other countries, but were denied entry to those countries and sent back to Moscow. For his part, Mr. A.M. was deported from Cuba to Russia. Since the Russian authorities seized the applicants' passports and did not allow them to exit the airport premises, the applicants had to stay in the transit zone of the airport for several weeks. In the meantime, they applied for asylum, as they feared for their lives in their respective countries of origin. They awaited the decision on the merits of their asylum claims in the transit zone, where they slept on a mattress on the floor of the boarding area. All of their asylum claims were eventually rejected.

The applicants complained that they had been unlawfully detained in violation of Article 5. Similarly to the Government of Hungary, the Russian Government argued that the applicants were not deprived of their liberty as they were not forced to stay in the transit zones. Article 5 was therefore inapplicable. Although the guiding principles that the Court used to analyse the case were the same as in *Ilias*, in this case the Court did conclude that there had been a deprivation of liberty.[591]

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588 Ashraf *et al.* 2019, p. 309.
589 *Ilias*, para. 8.
590 *Ibid*, paras. 197-200, 201-206 and 249.
591 *Z.A.*, paras. 109-112, 113-118 and 156.

3.2.2 The principles applied in *Ilias* and *Z.A.* to establish the applicability of Article 5 in 'migration cases'

In *Ilias* and *Z.A.*, the Court begins making the distinction between a deprivation and a restriction on liberty by quoting paragraph 43 of *Amuur v. France*, according to which 'holding aliens in the international zone does indeed involve a [confinement], but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation'.[592] With this statement, the Court recognised that the confinement of migrants in an international zone (or, for that matter, in an immigration reception centre or a refugee camp) is a context in which the applicability of Article 5 is not as clear-cut as in detention centres.

In these leading judgments, the Court sets out four criteria to differentiate between detention and a restriction on liberty in migration-related cases:

'(1) the applicants' individual situation and their choices, (2) the applicable legal regime of the respective country and its purpose, (3) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events, and (4) the nature and degree of the actual restrictions imposed on or experienced by the applicants.'[593]

These criteria, in turn, may be divided into more explicit sub-criteria, which must be considered cumulatively when assessing the applicability of Article 5.[594]

The applicants' individual situation and choices

This criterion relates to whether or not the migrant has created the situation of confinement by his own actions, i.e. whether he voluntarily entered and remained in the airport transit zone or the reception centre.

In *Ilias*, the Court affirmed that there was 'no doubt' that the applicants had entered the transit zone 'of their own initiative, with the aim of seeking asylum in Hungary', and that it had been the applicants' decision to remain there in order to appeal against the expulsion order.[595] In the *Z.A.* case, the Court did not clearly define whether or not the applicants' confinement had been voluntary. On the one hand, it found that the applicants had 'entered the airport *involuntarily'* because of the specific circumstances of their travel routes and the fact that the applicants had not acted in bad faith.[596] On the other hand, it considered that the Russian authorities had not been involved in the confinement of the applicants and that 'compelled by the circumstances, they all *decided* to seek asylum in Russia'. It was 'their own initiative' to 'request admission to that State's territory' and to 'remain there to await the outcome of their asylum proceedings'.[597]

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[592] *Ilias*, para. 215; and *Z.A.,* para. 137. See *infra*, note 614 for an explanation of why I have replaced the word 'restriction upon liberty' (used by the Court in this sentence) with the term 'confinement'.
[593] *Ilias*, para. 217; and *Z.A.*, para. 138.
[594] The need to consider the different factors cumulatively was first established in *Guzzardi*, para. 95.
[595] *Ilias*, paras. 223, 220, 224.
[596] The Court contrasted this situation with that of *Mahdid and Fatiha Haddar v. Austria,* a case in which the applicants did act in bad faith.
[597] *Z.A.*, paras. 140, 142, 149, 141 and 143.

In both *Ilias* and *Z.A.*, the decisive element for deciding that the entry into the place of confinement had been (either entirely or in part) voluntary was the fact that the applicants had 'no relevant prior link to the State'.[598] This distinguished migration-related cases from 'domestic cases' in which the Court had held that initial consent could not in itself result in the individual losing the protection of Article 5. While in those cases the applicants were complying with a legal obligation, such as entering a prison or a police station, in migration-related cases the State merely reacted to the individual's wish to enter by carrying out the necessary checks.[599]

The applicable legal regime, its purpose and the relevant duration in the light of that purpose and the attendant procedural protection

Classification of the measure by domestic legislation and domestic courts

Whether national legislation or the national courts classify the measure as a deprivation of liberty will influence the Court's decision on the applicability of Article 5. In *Ilias*, a factor that led the Court to rule that the applicants were not detained was the fact that Hungarian law defined the premises as 'transit zones for temporary accommodation' and not as detention centres. A similar reasoning was applied in *Z.A.*, but other factors played a more important role and thus Article 5 was found applicable despite the fact that Russian law did not classify the confinement at the airport as detention.[600]

Intention to detain and purpose of confinement

The question of whether the State authorities intended to deprive the migrant of his liberty plays a role in the Court's assessment. Moreover, if the purpose of the confinement is to prevent irregular migration, to organise the practical details of the migrant's repatriation or to consider his asylum application, the situation is less likely to be qualified as detention.[601]

In *Ilias*, the fact that the Hungarian authorities 'did not seek to deprive the applicants of their liberty' influenced the Court's decision not to classify the measure as a deprivation of liberty. The Court noted that the Hungarian authorities were 'apparently convinced' that the applicants could realistically leave in the direction of Serbia. Furthermore, it underlined that 'no action was imputable to [the authorities] other than what was strictly necessary to verify whether the applicants' wish to enter Hungary to seek asylum there could be granted' and that the authorities 'did not limit their liberty unnecessarily or to an extent or in a manner unconnected to the examination of their asylum claims'.[602]

Similarly, in *Z.A* the Court took note of the fact that 'the Russian authorities did not seek to deprive the applicants of their liberty' and that the purpose of the measure was to establish a waiting area for the admission into the territory.[603] This would have tipped the balance in

[598] *Ilias*, para. 221; *Z.A.*, para. 141.
[599] *Ilias*, paras. 221 and 225.
[600] *Ilias*, paras. 41 and 224; *Z.A.*, para. 143.
[601] *Ilias*, para. 215 and *Z.A.*, para. 137, quoting para. 43 of *Amuur.*
[602] *Ilias*, paras. 224, 229, 236 and 233.
[603] *Z.A.*, para. 143.

favour of finding Article 5 inapplicable, were it not for the other factors indicating the existence of a deprivation of liberty.

Duration in the light of the purpose

Should the duration of confinement exceed what is strictly necessary for the purpose pursued, the Court is more likely to classify the measure as a deprivation of liberty. However, if such excessive duration is justified by exceptional circumstances, the Court may still find Article 5 inapplicable. In *Ilias*, the Court considered that the length of the confinement (21 days) did not exceed what was strictly necessary to assess the admissibility of the asylum applications. In contrast, in *Z.A.* the examination of the applicants' respective asylum claims was 'anything but speedy', as they had been confined in the airport transit zone for 5-10 months, and the excessive duration of the confinement was 'not justified by any legitimate reasons'.[604]

Procedural protection: Maximum time limits, judicial review and conformity with international law (in particular with the Refugee Convention)

A confined migrant who enjoys procedural protection—also referred to as 'suitable safeguards'—[605] is less likely to fall within the scope of Article 5. A close reading of *Ilias* and *Z.A.* leads to the conclusion that the Court will find that a restriction on movement is accompanied by suitable safeguards if three elements are present:

(1) Provisions in national law fixing the maximum duration of the migrant's stay.[606]
(2) Speedy review by the national courts of the authorities' decision to prolong the order to restrict the liberty of the migrant.[607]
(3) Conformity of the confinement measure with the State's international obligations, particularly those flowing from the Refugee Convention and the European Convention on Human Rights.[608]

Applying these criteria to the facts of *Ilias and Ahmed*, the Court found 'of significant importance' that the length of confinement was limited by domestic law. As for judicial review, it considered that the applicants benefited from 'procedural rights and safeguards against excessive waiting periods'.[609] It also took into account the existence of procedural guarantees for the processing of asylum claims,[610] implying that Hungary had conformed to the Refugee Convention.

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[604] *Ilias and Ahmed*, paras. 227-229; *Z.A.*, para. 148.
[605] *Amuur*, para. 43.
[606] *Ilias*, para. 227.
[607] *Ilias*, para. 215 and *Z.A.*, para. 137, quoting para. 43 of *Amuur*.
[608] *Ibid.*
[609] *Ilias*, para. 227. However, the dissenting judges pointed out that there had been no real analysis of the procedural safeguards in place, since at no point in the proceedings had the applicants' stay in the Rözske transit zone been assessed by a national court with a view to determining the necessity or the arbitrariness of the measure. See Partly Dissenting Opinion of Judge Bianku, joined by Judge Vucini in *Ilias and Ahmed v. Hungary*, pp. 75-80, p. 78.
[610] *Ilias*, para. 226.

In *Z.A.*, the Court noted that there were no maximum time limits in place and that the applicants had no possibility to challenge the measures restricting their freedom. Furthermore, it held that the authorities did not provide the applicants with sufficient information about the outcome of their asylum claims and disregarded its own asylum procedural laws, thus suggesting that Russia had not complied with the Refugee Convention.[611]

The nature and degree of the actual restrictions imposed on or experienced by the applicants

Communication with the outside world, surveillance, personal space and conditions of confinement

Confined migrants who are allowed to communicate with family, NGOs and lawyers from within the place where they are confined are less likely to be covered by Article 5. Similarly, the larger the personal space and the better the confinement conditions, the more chances there are that the Court will find Article 5 inapplicable. Finally, if the migrant is under strict surveillance of the authorities, this plays in favour of qualifying the situation as detention.

As to the particular cases, there were two elements in *Ilias* which led the Court to find a restriction on movement: the fact that the asylum-seekers could receive visits by their lawyer with the authorities' permission and their holding in adequate conditions—which, as underlined by the Court, did not amount to a violation of Article 3 ECHR. On the other hand, there were two elements which would generally lead to the applicability of Article 5, yet the Court did not find that they were sufficiently important on the facts: the transit zone was fully guarded and the size of the area was very limited, in a manner 'similar to that characteristic of certain types of light-regime detention facilities'.[612]

For its part, in *Z.A.* the Court discussed neither the possibility of the asylum-seekers to communicate with the outside world nor the adequateness of the conditions of confinement—even though later in the judgment it found that these conditions amounted to a violation of Article 3.[613] It did however take into account that the applicants were under constant police surveillance and that the size of the area was small, 'similar to that characteristic of certain types of light regime detention facilities'. In contrast to *Ilias*, in this case these two elements were found to be of sufficient weight as to contribute to the finding of the applicability of Article 5.

Option to leave, option to leave in practice, direct threat to life or health

There is a higher chance that the Court will find a particular measure to qualify as a 'mere restriction on liberty' if the migrant has an option to leave the airport or the reception centre. However, where the only option to leave the place is to travel to another country, the

[611] *Z.A,* para. 146.
[612] *Ilias and Ahmed*, paras. 232 and 233.
[613] *Z.A.*, para. 197.

existence of this possibility does not automatically lead to the inapplicability of Article 5. Paragraph 48 of *Amuur*, cited in *Ilias* and in *Z.A.*, clearly reflects this:

'The mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge *cannot exclude* a [confinement] (…).'[614]

Therefore, Article 5 may be applicable *even if* the asylum-seeker can voluntarily leave the country. The decisive factor will then be whether that possibility is actually available *in practice*. If this is the case, the migrant's confinement will likely not amount to a deprivation of liberty. But what exactly is a 'practical possibility to leave'?

Following the principles set out in *Ilias* and *Z.A.*, a possibility to leave in practice means that the migrant has a *de facto* option to leave the country without encountering practical problems to make the journey. For the Court, having to board a plane or a ship to a third country will generally present such problems, as it requires planning, contacting aviation companies, purchasing tickets and, in some cases, applying for a visa. Other problems may include the need for the authorities to obtain diplomatic assurances from the destination country to make the return possible. Especially if that other country is not bound by the Refugee Convention, diplomatic assurances will be needed and therefore there will be no 'practical possibility to leave'.[615] Finally, the Court will only find that there is a practical possibility of leaving the country if doing so would not expose the migrant to a *direct threat to his life or health*.

Turning to the particular cases, in *Ilias* the Court held that the applicants had a practical possibility to leave for Serbia because, unlike in the case of *Amuur*, they did not require an authorisation to board a plane, nor did the Hungarian authorities need to seek diplomatic assurances regarding their return to Serbia, as this country is bound by the Refugee Convention and by a readmission agreement with the European Union. Moreover, unlike in a previous case concerning the confinement of asylum-seekers in the reception centre of a Greek island (*J.R. and Others v. Greece*), the asylum-seekers did not have to board a ship. Indeed, the applicants could simply walk to the border and cross into Serbia, as demonstrated by the fact that other migrants had done so. Furthermore, the Court found that the applicants' fears of returning to Serbia were linked to 'insufficient access to asylum procedures' in Serbia. These fears were relevant for the analysis of Article 3 ECHR (*non-*

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[614] *Ilias,* para. 239; *Z.A.*, para. 153 [emphasis added], quoting para. 48 of *Amuur*. In this paragraph, the Court uses the term 'restriction on liberty', however, this expression should be read as meaning 'confinement', i.e. a situation where freedom is limited and which may or may not trigger the applicability of Article 5 depending on the particular facts of the case. This is supported by the French version of *Amuur*, in which the Court chose what seems to be a more appropriate term, namely '*une atteinte à la liberté*', which translates as 'an attack on freedom'. The full first sentence of the French version provides that '*La simple possibilité pour des demandeurs d'asile de quitter volontairement le pays où ils entendent se réfugier ne saurait exclure une atteinte à la liberté*'. In the French version of *Amuur*, the Court uses the term '*restriction*' to refer to a restriction on liberty (as opposed to a '*privation de liberté*'). Therefore, in my understanding, the term '*atteinte*' does not refer to a restriction on movement not affecting Article 5 ECHR, but to confinement measures in general. See also paras. 42 and 43 of the French version of the judgment.

[615] For an evaluation of the case law of the Court on diplomatic assurances and Article 3 ECHR see Spalding 2022, pp. 132-134. The author criticises the fact that the Court has not prohibited the practice of European States of expelling migrants to States where their life and physical integrity are deemed to be safe simply because that third State has given diplomatic assurances that the person will not be subjected to ill-treatment.

refoulement), but did not amount to a *direct threat to life or health* in the context of the assessment of the applicability of Article 5.[616]

In *Z.A.* the Court (implicitly) contrasted this case to *Ilias* and found that, unlike in land border transit zones, in Moscow's Sheremetyevo airport there was no practical possibility to leave because doing so would have required 'planning, contacting aviation companies, purchasing tickets and possibly applying for a visa depending on the destination'. Moreover, the authorities had not shown that the applicants could leave the airport transit zone without a direct threat for their life or health.[617]

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Once the principles laid down by the Court in *Ilias* and *Z.A.* have been described, the following three sub-sections will evaluate some of the most complex and/or controversial criteria that the Court used in these judgments to delineate the boundaries between the right to free movement and the right to liberty.

3.2.3 Some reflections on the concept of 'procedural protection'

As shown above, two elements of the concept 'procedural protection' are: (a) conformity of the measure of confinement with the ECHR and the Refugee Convention and (b) speedy review by the national courts. These elements raise a number questions that need to be addressed.

Regarding the State's compliance with the ECHR, one may wonder which exact provision of the Convention States have to comply with in order for the Court not to find Article 5 applicable. It could be Article 8, as confined migrants are likely to face interference with their right to family life, especially if they are not held together with their family.[618] However, the most important provision for the Court appears to be Article 3, since in *Ilias* the Court suggests that the State's compliance with Article 3 regarding the conditions in the transit zones is a factor that leads it to find Article 5 inapplicable.[619]

As to the Refugee Convention, the question again arises as to which provision of this treaty the State must comply with in order for Article 5 to be found inapplicable. With regard to this issue, the Court does not refer to a specific article, but assesses in general terms whether the State enables the asylum-seeker to exercise 'his right to gain effective access to the procedure for determining refugee status' at the administrative and judicial level.[620] Although this right is not explicitly contained in the Refugee Convention, the principle of *pacta sunt servanda* requires State parties to carry out refugee status determination procedures.[621]

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[616] *Ilias*, paras. 235, 237, 240, 241 and 242-248.
[617] *Z.A.*, para. 154.
[618] For instance, as noted in Section 1.1 of the introduction of this study, in *Mengesha Kimfe v. Switzerland* (no. 24404/05, 29 July 2010) the Court found a violation of Article 8 because Switzerland had forced two married (failed) asylum-seekers to live in different cantons for five years.
[619] *Ilias*, para. 233.
[620] *Ilias*, para. 215 and *Z.A.*, para. 137, quoting para. 43 of *Amuur*; *Ilias*, para 226.
[621] Hathaway and Foster 2014, p. 26. The absence of an explicit right to access refugee determination procedures in the Refugee Convention derives from the fact that refugee status is declaratory. This means that a person

The criterion 'compliance of the measure with the Refugee Convention' is rather interesting, since the Court does not only refer to asylum-seekers' right to access to a procedure against *non-refoulement* (a procedural right derived from Articles 3 and 13 ECHR)[622] but to a right of access to a refugee determination procedure *under the Refugee Convention*. The Court is fond of repeating that the ECHR does not contain a right to political asylum,[623] and yet in *Ilias* and *Z.A* it makes the applicability of Article 5 ECHR dependent on whether or not the confined asylum-seeker has access to this right. It can thus be argued that Article 5 ECHR protects the right to asylum *par ricochet*, since those confined asylum-seekers who do not have access to a refugee determination procedure are more likely to enjoy all the safeguards of Article 5.[624]

A final question remains regarding the element of 'speedy review by the national courts', included in the concept of 'procedural protection'. What happens if the national court finds that there has been a deprivation of liberty? According to the guiding principles set out in *Ilias* and *Z.A.*, if a national court rules that a given measure qualifies as detention, this will generally lead the ECtHR to declare Article 5 ECHR applicable. At the same time, however, a speedy review of the length of the confinement by a national court will tend to lead the Court to find that Article 5 does not apply. In my view, the only way to reconcile these two criteria is to conclude that the term 'speedy review by the national courts' means 'judicial review of a measure that the national court regards as a *restriction* on movement'.

3.2.4 Must the measure be *necessary* for the purpose?

As noted above, the Court is more likely to find that there is no deprivation of liberty if the purpose of the confinement is to arrange the reception of the asylum-seeker while the authorities examine his asylum application. However, for Article 5 to be declared inapplicable, does the State have to show that the confinement was *necessary* for such purpose, i.e. that there were no other less restrictive means available to achieve it?

The Court does not list the necessity test as one of the criteria to be considered in the assessment of the applicability of Article 5. Nonetheless, there are some elements in *Ilias* and *Amuur* which could lead to the conclusion that considerations of necessity play a role in the Court's reasoning. Firstly, in *Ilias*, when analysing 'the nature and degree of the actual restrictions imposed on the applicants', the Court affirmed that the conditions in which the applicants were confined 'did not limit their liberty *unnecessarily* or to an extent or in a manner unconnected to the examination of their asylum claims'.[625] This weighed in favour of finding no deprivation of liberty. Secondly, in the *Amuur* judgment (on which *Ilias* is built), one

who meets the definition of refugee under Article 1 RC is entitled to the rights set out in the Convention without the need for a formal assessment that recognises her condition as a refugee. However, if a State chooses to make access to refugee rights conditional on the results of such assessments (as most States do), an obligation arises to make these procedures accessible.

[622] For an analysis of these procedural rights, see De Weck 2017, pp. 61-136.

[623] In fact, the Court recalls this in *Ilias*, para. 125. See also *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, 23 February 2012, ECHR 2012, para. 113 and De Weck 2017, p. 77.

[624] See also Nicolosi (2015, p. 317-322), who argues that the Court has drawn a right to *de facto* asylum from the obligation not to return asylum-seekers under Article 3 ECHR (*non-refoulement*) and the duty under Article 13 ECHR to respect some guarantees in granting access to adequate asylum procedures.

[625] *Ilias*, para. 233.

element that led the Court to find that there had been detention was the fact that 'until 26 March neither the length nor the *necessity* of [the applicants'] confinement were reviewed by a court'.[626]

There is, however, an important counterargument to this. It is settled case law that States do *not* have to justify the necessity of detention under Article 5(1)(f) EHCR (administrative detention for the prevention of unauthorised entry and expulsion).[627] If the Court were to make the 'necessity test' a part of the assessment of the applicability of Article 5, this would lead to an odd jurisprudence: it would mean that the ECtHR would review whether or not the State has sought alternatives to the *confinement* of migrants at airports and reception centres (in order to decide on the applicability of Article 5), but would not examine whether or not the State has searched for alternatives to the *detention* of migrants under Article 5(1)(f) (in order to decide on the violation of Article 5). Therefore, it is unlikely that the necessity test plays a role in the Court's reasoning at the admissibility stage of an asylum-seeker's complaint under Article 5.

3.2.5 On the meaning of a 'direct threat to life or health'

As noted by Stoyanova, it follows from *Ilias* and *Z.A.* that 'the possibility to leave for a place will not preclude the qualification of the situation as one of detention, only if this place poses a direct threat to life or health'.[628] However, the meaning of this threat, or how to assess it, is left unclear. With regard to its content, the Court only mentions what a 'direct threat to life or health' is *not*: it is not the fear of entering a country with systematic deficiencies in the asylum system, nor the fear of being indirectly *refouled*.[629] In this respect, the concept 'direct threat to life or health' in the context of Article 5 seems to differ from the material protection against *refoulement* offered by Article 3 ECHR. Indeed, there are important cases in which the Court has found a violation of the latter provision on the basis of deficiencies in the asylum system of the country of destination[630] and the risk of indirect *refoulement*.[631]

As to the procedure for assessing the threat, the Court only hints at it in *Z.A.*, stating that in order for Article 5 to be found inapplicable, the State must 'convincingly show' that there was a real possibility to leave the place without a direct threat for the asylum-seekers' life or health.[632] In *Ilias*, however, the Court held that Hungary had committed a procedural violation of the principle of *non-refoulement* (Article 3 ECHR) on the grounds that the authorities had returned the applicants to Serbia without first carrying out a detailed individual assessment, but at the same time concluded that the applicants had not been detained because they could return to Serbia without any direct threat to their lives or

[626] *Amuur*, para. 45.
[627] Some of the many judgments following this line of case law are *Thimothawes v. Belgium,* no. 39061/11, 4 April 2017, para. 60 and *S.Z. v. Greece,* no. 66702/13, 21 June 2018*,* para. 53. See Cornelisse 2010 and Ruiz Ramos 2020 for an analysis of this line of case law.
[628] Stoyanova 2019.
[629] *Ilias*, paras. 242-248.
[630] *M.S.S. v. Belgium and Greece* [GC], no 30696/09, 21 January 2011; *Tarakhel v. Switzerland* [GC], no. 29217/12, 04 November 2014.
[631] *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, 23 February 2012.
[632] *Z.A.*, para. 154.

health.[633] As can be seen, the procedure for assessing this 'direct threat' appears to be different from the procedure that States must follow when examining whether the expulsion of an asylum-seeker amounts to a violation of Article 3. Thus, for the time being, it remains unclear how a State is to 'convincingly show' that such a risk does not exist.

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Section 3.2 has answered the first research question of this chapter by summarising the guiding principles of *Ilias* and *Z.A.* and engaging with some of the concepts used by the Court, (1) trying to clarify the ambiguous concept of 'procedural protection', (2) arguing that the 'necessity test' does not play a role in the applicability of Article 5 ECHR and (3) taking issue with the contradictions inherent in the term 'direct threat to life or health'. The next section will compare these guiding principles to previous cases related to the confinement of asylum-seekers and other migrants.

3.3 The *Ilias* and *Z.A.* criteria compared to previous migration-related judgments

This section will review the migration-related judgments rendered before *Ilias* and *Z.A.* in order to gain a more comprehensive understanding of how the Court delimits the line between the right to free movement and the right to liberty in cases involving the confinement of asylum-seekers and other migrants. Moreover, in *Ilias* and *Z.A.*, the Grand Chamber affirmed that the guiding principles laid down in these rulings were a *summary* of the factors that the Court had previously taken into account in the Article 5 applicability test of migration-related cases.[634] Therefore, I will evaluate the accuracy of this statement: Did these principles really summarise the criteria used in previous similar cases, or did the Court establish new principles?

In order to do this, I will analyse twelve migration-related judgments, seven of which concern international airport zones and five of which relate to accommodation centres. The Court found Article 5 applicable in seven cases and inapplicable in two. Finally, in three rulings (*J.R.*, *O.S.A.* and *Kaak*) Article 5 was only partially found applicable (regarding a specific period of the total duration of the confinement). Each of the guiding criteria set out in *Ilias* and *Z.A.* will be applied to these judgments in order to assess whether they were also used by the Court in these previous cases. Finally, a hierarchy of criteria will be construed to determine the relative importance that the Court gave to each of them prior to *Ilias* and *Z.A.*

3.3.1 The applicant's individual situation and choices

This first element played a role only in three migration-related cases: twice in favour of finding Article 5 inadmissible and once in favour of its admissibility.

In both *Mogos and Others v. Romania* and *Mahdid and Fatiha Haddar v. Austria* the Court found that Article 5 was inapplicable, inter alia, because the applicants had created the situation of

[633] This was strongly criticised by the dissenting judge, who considered that 'to conclude that the applicants would have faced no risks is mere speculation.' See Partly Dissenting Opinion of Judge Bianku, p. 76.
[634] *Ilias*, para. 217; *Z.A.*, para. 138.

confinement themselves. In *Mogos*, the applicants were a stateless family expelled from Germany to Romania. Upon arrival at Bucharest Airport, they refused to sign the required repatriation documents and to enter mainland Romania. They could also not return to Germany—as was their wish—, because they did not have passports. As a result, they were accommodated in the transit zone of the airport. For the Court, this situation was not attributable to the State.[635] In *Mahdid and Fatiha*, the applicants arrived at Vienna Airport and requested asylum. After their asylum claim had been rejected, they destroyed their passports to avoid deportation and, as a consequence, the Police Directorate ordered them to remain in the airport transit zone. According to the Court, the applicants' actions had been a 'free choice for which the Contracting State cannot be held responsible'.[636]

By contrast, in *Khlaifia and Others v. Greece* the applicants were involuntarily held in an 'early reception centre' on the island of Lampedusa after being intercepted by the Italian coastguard. According to the Court, the involuntary nature of the confinement was demonstrated by the fact that the applicants escaped the centre and were forcibly returned to it.[637]

In most of the judgments, however, the Court did not mention whether the confinement had been voluntary or not. This element was ignored even in cases where the defendant Government made the argument that the situation had been created by the behavior of the applicants because they had been 'obstinate in seeking to enter French territory'[638] or because they had allegedly refused the opportunities the Government had given them to take a flight out of the country.[639] Similarly, in another case, the defendant Government submitted that the applicants had freely chosen to stay in the Warsaw airport transit zone, but the Court did not respond to this argument.[640]

3.3.2 The applicable legal regime, its purpose and the relevant duration in the light of that purpose and the attendant procedural protection

Classification of the measure by domestic legislation and domestic courts

Before *Ilias* and *Z.A.*, the Court had explicitly rejected in migration-related cases the idea that national legislation could play a role in its decision on whether Article 5 applies to a particular case. In *Abdolkhani and Karimnia v. Turkey*, where the applicants had been placed in an

[635] *Mogos and Others v. Romania* (dec.), no 20420/02, 6 May 2004, Section C(b).
[636] *Mahdid and Haddar v. Austria* (dec.), no.74762/01, 8 December 2005, ECHR 2005-XIII (extracts), The Law, Section (b). This finding has been criticised by Cornelisse. The author argues that, since an appeal against the dismissal of the asylum application was still possible, it could be that the Austrian government had been wrong in their assessment and that the applicants were in fact in need of international protection. According to her reading of the case, if the applicants were indeed in need of such protection, the fact that they may have used their situation as a means to exert pressure on the Government becomes quite comprehensible (Cornelisse 2010, p. 282).
[637] *Khlaifia and Others v. Greece* [GC], no. 16483/12, 15 December 2016, para. 68.
[638] *Amuur*, para 39.
[639] *Riad and Idiab v Belgium*, nos. 29787/03 and 29810/03, 24 January 2008, para. 66.
[640] *Shamsa v. Poland*, nos. 45355/99 and 45357/99, 27 November 2003, paras. 27 and 37.

accommodation centre, national legislation did not classify this measure as detention.[641] The Court nonetheless affirmed that

'the applicants' placement in the aforementioned facilities amounted to a deprivation of liberty given the restrictions imposed on them by the administrative authorities *despite the nature of the classification* under national law.'[642]

Similarly, the Court held in *Khlaifia* (a Grand Chamber ruling) that the classification of the confinement under domestic law '*cannot alter the nature* of the constraining measures imposed on them'.[643] In the other cases, the Court did not look into the letter of the domestic legislation, neither when national law classified the measure as a restriction on movement,[644] nor when it classified the confinement as detention.[645]

The classification of the measure in national *judgments* did play a role in two earlier cases. In *Amuur v. France*, the applicants, four Somali asylum-seekers, arrived from Syria at the Paris-Orly Airport and applied for asylum. They were refused entry to mainland France and had no option but to stay in the airport transit zone. The Court 'took note' of the fact that the national courts had described the applicant's confinement as an 'arbitrary deprivation of liberty'.[646] This helped the Court find that Article 5 was applicable. On the other hand, in the *Mogos* ruling, the fact that there were no judicial decisions ordering the arrest or detention of the applicants played a role in the finding that Article 5 was not applicable.[647]

However, this approach was later rejected in *Nolan and K v. Russia.* In this case, the Government held that the applicant, a Georgian national, had not been detained in a small room of the Moscow airport because 'no formal detention measures had been taken'. A national court also held that the applicant had not been deprived of his liberty. The ECtHR made clear that these factors '[were] not relevant for the Court's assessment of whether or not there existed a *de facto* deprivation or restriction of his liberty'.[648]

Intention to detain and purpose of confinement

There is only one migration-related judgment before *Ilias* and *Z.A.*, namely *Nolan and K.*, in which the Court considered whether the authorities had an intention to deprive the person of her liberty. In this case, an internal document called the 'Border Crossing Guidelines' gave instructions to the airport border guards on how to act towards lawfully present non-nationals who posed a security risk, such as Mr. Nolan. The Court found that Article 5 was

[641] Law no. 5683 and Section 4 of Law no. 5682.
[642] *Abdolkhani and Karimnia v. Turkey*, para. 127 [emphasis added].
[643] *Khlaifia*, para. 71 [emphasis added].
[644] See *Amuur* (paras. 56 and 57), where domestic legislation established that 'aliens have the right to freedom of movement inside the international zone', and the three judgments against Greece *J.R and Others* (no. 22696/16, 25 January 2018), *O.S.A. and Others.* (no. 39065/16, 21 March 2019) and *Kaak and Others* (no. 34215/16, 3 October 2019), in which, after the 15th of April 2016, domestic law classified confinement in the refugee camps as a 'restriction of movement' (Article 14 law nº 4375/2016).
[645] See *Shamsa v. Poland*, where the confinement measure was part of an expulsion order which included a decision to 'detain'.
[646] *Amuur*, para. 45.
[647] The Court stated that 'the applicants are neither arrested nor detained by the Romanian authorities, as there are no judicial decisions to that effect' (*Mogos*, Section C(b)).
[648] *Nolan and K.,* no. 2512/04, 12 February 2009, paras. 40 and 95.

applicable in the case, inter alia, because 'the Guidelines mandated the border control to escort persons in the applicant's situation to "isolated premises" and place them "under guard"'. Therefore, the Court implicitly recognised that the measure was *intended* to detain migrants.

However, there is a difference between *Nolan* and *Ilias/Z.A.* In the latter two cases, in order to ascertain the intention of the measure, the Court merely referred to the Governments' statements,[649] while in *Nolan* the intention of the measure was sought in an official policy document (the Guidelines) and not in the Government's statements—in fact, the Russian Government argued that it had *not* intended to deprive the applicant of his liberty.

In all the other cases, the defendant Government did not *intend* to deprive the migrant of his liberty. The most obvious case in this regard is *Mogos*, where the Romanian Government wanted the applicants to leave the airport towards Romanian territory; it did not wish to detain them in the transit zone. Nevertheless, neither in *Mogos* nor in the other rulings analysed did the Court refer to the element of 'intention to detain'.

Regarding the element 'purpose of confinement', in all previous migration-related cases the purpose of the measure was either to prevent the migrant's unlawful entry into the territory of the State[650] or a second State,[651] to ensure the implementation of the return decision[652] or to refuse entry to a migrant considered to be a security threat.[653] However, the purpose of the measure was not considered by the Court when classifying the measure in question as a restriction on movement or as a deprivation of liberty. Sometimes the purpose of the measure was taken into account at a later stage, when assessing the compatibility of the *detention* with Article 5(1)(f),[654] but not at the admissibility stage.

Moreover, in *Khlaifia* the Court took the opposite approach than in *Ilias* and *Z.A* with regard to the element of 'purpose'. In this Grand Chamber case, the Government argued that it had not detained the applicants in the reception centre because its purpose had been to assist them and ensure their safety. The Court rejected this argument, finding that

'[t]he applicability of Article 5 of the Convention cannot be excluded by the fact (…) that the authorities' aim had been to assist the applicants and ensure their safety. *Even measures intended for protection or taken in the interest of the person* concerned may be regarded as a deprivation of liberty.'[655]

Duration in the light of the purpose

The length of the confinement is not an element to which the Court generally referred to in previous migration-related rulings, with the exception of *Khlaifia.* In that judgment, the Court noted that the duration of the applicants' confinement in the reception centre 'was not

[649] As noted above (Section 3.2.2), the Court affirmed that 'it is relevant to note that the [Hungarian/Russian] authorities did not seek to deprive the applicants of their liberty'.
[650] *Amuur v. France*; *Mahdid and Haddar v. Austria*; *Rashed v. Czech Republic*; *J.R and Others v. Greece*; *O.S.A. and Others. v. Greece*; *Kaak and Others v. Greece.*
[651] *Mogos v. Romania.*
[652] *Riad and Idiab v. Belgium*, *Abdolkhani and Karimnia v. Turkey.*
[653] *Shamsa v. Poland*, *Nolan and K v. Russia.*
[654] For instance, in *Rashed*, para. 70.
[655] *Khlaifia*, para. 71 [emphasis added].

insignificant', as it had lasted twelve days in the case of the first applicant and nine days in that of the second and third applicants.[656] However, it did not evaluate whether that duration had been excessive *in the light of the purpose* of the measure, as in *Ilias* and *Z.A.*

Regarding other judgments, in *Amuur,* the duration of the confinement in the Parisian airport transit zone was almost the same as in *Ilias* (20 days), yet the Court did not mention this factor. Similarly, in *Rashed v. Czech Republic*, the applicant, an asylum-seeker from Egypt, was confined at Prague airport and at a reception centre for 10 months,[657] just as one of the applicants in *Z.A.*, but the Court did not refer to this element.

In *Abdolkhani and Karimnia*, the Court would have had a reason to refer to the duration of the confinement, since the applicants contended that the duration (16 months) was excessive,[658] but it did not do so. There are two other judgments in which the Court notes the length of the confinement when describing the facts of the case, but does not assess whether or not that length had been excessive in its assessment of the applicability of Article 5.[659]

The case with the longest period of confinement was *Mogos*, where the applicants were confined at Bucarest airport for more than two years. Despite this, the Court found no deprivation of liberty (inter alia because of the voluntary nature of the stay, as explained above), which shows that the 'excessiveness' of the duration of confinement was not a relevant criterion before *Ilias* and *Z.A.*

Finally, similarly to with the 'purpose' criterion, the Court at times looked into the duration of the *detention* after classifying the measure as a deprivation of liberty, in order to assess its compatibility with Article 5(1)(f), but not at the applicability stage.[660]

Procedural protection

Maximum time limits

Riad and Idiab v. Belgium is the only example of a migration-related case prior to *Ilias* and *Z.A.* where considerations of time limits played a role in the Court's evaluation of the applicability of Article 5. The case concerned two Palestinian asylum-seekers who were first formally detained in a detention centre and later confined in the transit zone of Brussels National Airport. In deciding whether or not the confinement in the transit zone amounted to detention, the Court observed that '[the applicant's] confinement was ordered for an indefinite period'.[661]

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[656] *Khlaifia*, para. 70.
[657] According to the applicant's version of the events.
[658] *Abdolkhani and Karimnia*, para. 122.
[659] *Shamsa v. Poland*; *Riad and Idiab v. Belgium*.
[660] See for instance *Nolan and K.*, where the Court found that the duration of confinement (9 hours) was 'short' only after determining that Article 5 was applicable to the case.
[661] *Riad and Idiab*, para. 68.

In all the other cases, the presence of time limits was only taken into account to determine the lawfulness of the detention—as with the elements of 'purpose' and 'duration'.[662] At the applicability stage, the absence of maximum time limits was neither a factor for nor against a finding of deprivation of liberty. *Mogos* and *Mahdid and Haddar* stand out in this respect. As noted above, in these cases the applicants created the situation of confinement themselves, respectively, by refusing to enter Romanian territory and by destroying their passports. Nonetheless, the police did not set a deadline after which they would attempt to search for other solutions to the applicants' situation in order to avoid indefinite confinement.[663] Despite this, the Court held that Article 5 was inapplicable, which proves that, before *Ilias* and *Z.A.*, the presence of time limits was largely irrelevant to distinguish a restriction on movement from detention.

Judicial review

Just as the element of maximum time limits, the criterion 'judicial review of the restriction on movement' appeared only once in migration-related case law prior to *Ilias* and *Z.A.* Indeed, in *Amuur*, the fact that the length and necessity of the confinement in the airport transit zone had not been reviewed by a national court for 17 days was one of the factors that led the Court to classify the measure as a detention.[664]

Since that 1996 judgment, no other migration-related case has referred to this criterion, until the rendering of *Ilias* and *Z.A.* It may thus be said that the Court has 'rescued' an element of the Article 5 applicability test which for a long time it had only taken into account at a later stage, namely in the evaluation of the compatibility of the *detention* with Article 5(4) ECHR (*habeas corpus*).[665]

The judgment *Shamsa v. Poland* is a good example of the irrelevance of this criterion in previous case law. The applicants, of Libyan nationality, were detained by the border police in a 'special area' of the Warsaw airport because there was an expulsion order against them. The Warsaw District Court, which did not consider that the measure amounted to detention, reviewed the lawfulness of the *restriction* on liberty.[666] According to the *Ilias/Z.A.* criteria, such a review would weigh against finding Article 5 applicable. Nevertheless, the Court did not comment on this and declared the complaint admissible under Article 5.

Conformity with international law (in particular the Refugee Convention)

I have found two cases where this element was taken into account. First, in *Amuur*, the Court reprehended the Government for returning the applicants to Syria 'without being able to

[662] For instance, in *Shamsa* (para. 58) the Court established that the duration of the detention was 'indeterminate and unforeseeable', which led it to find a violation of Article 5(1)(f). Similarly, in *Rashed* (para. 75) the Court considered that the duration of the holding was not provided by law, which made the detention unlawful.
[663] For example, in *Mogos*, the authorities could have asked a national judge to allow the police to force the applicants into Romanian territory.
[664] *Amuur,* para 45.
[665] *Nolan and K.*, para. 101; *Abdolkhani and Karimnia*, para. 118.
[666] *Shamsa*, para. 29.

make an effective application to the authority having jurisdiction to rule on their refugee status'[667]. This sentence thus implied that the State had not acted in compliance with the Refugee Convention. Secondly, in *Mahdid and Haddar*, the Court compared the facts with those in *Amuur* and stated that 'unlike the authorities in the *Amuur* case, those in the instant case considered and dismissed the applicants' request for asylum within three days',[668] implying that they had not been deprived of their right of access to a refugee determination procedure.

In general terms, however, this element was not relevant before *Ilias* and *Z.A.* For instance, there was a case in which the Government was allegedly not complying with the UN Convention on Statelessness,[669] but the Court did not look into this allegation and declared Article 5 inapplicable.[670] Conversely, in two other cases, the applicants did have access to an asylum procedure in accordance with the Refugee Convention, yet the Court found that the measure amounted to a deprivation of liberty.[671]

3.3.3 The nature and degree of the actual restrictions

Communication with the outside world, surveillance, personal space and conditions of confinement

One of the most frequently used criteria in previous migration-related judgments (half of them) was the presence of police surveillance. In five cases, the Court was persuaded that the measure in question amounted to detention, inter alia, because the applicants had been under 'strict'[672] and 'constant surveillance'[673] or because they had been 'controlled by the police'.[674] On the contrary, in *Mahdid and Haddar*, the fact that the police did not monitor the applicants' movements in the airport transit zone was a factor that led the Court to classify the situation as a restriction on liberty.[675]

Another relatively important criterion was the 'communication with the outside world'. In three cases, the Court noted that the applicants did not have socio-legal assistance for fifteen days, [676] that communication with lawyers and UNHCR was subject to authorisation[677] and that the applicants were unable to communicate with the outside world.[678] This weighed in favour of finding a deprivation of liberty. On the other hand, in *Mahdid and Haddar*, the fact that the applicants were able to 'correspond and make contact with third parties', including an NGO that provided them with socio-legal assistance, was a relevant criterion for the Court to describe the situation as a restriction on freedom of movement.

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667 *Amuur,* para 44.
668 *Ibid.*
669 Convention Relating to the Status of Stateless Persons, 28 Sept. 1954 (U.N.T.S., vol. 360, p. 117).
670 *Mogos*, Section C(b).
671 *Rashed*, para. 72 and *Riad and Idiab*, paras. 8-12 and 14-17.
672 *Amuur*, para. 45.
673 *Shamsa,* para. 47; *Nolan and K.*, para. 96.
674 *Abdolkhani and Karimnia*, paras. 126-127.
675 *Mahdid and Haddar*, The Law (b).
676 *Amuur*, para 45.
677 *Abdolkhani and Karimnia*, paras. 126-127.
678 *Khlaifia*, para. 67.

The extent of the migrants' personal space in the transit zone or reception centre was considered in two cases. In *Shamsa*, the inability of the applicants to move freely within the 'special area' of the Warsaw airport was a factor that led the Court to find Article 5 applicable.[679] The opposite was true in *Mahdid and Haddar*, since the applicants could 'go about their daily lives'[680] within the airport transit zone. This militated against finding Article 5 applicable.

Finally, the adequacy of the conditions of confinement was never considered before *Ilias*. There were some cases were, like in *Ilias*, the conditions of confinement did not amount to a violation of Article 3;[681] in others, the conditions either amounted to a violation of Article 3[682] or were very poor,[683] but the Court did not refer to these findings in the applicability assessment of Article 5.

Option to leave, option to leave in practice, direct threat to life or health

The availability of an option to leave the place was the most important criterion in the previous migration-related case law. In fact, this element was present in all the judgments analysed.

The three rulings where this element is more visible are *J.R. and Others*, *O.S.A. and Others* and *Kaak and Others v. Greece*. They concern the placement of asylum-seekers in the Vial refugee camp (on the Greek island of Chios) on the 21st of March 2016, one day after the entry into force of the EU-Turkey Statement.[684] In *Kaak*, the applicants were moreover placed in a refugee centre known as the Souda Camp. In these cases, the *only* factor that the Court took into account to decide whether the confinement in the Vial Camp amounted to detention was the option to leave. Indeed, the Court drew a line between the days before the 21st of April, when Vial was a closed centre, and the days after that date, when the camp 'was transformed into a semi-open centre'.[685] For the Court, the applicants had stopped being detained after the 21st of April, when they had an option to leave during the day—even if they had to return in the evenings if they did not want to lose the social benefits provided in the camp. Similarly, the fact that the Souda Camp was an open structure led the Court to accept the Government's argument that Article 5 did not apply.[686]

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679 *Shamsa*, para. 47.
680 *Mahdid and Haddar*, The Law (b)
681 *Mogos v. Romania* ; *J.R. v. Greece*; *O.S.A. v. Greece*; *Kaak v. Greece.*
682 *Riad and Idiab*, para. 111.
683 In *Shamsa*, the Polish Ombudsman raised concerns about the painful conditions of confinement; in *Rashed*, the airport reception centre exceeded its maximum capacity; and in *Nolan and K*, the room where the applicant was held had no ventilation or windows.
684 EU-Turkey statement. European Council Press release, 18 March 2016.
685 *J.R.*, para. 86, *O.S.A.*, para. 43, *Kaak*, para. 65.
686 *Kaak*, para. 85. The Court did not actually assess whether the accommodation in Souda Camp amounted to a deprivation of liberty. However, the Government did claim that 'Article 5 was not applicable because it was an open structure', and the Court recorded this claim under the section of the judgment referring to the applicability of Article 5. Thus, through the Court's silence, and in view of its finding regarding the Vial camp, implicitly acknowledged that Article 5 was not applicable because the applicants had the option to leave.

As for the option to leave 'in practice',[687] there is only one case in which, depending on its reading, it may be argued that the Court did or did not take this factor into account. Indeed, in para. 48 of *Amuur v. France*, the Court made the following statement:

'The mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a [confinement] (…). This possibility becomes theoretical if no other country offering *protection comparable* to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in. Sending the applicants back to Syria only became possible, apart from the *practical problems of the journey*, following negotiations between the French and Syrian authorities. The assurances of the latter were dependent on the vagaries of diplomatic relations, in view of the fact that Syria was not bound by the Geneva Convention relating to the Status of Refugees.'[688]

The first possible interpretation of this paragraph is the one made by the Grand Chamber in *Ilias and Ahemd*. The Grand Chamber focused on the expression 'the practical problems of the journey', and concluded that these problems were the decisive factor which had led the Court to conclude that Mr. Amuur had no option to leave the country.[689]

The second possible interpretation is the one made by the partly dissenting judge in *Ilias and Ahmed*. According to Judge Bianku, the Court in *Amuur* had found that the applicants had no option to leave the airport *not* because of the practical problems of the journey, but because they could not find protection in Syria comparable to that which they hoped to enjoy in France.[690]

In the other cases, the element 'practical option to leave' was not present. For example, in *Shamsa* the Polish authorities constantly attempted to deport the applicants to Libya, as evidenced by the fact that the applicants were sent to Prague and Tunis—but on both occasions they returned to Warsaw instead of continuing their journey to Libya. The Court could thus have concluded that the applicants had no practical difficulties in leaving the Warsaw airport by plane and that they had therefore not been detained in the transit zone. Nonetheless, it did not mention this factor and found Article 5 to be applicable. A similar situation arose in *Riad and Idiab*, where the Belgian Government booked flights for the applicants on several occasions and eventually returned them to Beirut, but the Court nevertheless found a deprivation of liberty without considering the absence of practical problems to leave Belgium. The Court also quoted para. 48 of *Amuur* in two cases without referring to this element.[691]

One final case should be highlighted in this context, namely *J.R. and Others v. Greece*. According to the Grand Chamber in *Ilias and Ahmed*, the applicants in *J.R.* did not have a practical possibility to leave the island of Chios 'because they could only leave to the direction of Turkey, the country from which they came, otherwise than by boarding a vessel'.[692] The

[687] I.e. the *de facto* option to leave the country without encountering practical problems to effect the journey. See explanation above, Section 3.2.2, sub-section *Option to leave, option to leave in practice, direct threat to life or health*.
[688] *Amuur*, para. 48 [emphasis added].
[689] *Ilias*, para. 240. According to Stoyanova (2019), this 'move' by the Grand Chamber 'play[ed] down the importance of and narrow[ed] the relevance of *Amuur v. France*'.
[690] Partly Dissenting Opinion of Judge Bianku, p. 79.
[691] *Rashed*, para. 71; *Riad and Idiab*, para. 68.
[692] *Ilias*, para. 240.

Grand Chamber thus appears to suggest that in *J.R.* the element 'practical option to leave' was an important factor in the Article 5 applicability test. However, there is no reference to this criterion in the judgment *J.R.* itself. Moreover, the question in *J.R.* was not whether the applicants could leave the island of Chios towards Turkey, but whether they were able to leave the Vial reception centre towards the rest of the island.

On a different note, the element 'direct threat to life or health' was not present in any of the cases preceding *Ilias* and *Z.A.* For instance, in *Mahdid and Haddar* the life or health of the asylum-seekers could have been directly threatened upon deportation, as UNHCR had warned that, if the Austrian authorities returned them to Tunisia, they would risk deportation to their country of origin (Algeria).[693] However, this element was not considered and the Court classified the confinement as a restriction on freedom of movement. On the contrary, in *Shamsa* and in *Rashed* there was no indication that the applicants would face a direct risk to their life or health upon deportation, since Mr. Shamsa had not sought asylum and the asylum application of Mr. Rashed had been rejected by a national court. Nonetheless, the ECtHR ignored this element and found Article 5 applicable.

3.3.4. A summary or an innovation?

In order to provide a general overview of the above findings and answer the second research question of this chapter, I have created a ranking of the factors that the Court took into account before *Ilias* and *Z.A.* when delimiting the boundaries between the right to free movement and the right to liberty. The ranking, from the most relevant to the least important factor, is the following:

(1) Option to leave the place (12 cases);
(2) Police surveillance (6 cases);
(3) Communication with outside world (4 cases);
(4) Voluntary entry (3 cases);
(5) Personal space, conformity with the Refugee Convention (2 cases);
(6) Intention to detain, maximum time limits, judicial review, duration of the confinement (1 case);
(7) Option to leave in practice (in *Amuur*, depending on how the judgment is interpreted);
(8) Classification of the measure by the national courts (2 cases, but later rejected).

As noted at the beginning of this section, the Grand Chamber affirmed that the elements presented in *Ilias* and *Z.A.* were a summary of previous migration-related cases. The answer to whether this statement is accurate is nuanced. On the one hand, most of the factors were in fact a summary of previous criteria—though their relative importance changed. On the other hand, there were four elements which appeared for the first time either in *Ilias* and/or *Z.A.*

There is a first set of summarised factors which retained their relative importance in *Ilias* and *Z.A.*, namely 'the option to leave the place' and 'communication with the outside world'. The

[693] *Mahdid and Haddar*, Section A. Moreover, their asylum application had only been rejected at first instance (see *supra* note 636).

interpretation of the latter element, however, changed: in former cases, when the communication with the outside world was subject to authorisation, this weighed in favour of finding a deprivation of liberty.[694] In contrast, in *Ilias and Ahmed*, the fact that the applicants could receive visits by their lawyer *with the authorities' permission* was one of the factors that lead the Court to declare Article 5 inapplicable.

Secondly, I have identified a second group of factors which, although present in the previous case law, gained more relevance in *Ilias* and *Z.A.*:

(a) The criterion 'voluntary entry' only appeared in 3 out of 12 judgments, but in *Ilias* and *Z.A.* it became the first criterion that the Court assessed.
(b) The 'classification of the measure by the national courts' was used twice but later rejected in *Nolan*. The Grand Chamber in *Ilias and Z.A.* therefore reverted to its pre-*Nolan* case law by reconsidering this element as an important criterion.
(c) The 'intention to detain' was only present in one previous case. This element became more important in *Ilias* and *Z.A.*, and the source from which the authorities' intention was inferred changed, since the statements of the defendant Governments about their intentions were taken into account.
(d) The 'duration of the confinement', which was used only once before *Ilias* and *Z.A.*, became one of the main principles in the Grand Chamber judgments. Moreover, the meaning of this element slightly changed, since the Court referred to the duration *in light of the purpose* of the measure.
(e) The elements 'maximum time limits', 'judicial review' and 'conformity with the Refugee Convention' were barely present in previous judgments. In *Ilias* and *Z.A.*, however, the Court included them as the three pillars that make up the general criterion 'procedural protection'.

There is a third set of criteria which were present in previous case law, but which lost importance in *Ilias and Ahmed* (although not in *Z.A.*):

(a) Police surveillance, which was the second most important facotr in previous judgments, was not regarded as being sufficiently relevant in *Ilias*. Indeed, the Grand Chamber noted that that the Rözke transit zone was 'fully guarded', in a manner similar to 'certain types of light-regime detention facilities'. However, it did not consider this factor to be of sufficient weight for it to apply Article 5 to the case.
(b) Personal space, although not the most important factor before *Ilias* and *Z.A.*, led to a positive finding on the applicability of Article 5 in the two cases in which the Court referred to it. In *Ilias*, however, the Court mentioned it—noting that its size was similar to that of light-regime detention facilities—and yet did not classify the measure as detention.

Finally, the four elements which the Court took into account for the first time were (1) 'classification of the measure in domestic legislation', (2) 'purpose of the measure', (3) 'conditions of confinement' and (4) 'direct threat to life or health'. The first two elements represent a major shift in the case law, since the Court had twice rejected the 'classification

[694] *Abdolkhani and Karimnia*, paras. 126-127.

in domestic legislation' as a relevant factor, and in one Grand Chamber case dismissed the notion that the purpose should play a role assessing the applicability of Article 5.

3.4 The Courts' criteria to determine the applicability of Article 5 in 'domestic cases'

This section will explore the criteria that the Court applied to draw the line between the right to free movement and the right to liberty in 'domestic cases' rendered prior to *Ilias* and *Z.A.*.[695] This analysis will serve as a basis for a comparison between domestic cases and the *Ilias/Z.A.* criteria, which will be made in Section 3.5 to assess whether the 'migration exceptionalism' or the 'two-tier human rights system' can be observed in the case law on the distinction between the right to free movement and the right to liberty. In order to facilitate this comparison, I will apply the guiding principles of *Ilias* and *Z.A.* to the selected domestic judgments. This will allow me to evaluate not only whether the criteria used in *Ilias/Z.A.* and in domestic cases were the same, but also whether the Court understood them in a similar manner. Should I find elements in domestic cases that were not part of the *Ilias/Z.A.* principles, I will add them at the end of this section under the heading 'other criteria not presented in *Ilias* and *Z.A.*'.

I have selected a total of twenty-one domestic cases. The Court found Article 5 applicable in fifteen of them, and declared the complaint inadmissible in five others. Finally, in *Engel and Others v. The Netherlands*, the Court found that there had been detention in some of the applicants' cases and a restriction on movement in the case of another group of applicants.

3.4.1 The applicant's individual situation and choices

This criterion was discussed by the Court in the majority of the domestic cases (thirteen). The general rule it applied is that a deprivation of liberty requires an *objective* element (confinement in a particular restricted place for a not negligible length of time) and a subjective one (lack of valid consent).[696] However, the case law shows that the element of consent is quite complex, with many nuances to it.

The first point to note is that the Court's analysis focuses not on the initial consent to be confined, but on whether the applicant agreed to the *continuation* of the confinement. This line of case law began in 1971 with *De Wilde, Ooms and Versyp v. Belgium*. The case concerned three persons who had presented themselves at the police station in order to be treated as a vagrants because they found themselves without means of subsistence. As a result, they were placed in a welfare settlement, a measure which the Government argued did not amount to detention, 'since their admission to [the settlements] had been the result of an express or implicit request'. The Court was not persuaded by this argument, and made its—often quoted—statement that

[695] As noted in the introduction of this chapter, I will classify under this term those ECtHR judgments relating to the admissibility of an Article 5 complaint where the applicant was a citizen of the State, as well as those in which the applicant was a migrant who found himself confined in a place other than an airport transit zone or a refugee camp.

[696] *Storck v. Germany*, no. 61603/00, 16 June 2005, ECHR 2005-V, para. 74; *Stanev v. Bulgaria*, no. 36760/06, 17 January 2012, ECHR 2012, para. 117.

'[t]he right to liberty is too important in a "democratic society" within the meaning of the Convention for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention. Detention might violate Article 5 even although the person concerned might have agreed to it.'[697]

Subsequent cases confirmed the (relative) irrelevance of whether or not the applicant initially consented to confinement. For instance, in *Storck v. Germany* and in *Rantsev v. Cyprus and Russia*, the Court noted that, while the applicants had initially consented—or not objected—to their confinement (respectively in a hospital and in a private apartment),[698] this was immaterial because they had later shown their disagreement with the continuation of the confinement.[699] Article 5 was therefore found to be applicable. The opposite situation arose in *H.M. v. Switzerland*, where the applicant initially objected to her confinement in a psychiatric hospital, but after some time consented to its continuation.[700] Thus, the Court found no deprivation of liberty. The case of *H.L. v. UK* additionally shows that initial consent is especially irrelevant when the person is legally incapable of giving or withholding consent to the proposed measure.[701]

A second issue relating to this criterion is how to determine whether or not the applicant consented to the confinement. For the Court, a strong proof of lack of consent is an attempt to escape.[702] However, it is not necessary that the applicant tries to escape in order for the confinement to be classified as 'involuntary'.[703] Not is it necessary for the applicant to ask to be allowed to leave—a factor that used to be decisive for the former European Comission—[704] or to resist the authorities.[705] For example, in *Stanev v. Bulgaria*, the mere fact that the applicant had not *explicitly consented* to the confinement in a psychiatric hospital led the Court to classify the confinement as involuntary.[706] This could be read as a 'presumption of involuntariness': confinement is only voluntary if the applicant explicitly agrees at some point during the confinement (such as the applicant in *H.M. v. Switzerland*).

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[697] *De Wilde, Ooms and Versyp*, 18 June 1971, Series A no. 12, paras. 64 and 65. The Court therefore found Article 5 to be applicable.

[698] *Storck,* para. 75; *Rantsev v. Cyprus and Russia*, no. 25965/04, 7 January 2010, ECHR 2010 (extracts), para. 312. The initial consent of Ms. Storck was recalled in *Stanev*, para. 118.

[699] *Storck*, para. 76; *Rantsev*, para. 316. See also the Court's statement in *Creangă v. Romania* [GC], no. 29226/03, 23 Feburary 2012, para. 94: 'although the applicant was not brought to the [office of the prosecutor] under duress, this does not constitute a decisive factor in establishing the existence of a deprivation of liberty'. A further example of this line of case law is *Buzadji v. Moldova*, paras. 106-109.

[700] *H.M. v. Switzerland*, no. 39187/98, 26 February 2002, ECHR 2002-II, paras. 32 and 47.

[701] In *H.L.*, the fact that the person was legally incapable of consenting to her confinement in a mental hospital led the Court to reject the Government's argument that the measure had been voluntary. See *H.L. v. the United Kingdom*, no. 45508/99, 5 October 2004, ECHR 2004-IX, para. 90.

[702] *Storck*, para. 76; *Rantsev*, para. 316.

[703] In *H.L. v. UK* the Government argued that the person confined in the hospital never attempted or expressed her wish to leave, but the Court rejected this argument as irrelevant. See *H.L.*, paras. 83 and 90.

[704] See *Creangă v. Romania* (para. 93) and *M.A. v. Cyprus*, no. 41872/10, 23 July 2013, ECHR 2013 (para. 188), where the Court acknowledges the position of the Commission in this regard but affirms that 'the case law has evolved since then'.

[705] *M.A. v. Cyprus*, para. 193.

[706] *Stanev*, para. 130. On the contrary, in *H.M. v. Switzerland* (para. 46) the Court found that confinement in the hospital was voluntary because the applicant had expressly stated her agreement with the measure. Similarly, in a previous case (on which the reasoning in *H.M.* is based), the mother of the applicant, having legal authority to act on his behalf, explicitly expressed her will to confine her son in the hospital. This led the Court to classify the confinement as 'voluntary'. See *Nielsen v. Denmark*, 28 November 1988, Series A no. 144.

A key concept in this discussion is that of *coercion*. Drawing on various judgments, the Court's understanding of coercion can be defined as 'the physical or mental pressure exerted on a person which leads her to accept or even seek the measure of confinement'. In order to determine whether coercion is present, the following question must be asked: did the applicant have a realistic or reasonable choice to refuse the measure or not to request it?

Examples of situations in which the mental pressure exerted on an applicant led him to 'accept' the confinement were the threat of the use of force by the police,[707] an order received from the person's superior,[708] a large-scale police operation conducted at night to dismantle a protest,[709] and the fear of disobeying an apparently lawful order of the police.[710] On the other hand, *De Wilde, Ooms and Versyp* and *Buzadji v. Moldova* are examples of cases where an external factor forced the applicants to ask for the measure of confinement. In the first case, the applicants' 'temporary distress or misery' was the reason behind their request to be placed in a welfare home. In the second case, it was the 'deterioration of [the applicant's] state of health during his remand in custody' which made him 'ready to make concessions in order to put an end to it'.[711] In all these judgments, the Court found Article 5 to be applicable, inter alia, because the presence of coercion made it unrealistic to assume that the person had a genuine choice to refuse or not to request the measure of confinement.

3.4.2 The applicable legal regime, its purpose and the relevant duration in the light of that purpose and the attendant procedural protection

Classification of the measure by domestic legislation and domestic courts

In domestic judgments, the classification of the measure in national *legislation* was only considered in two cases in the law regarded the measure as detention: *Ashingdane v. UK*, a case concerning confinement in a psychiatric hospital, and *Buzadji*, a case relating to house arrest. In the first ruling, the Court held that Article 5 was applicable, inter alia, because the applicant's liberty had been 'circumscribed both in fact *and in law*', since 'he ha[d] been continually subject to an [order of discharge] under the 1959 Act'.[712] In *Buzadji*, the Court stated that '*it is of interest to note* that, in the instant case, house arrest is also considered as deprivation of liberty under the relevant national law'.[713] The wording of this sentence suggests that this criterion was not central to the Court's reasoning. In fact, in this case, the Court 'insisted' on the ECtHR's 'autonomous interpretation of the notion of deprivation of

[707] *Shimovolos v. Russia*, no. 30194/09, 21 June 2011, para. 50. Although not handcuffed or physically restrained, the applicant was brought to the police station by a police officer under a threat of force.
[708] *Creangă v. Romania*, para. 32. The applicant was a police officer who received a verbal order from his superior to report to the prosecutor's office. According to the Court, since police officers are bound by military discipline, 'it would have been extremely difficult for them not to carry out the orders of their superiors'.
[709] *M.A. v. Cyprus*, para. 193, according to which 'it cannot be said that they had a real choice and that they boarded the buses and remained on the police premises voluntarily. It would be unrealistic to assume that the protesters were free to refuse to board the bus or to leave the police headquarters'.
[710] *Kasparov v. Russia*, para. 40. According to the Court, 'the applicant had little choice but to follow the police officer from the check-in hall; if he had refused, he would have been disobeying an ostensibly lawful order of the police'.
[711] *Buzadji v. Moldova* [GC], no. 23755/07, 05 July 2016, ECHR 2016 (extracts), para. 108.
[712] *Ashingdane v. the United Kingdom*, 28 May 1985, Series A no. 93, para. 42.
[713] *Buzadji*, para. 105 [emphasis added].

liberty'.[714] Moreover, there were other similar cases in which domestic law also classified the measure as detention but the Court considered it to be a restriction on movement.[715]

In cases where national legislation classified the measure as a restriction on movement, the Court either ignored this fact[716] or explicitly refused to examine the wording of national law. Already in the early case *Guzzardi v. Italy*, in which the applicant was convicted by a court to live in the district of an island, the ECtHR stated that although residence in a specified district did not fall within the scope of Article 5 under national law, 'the manner of implementation is the sole issue that falls to be considered'.[717] In three subsequent cases it laid down the general principle according to which

'it is often necessary to look beyond the appearances and the language used and concentrate on the realities of the situation [and] the characterisation or lack of characterisation given by a State to a factual situation cannot decisively affect the Court's conclusion as to the existence of a deprivation of liberty.'[718]

As for the classification of the measure by the *national courts*, in *H.L. v. UK* and in *Storck v. Germany* the Court downplayed the relevance of this element by stating that the ECtHR

'needs to have regard to the domestic courts' related findings of fact but is not constrained by their legal conclusions as to whether or not the applicant was deprived of her liberty within the meaning of Article 5(1).'[719]

In the other judgments, the findings of the national courts were simply ignored. For example, in four cases, the national courts held that Article 5 did not apply to the case, and yet the ECtHR declared that the case was admissible, thus contradicting the domestic courts.[720] In contrast, in *Nada v. Switzerland*, the national court decided that 'practically speaking', the applicant's inability to leave Campione d'Italia, an area of only 1.6 sq. km., was tantamount to house arrest.[721] Although the applicant attempted to support his claim on this finding,[722] the Court did not consider them and declared that the applicant's confinement only amounted to a restriction on movement.

Intention to detain and purpose of confinement

The 'intention to deprive the applicant of his liberty' was referred to in only three domestic cases. In *Shimovolos v. Russia*, the Court noted that the Government did not dispute the applicability of Article 5.[723] Similarly, in *Buzadji* it considered that 'it is of interest to note that,

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[714] *Buzadji*, para. 103.
[715] *Engel*, para. 49; *H.M. v. Switzerland*, para. 30.
[716] *Stanev*, para. 58.
[717] *Guzzardi*, para. 94.
[718] *Creangă*, para. 91-92; *M.A. v. Cyprus*, para. 187; *Kasparov v. Russia*, para. 36. In *Kasparov v. Russia* (para. 46), the Court responded to the Government's arguments by asserting that 'it is no answer that, as the Government have argued, the applicant was not detained because he was not arrested'.
[719] *H.L. v. UK*, para. 90; *Storck*, para. 72 (emphasis added).
[720] *Engel*, para. 49; *Riera Blume and Others v. Spain*, no. 37680/97, 9 March 1999, ECHR 1999-II, paras. 16-17; *Rantsev*, para. 41; *Medvedyev and Others v. France*, no. 3394/03, 29 March 2010, ECHR 2020, para. 22.
[721] *Nada v. Switzerland* [GC], no. 10593/08, 12 September 2012, ECHR 2012, para. 52.
[722] *Nada*, para. 222.
[723] *Shimovolos*, para. 50.

in the instant case (…) the Government themselves accepted that the applicant's house arrest constituted deprivation of liberty'.[724] Finally, in *M.A. v. Cyprus*, the Court referred to the fact that the police had received instructions to use 'discreet methods of arrest'.[725] These cases show that the 'intention to detain' might be taken into account when either the Government's statements or internal documents reveal that this intention was present.

However, this criterion did not play a role in any of the domestic cases in which the Government argued that it did not intend to detain the person. For example, in *Riera Blume and Others*, the Government submitted that when the police transferred the applicants to the hotel (where they were subsequently confined by a religious organisation), they 'had been treated like people at liberty' because they had not been handcuffed.[726] Similarly, in *Medvedyev*, the Government argued that the applicants (drug smugglers who had been intercepted by a navy ship) were only restricted in their movements by the confines of the ship itself, and thus the case should not be classified as detention.[727] In both cases, the Court did not respond to these arguments and found Article 5 applicable on the basis of other factors.

As regards the element of 'purpose of the measure', this was only taken into account in the 2002 case of *H.M. v. Switzerland*, where one factor that led the Court to find a restriction on movement was the fact that the national court had ordered the applicant's placement in a nursing home *in her own interest*, 'in view of providing her with the necessary medical care and satisfactory living and sanitary conditions'.[728] However, this appears to have been an isolated case without repercussions in subsequent judgments, since in the Court did not refer to this element in subsequent similar cases in which the purpose of the confinement was to protect the applicant.[729] In fact, in one of these cases, the State tried to rely on *H.M.* by arguing that the applicant's placement in the home had simply been a protective measure taken in his best interests, but the Court ignored this argument.[730]

Should any doubts remain as to whether the purpose might be relevant in domestic cases, they are dispelled when reading *Creangă v. Romania* and *MA. v. Cyprus*. In these judgments, the Court acknowledged that, for the former European Commission, the purpose of the presence of individuals in police stations was a relevant factor to assess the applicability of Article 5. However, it goes on to state that the case law has evolved and that

'the purpose no longer appears decisive for the Court's assessment of whether there has been a deprivation of liberty. To date, the Court has taken this into account only at a later stage of its analysis.'[731]

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[724] *Buzadji*, para. 105.
[725] *M.A. v. Cyprus*, para. 194.
[726] *Riera Blume*, para. 27.
[727] *Medvedyev*, para. 50.
[728] A similar reasoning was used in the judgment *Nielsen v. Denmark,* to which the Court refers (*H.M.*, para. 43). In this case, a child was placed in a psychiatric hospital 'in order to cure him of his neurosis', and the ward in the hospital was locked 'to prevent children from exposing himself to danger and disturb others'.
[729] *H.L. v. UK*; *Storck v. Germany*; *Stanev v. Bulgaria.*
[730] *Stanev*, para. 111.
[731] *Creangă*, para. 93; *M.A. v. Cyprus*, paras. 188-189. This sentence is not entirely accurate, since the purpose was taken into account in *H.M.* by the European Court, not by the Commission. In any event, the statements in *Creangă* and *M.A.* prove the little impact that the finding regarding the 'purpose' in *H.M.* had in the Court's subsequent case law.

Duration in the light of the purpose

When stating the general principles on the applicability of Article 5 in the various judgments, the Court often repeats that the duration of the measure is one of the criteria to be taken into account.[732] Despite this statement, the element of duration is not always present in the Court's reasoning. Drawing on the substantive part of the Court's analysis on the applicability of Article 5, I have identified four types of domestic cases:

(1) Judgments in which the Court only mentioned the duration of the confinement in passing, when recalling the facts of the case, but without assessing whether the length of the confinement has an impact on the applicability of Article 5—even if in some of them the actual duration was very long.[733]
(2) Cases where a very long duration of the confinement was a factor that led the Court to find a deprivation of liberty.[734] However, in *Nada v. Switzerland*, the Court acknowledged that the measure had been maintained for a 'considerable length of time'[735] (several years), yet other factors played a more important role and Article 5 was found to be inapplicable.
(3) One case (*H.M. v. Switzerland*) in which the fact that the duration of the applicant's hospitalisation (about a year) was similar to the length of the stay in the hospital of any other patient weighed against a finding of detention.[736] This is the only case in which the 'short' length of the confinement was a factor leading the Court to reject the applicability of Article 5.
(4) Cases in which the Court showed that 'duration' is only a minor factor in its assessment. In most of these cases, the duration of the confinement was short (e.g. 2 days) or very short (e.g. 2 hours), yet the Court found a deprivation of liberty, affirming that 'a short duration cannot alter the conclusion that there is a deprivation of liberty if there are other factors which lead to this finding'.[737] It does appear, however, that in cases where the duration of the confinement is short (e.g. less than an hour), there must be other elements which point to a deprivation of liberty.[738]

In its general principles, the Court has sometimes stated that Article 5 does not apply at all where the duration of confinement is 'negligible'.[739] However, I did not find an example of a case where the duration was considered to be negligible. From the rulings examined, it is clear that thirty minutes is not a 'negligible time', as this was the duration of confinement in *Gillan and Quinton*[740] and the Court found that Article 5 was applicable.

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[732] See, for instance, *Riera Blume*, para. 28.
[733] *De Wilde, Ooms and Versyp v. Belgium*; *Ashingdane v. UK*; *Riera Blume and Others v. Spain*; *H.L. v. UK*; *Storck v. Germany*; *Medvedyev and Others v. France*; *De Tommaso v. Italy* [GC], no. 43395/09, 23 February 2017, ECHR 2017 (extracts).
[734] One of the applicants in *Engel* (para. 64); *Guzzardi*, para. 95; *Stanev*, para. 129; *Buzadji*, para. 105.
[735] *Nada*, para. 229.
[736] *H.M.*, para. 43. The Court's finding in *H.M.* relied on that of a previous case, *Nielsen v. Denmark*.
[737] One of the applicants in *Engel* (para. 63); *Rantsev*, para. 317, *Iskandarov v. Russia*, no. 17185/05, 23 September 2010, para. 140; *Shimovolos*, para. 50. This statement was repeated in the general principles on the applicability of Article 5 in *Creangă* (para. 93), in *M.A. v. Cyprus* (para. 190) and in *Kasparov* (para. 36).
[738] This may be inferred from *M.A. v. Cyprus*, where the Court decided to closely analyse whether or not Article 5 was applicable because of the fact that the person had only been held in the police stations for 45 minutes.
[739] *Storck v. Germany*, para. 74.
[740] *Gillan and Quinton v. the United Kingdom*, no. 4158/05, 12 January 2010, ECHR 2010 (extracts). This case was quoted, among others, in *Shimovolos*, para. 49.

In conclusion, the element of 'duration' only seems to come into play at the applicability stage when the confinement lasts for a very long time—and even then, it is often ignored by the Court. Duration is clearly a 'second class' criterion, but not an insignificant one. Finally, it should be noted that the length of the confinement is also (and often *only*) relevant in the assessment of the lawfulness of the *detention*.[741]

Procedural protection

Maximum time limits

Of all the domestic cases analysed, the element 'maximum time limits' was considered only once, in *Stanev v. Bulgaria*, where the Court observed that the duration of the measure 'was *not specified* and thus indefinite', which weighed in favour of classifying the measure as detention.[742]

However, as with 'purpose' element examined above, this was an isolated finding, since it was not mentioned in any other judgment. Moreover, the little relevance of this criterion can be observed in several cases. For example, in *Buzadji v. Moldova*, the national court imposed the measure of house arrest for a limited period of time. Despite the foreseeability of the duration of the confinement, the Court found Article 5 to be applicable.[743] Conversely, in *Nada v. Switzerland*, there were no maximum time limits for the confinement of the applicant in Campione D'Italia, neither in the UN Security Council Resolution imposing the measure nor in the national law implementing it, yet the Court held that Article 5 was not applicable.[744]

Judicial review

Whether or not a national court had reviewed the lawfulness of the *restriction* on movement[745] was not taken into account in any of the domestic cases analysed at the applicability stage of an Article 5 complaint. In some of the cases, judicial review played a role at a later stage, wither in the Court's analysis of the alleged breach of Article 5(4) (*habeas corpus*),[746] Article 5(3) (right to trial within a reasonable time or to be released pending trial),[747] or in its analysis of the violation of other provisions.[748]

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[741] See for instance *Medvedyev*, in which the duration of the confinement of the applicants in the ship (13 days) was not mentioned by the Court in its applicability assessment of Article 5, but was taken into account when evaluating whether or not there had been a breach of Article 5(3).
[742] *Stanev v. Bulgaria*, para. 129.
[743] *Buzadji*, paras. 37-38. Similarly, in *Engel* (paras. 21-22, as regards the applicant who was confined under the regime of committal to disciplinary unit) and in *Guzzardi* (para. 49) time limits were present in domestic law, yet the Court found Article 5 to be applicable.
[744] See also *Engel v. Netherlands* (as regards the measure imposed against some of the applicants) and *H.M. v. Switzerland*, in which the measure was classified as a restriction on liberty despite the lack of time limits.
[745] See explanation in Section 3.2.3: only judicial review by national courts who view the measure as a restriction on movement (i.e. who do not apply Article 5 to the case) is relevant for the criterion 'procedural protection'.
[746] *H.L. v. Switzerland.*
[747] *Medvedyev v. France.*
[748] For example, in the Court's assessment of the alleged violation of Article 6 ECHR (right to a fair trial) in *Ashingdane v. UK.*

In several cases, the national courts did review the lawfulness of the measure after classifying the confinement as a restriction on movement. This could have led the Court to declare Article 5 inapplicable, but it did not. In *Guzzardi*, for example, there were two courts—the Milan Court of Appeal and the Court of Cassation—which reviewed the lawfulness of the restriction on movement, and yet the ECtHR found Article 5 to be applicable.[749] On the other hand, in *Nada v. Switzerland*, the applicant could not challenge the lawfulness of the confinement measure imposed by the UN Security Council.[750] Nonetheless, this lack of judicial review did not lead the Court to apply Article 5 to the case.

Conformity with international law (in particular the Refugee Convention)

In none of the domestic cases did the requirement 'conformity with international law' play a role. It is evident that 'conformity with the Refugee Convention' could not have been relevant in domestic cases, as the applicants were not refugees. Nonetheless, the Court could have made the applicability of Article 5 dependant on State's compliance with Article 3 ECHR regarding the conditions of confinement—as it did in *Ilias*—or other provisions of the Convention (such as the right to family life), but it did not do so.

3.4.3. The nature and degree of the actual restrictions

Communication with the outside world, surveillance, personal space and conditions of confinement

The element of 'communication with the outside world' was used in seven of the cases analysed. It therefore appears to be a criterion of medium importance in domestic judgments. For instance, in *Buzadji*, the Court found a deprivation of liberty, inter alia, because the applicant under house arrest was prohibited from communicating with certain persons and had limited communication with his relatives.[751] In *De Tommaso*, on the contrary, where the applicant was also under house arrest, the fact that he was able to socialise during the day led the Court to find that Article 5 did not apply.[752]

For its part, the control and/or surveillance exercised by the police authorities (or other persons guarding the area, such as medical staff) is one of the most important factors in domestic cases, since it was taken into account in eleven judgments. For example, in *H.L. v. UK* the key factor for finding a deprivation of liberty was that the health care professionals of the hospital exercised '*complete and effective control* over the applicant's care and movements'.[753] Similarly, in *Iskandarov v. Russia*, the crucial factor for declaring Article 5 applicable that the Russian State agents forced the applicant to travel from Russia to Tajikistan and accompanied him along the way.[754] In *Creangă*, the mere *presence* of police

[749] *Guzzardi*, paras. 13, 18-19. Similarly, see *Engel*, paras. 35-36; *Ashingdane*, para. 60; *Riera Blume*, para. 16; *H.L. v. UK*, paras. 120 and 124; *Storck*, para. 34; *Rantsev*, para. 41.
[750] The lack of an effective remedy was even recognised by the national court. See *Nada*, para. 50.
[751] *Buzadji*, para 105. See also *Guzzardi*, para. 95; *H.L. v. UK*, para. 91; *Storck*, para. 73.
[752] *De Tommaso*, para. 85. For a similar reasoning, see *H.M. v. Switzerland* (para. 45) and *Nada* (para. 231).
[753] *H.L. v. UK*, paras. 91 and 93 [emphasis added].
[754] *Iskandarov*, para. 140. The applicant, a Tajik national prosecuted by the Tajik authorities, was kidnapped in Russia and returned to Tajikistan by unidentified Russian State agents.

guards at the prosecutor's office (where the applicant was confined) was sufficient for this element to weigh in favour of the applicability of Article 5.[755] Furthermore, the fact that the authorities in *Buzadji* were controlling the applicant *remotely* (as he had to phone the prosecutor's office every day from his home) was a factor that led the Court to find a deprivation of liberty.[756]

Just as the 'communication with the outside world', 'personal space' is a criterion of medium importance, as it was mentioned in six cases.[757] Nonetheless, *Medvedyev* shows that, in domestic judgments, this factor is less relevant than control/surveillance. In this case, although the applicants were able to move around the ship in which they were confined, the Court held that this did not alter the fact that the applicants were detained, 'as the ship's course was imposed by the French forces'.[758] *Nada* also suggests that personal space is not as relevant as other criteria. This case is an example at the opposite end of *Medvedyev*: while the Court recognised that Campione d'Italia was a small area, other elements played a more important role in its analysis and it found only a restriction on movement.[759]

Finally, the conditions of confinement were only taken into account in the early case of *Guzzardi v. Italy*, where the Court noted that the buildings in which the applicant was confined were 'in a state of disrepair or even dilapidation' and 'not suitable' for the normal application of criminal law.[760] However, similar observations were never repeated in subsequent cases. Moreover, in *Lavents v. Latvia*, the Court explicitly stated that the notions of 'degree' and 'intensity', used in the case law to distinguish a restriction on movement from detention, 'relate only to the degree of the restrictions on the freedom of movement and not the difference in comfort or the internal regime in the different places of confinement'.[761]

Option to leave, option to leave in practice, direct threat to life or health

The option to leave is the most important element in domestic cases, since it was taken into account in fourteen of them. It is possible to observe a development in the case law from the 1976 case *Engel and Others v. Netherlands*, where the decisive factor was whether or not the applicants had been kept under lock and key,[762] to later cases in which the Court undertook a more nuanced analysis to decide whether the applicant had a *realistic* option to leave *despite the existence of a theoretical possibility to leave* (i.e. an open door or a way out). In these judgments, the Court used a similar criterion to the 'option to leave in practice' of *Ilias* and *Z.A.*

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[755] *Creangă*, para. 76.
[756] *Buzadji*, paras. 36 and 105. For further cases in which the element of surveillance was relevant, see *Guzzardi*, para. 95; *Riera Blume*, para. 29; *Storck*, para. 73; *Stanev*, para. 128; *Kasparov*, para. 46.
[757] *Guzzardi*, para. 95; *Riera Blume*, para. 29; *H.M. v. Switzerland*, para. 45; *H.L. v. UK*, paras. 91 and 93; *Storck*, para. 73; *De Tommaso*, para. 17.
[758] *Medvedyev*, para. 74.
[759] *Nada*, para. 230.
[760] *Guzzardi,* para. 95. The premises included buildings of a former medical establishment, a carabinieri station, a school and a chapel.
[761] This was a judgment quoted in *Buzadji* which also concerned house arrest. See *Lavents v. Latvia*, no. 58442/00, 28 November 2002, para. 64.
[762] *Engel*, paras. 61-64. The military punishments which did not involve locking up the applicants were not classified as detention, and vice versa.

However, as will be shown in Section 3.5, there are important differences in the Court's interpretation of this criterion in domestic and in migration-related cases.

In domestic cases, in order to assess whether a realistic option to leave existed, the Court carried out an 'overall assessment of the factual and legal elements which may have an influence on the choice made by the person concerned'.[763] For example, in *Ashingdane*, the applicant could go home every week from Thursday to Sunday and leave the psychiatric hospital during the day from Monday to Wednesday. However, there were *legal* elements (the judicial order imposing the confinement measure) which influenced his choice, putting pressure on him to return to the hospital instead of running away. This led the Court to find Article 5 applicable.[764] On the other hand, in *Stanev*, although the applicant was often granted leave of absence from the social care home, there were *factual* elements which put pressure on him in order not to leave the social care home altogether (e.g. the fact that the carers kept his identity documents when he was granted leave of absence).[765] These factors were taken into account by the Court to declare Article 5 applicable. As a final example, in *M.A. v. Cyprus*, the applicants had not been handcuffed, placed in cells or even physically restrained, but because of the coercion exerted by the scale and manner of the police operation, the Court held that 'it would be unrealistic to assume that the protesters were free to leave the police headquarters'.[766]

As for the element 'direct threat to life or health', this was never mentioned in domestic judgments, even though it could have been relevant in some of them. For example, in *Medvedyev v. France*, where the applicants were confined in a ship, attempting to jump off the ship would have arguably posed a threat to their lives. Similarly, in *Rantsev v. Cyprus and Russia*, it is clear that leaving the apartment through the window (apparently the only way out) posed a direct threat to the life of the applicant's daughter, who died after attempting to escape.

Finally, there is one ruling that deserves particular attention, namely *De Tommaso v. Italy*, which makes the element 'option to leave' in domestic cases slightly more complex. In this case, the applicant, who was under house arrest, was unable to leave his home between 10 p.m. and 6 a.m, except in case of necessity. The Court considered that this fact did not amount to house arrest 'and hence [to] deprivation of liberty', because the applicant could leave during the day.[767] The facts of this case resemble *Ashingdane* in that in both cases the applicant was free to move around the city during the day but was under a legal obligation (imposed by a judge) to return to a designated place at night. However, in *Ashingdane* the Court found a deprivation of liberty and in *De Tomasso* it did not. What might explain this difference?

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[763] These were the words used by Advocate General M. Priit Pikamäe in a case before the Court of Justice of the EU which, like *Ilias and Ahmed*, also concerned the confinement of asylum-seekers in the transit zones. While Advocate General was not referring to the European Court of Human Rights, these words very much reflect the reasoning of the ECtHR in domestic cases. See Opinion of Advocate General Pikamäe of 23 April 2020, *FMS and FMZ,* Joined Cases C-924/19 PPU and C-925/19 PPU, EU:C:2020:294. See also Section 7.3.2 of the introduction of this study.
[764] *Ashingdane*, paras. 24 and 42.
[765] *Stanev*, paras. 124-125.
[766] *M.A. v Cyprus*, para. 193.
[767] *De Tommaso*, para. 86.

In my view, the difference lies in the *type* of place to which the applicant had to return. While in *Ashingdane* the applicant was required to live in a hospital, in *De Tomasso* he was ordered to live in his own house. Since one's own house is the place where, under normal circumstances, individuals voluntarily isolate themselves from their surroundings, it may well be that the intensity of the measure that confines a person to her own house needs to be greater than in any other place in order for it to amount to detention. For instance, in *Buzadji v. Moldova* and in two cases cited in that judgment (*Mancini v. Tialy* and *Lavents v. Latvia*), where the applicants were under house arrest, the Court found a deprivation of liberty because the applicants were not allowed to leave the house *at any time*.[768] The intensity of the measure in these latter cases was therefore greater than in *De Tomasso*.[769]

3.4.4 The burden of proof

An important clarification made in domestic cases—which is absent in both *Ilias/Z.A.* and earlier migration-related cases—is the answer to the questions 'who has to show that there was consent' and 'who was to show that there was an option to leave the place'? These issues arose when the parties disagreed not only on whether or not Article 5 was applicable to the case, but also on the underlying facts.

As regards proof of consent, in *Stanev v. Bulgaria* the Court stated that the Government had to show that, on arrival to the place of confinement or at a later date, the applicant agreed to stay there.[770]

As for the option to leave, in *Creangă v. Romania* the Court established a general rule on how to prove it: if an applicant can provide a *prima facie* concordant evidence capable of showing that he was under the *exclusive control* of the authorities on the day of the events the burden of proof would be shifted, and the Court would presume that he was not free to leave unless the Government proved that this was not the case.[771] The Court applied this rule to the facts of *Creangă* and to the facts of the subsequent case *Kasparov v. Russia*. In both cases, it found that the burden of proof had been shifted and that the Government had not sufficiently proved that the applicant had the option to leave of his own free will.[772]

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[768] *Buzadji*, para 30; *Mancini v. Italy*, no. 44955/98, 2 August 2001, ECHR 2001-IX, para. 11; *Lavents v. Latvia*, para. 63. Only Mr. Mancini was exceptionally allowed to leave with the authorities' prior authorisation.
[769] See also one of the earliest cases on house arrest, *Raimondo v. Italy*, no. 12954/87, 22 February 1994 (which is part of the selected case law for examining the safeguards of Article 2 of Protocol 4 ECHR in Chapter 4). In a similar manner to Mr. De Tommaso, Mr. Raimondo was not allowed to leave his house between 9 p.m. and 7 a.m. The Court considered that 'notwithstanding the applicant's assertion to the contrary, the measure in issue did not amount to a deprivation of liberty' (para. 39). While the Court did not explain the factors that led it to this conclusion, this case reinforces my view that confinement in one's own house needs to be particularly intense for it to amount to detention.
[770] *Stanev*, para. 131. The exact words of the Court were: 'the Government ha[s] not shown that in the present case, on arrival at the Pastra social care home or at any later date, the applicant agreed to stay there'.
[771] *Creangă*, para 90. The Court could therefore require the Government to provide a detailed hour-by-hour report on what happened in the premises in question and to account for the time spent there by the applicant. The Government would then have to provide satisfactory and convincing written evidence to support their version of the facts.
[772] *Creangă*, paras. 94 and 99; *Kasparov*, para. 39.

Once the domestic cases have been examined in light of the general principles laid down in *Ilias/Z.A.*, the next sub-sections will look beyond these principles to analyse those criteria that the Court used in domestic cases which were not referred to by the Grand Chamber in *Ilias* and *Z.A.*

3.4.5 Other criteria not present in *Ilias* and *Z.A.*

There are eight criteria that the Court takes into account in domestic cases to delimit the boundaries between the right to free movement and the right to liberty which were not mentioned in *Ilias* and *Z.A*: (1) 'A context where temporary restrictions are generally accepted'; (2) 'As close as possible to normality'; (3) 'Confinement together with persons who are formally detained'; (4) 'The context of an investigation procedure'; (5) 'Assistance by a lawyer'; (6) 'The adverse effects of the measure for the applicant's well-being'; (7) 'Positive obligations under Article 2 and its relation to Article 5'; and (8) 'Material dependency'.

A context where temporary restrictions are generally accepted

Austin and Others v. UK[773] introduced a new element into the analysis of the applicability of Article 5 ('the specific context') which was criticised by the minority of judges and by legal commentators because of its resemblance to the criterion 'purpose of the measure'.[774] However, in the same judgment, the majority of the Court rejected the 'purpose' as a factor to be considered.[775] Therefore, in an attempt to make sense of the majority's reasoning, I will separate the 'purpose of the measure' from this new criterion, which I will call 'a context where temporary restrictions are generally accepted'.

In *Austin*, the Court stated that, in certain circumstances, the 'context' of a measure may lead it to find that the confinement amounts only to a restriction on movement. While the reasoning is quite obscure,[776] clarity can be found by listing the requirements that the Court sets in order for 'the context' to lead it to find that Article 5 does not apply.[777] These requirements—which must be cumulatively fulfilled—are the following:

(1) The situation does not involve confinement in a cell.
(2) The situation in which the applicants find themselves is one which *commonly occurs* in modern society and where the public *generally accepts* that their freedom of movement may be temporarily restricted. While not stated by the Court, it is arguable that the State must

[773] *Austin and Others v. the United Kingdom*, nos. 39692/09, 40713/09 and 41008/09, 15 March 2012, ECHR 2012.
[774] See the Dissenting Opinion of Judge Tulkens, Spielmann and Garlicki in *Austin and Others v. UK* and the analysis in Wastell 2012 and Mead 2012.
[775] *Austin*, para. 58.
[776] Which is why the judgment was ranked as the third worst judgment of 2012 in the *Strasbourg Observers* blog (Smet 2012).
[777] I have derived these requirements from a joint reading of paras. 59 to 60 of *Austin*, as well as from the subsequent judgment *Gahramanov v. Azerbaijan*, in which the Court's reasoning also revolves around the element of 'a context where temporary restrictions are generally accepted'.

prove in each case that the situation at hand amounts to a 'common' situation where temporary restrictions on movement are 'generally accepted'.[778]

(3) The origin of the situation is *beyond the control of the authorities*. For example, in the facts surrounding *Austin*, the 'dangerous and volatile conditions' at the demonstration resulted from the violent behaviour of a significant minority of demonstrators.

(4) The purpose of the restriction is to a*vert a real and immediate risk of serious injury or damage*. Admittedly, the Court does refer to a specific 'purpose' here but, in my interpretation of the judgment, this purpose can only be taken into account *after* requirements (1), (2) and (3) have been proved.

(5) The State shows that the restrictions put in place were the '*least intrusive means*'[779] (in terms of the method employed) to avert such a real risk of serious injury or damage.

(6) The restriction is *temporary*, 'kept to the minimum required for that purpose',[780] not exceeding the time strictly necessary to avert the risk.[781] Again, the burden of proving that the duration of the restriction was kept to a minimum falls on the State.[782]

In *Austin*, the Court gave some examples of situations falling into the category of 'commonly occurring situations' and which, if the other conditions are met, do not amount to detention: restrictions on the movement crowds at a football match, restrictions during travel by public transport, restrictions to by-passers after a fire or a terrorist incident, and restrictions on motorists after an accident on a motorway. A large demonstration—such as the one that led to the restriction on the applicant's movement in *Austin*—also falls within this category. Finally, in the subsequent case *Gahramanov v. Azerbaijan*, the Court indicated that security checks carried out at airports prior to boarding a plane also fall within this category, since 'an air traveller may be seen in this regard as consenting to a series of security checks by choosing to travel by plane'.[783] Therefore, 'where a passenger has been stopped by border officials during border control in an airport in order to clarify his situation no issue arises under Article 5 of the Convention'.[784]

If the findings of the Court in *Austin* and *Gahmaranov* are understood in this limited manner, it will not be possible for States to detain individuals without the safeguards of Article 5 whenever it is necessary to impose a coercive measure for a legitimate public interest purpose, as feared by the dissenting minority in *Austin*.[785] Indeed, the majority of the Court emphasised that its conclusion that there was no detention in *Austin* was based on the 'specific and exceptional facts' of the case.[786] Moreover, in *M.A. v. Cyprus*, the Court recalled that the circumstances in *Austin* were exceptional and that, in contrast to that case, in *M.A.* there was

[778] See also Section 3.4.4 on the burden of proof.
[779] *Austin*, para. 59.
[780] *Ibid.*
[781] *Gahramanov*, para. 41.
[782] *Gahramanov*, para. 44.
[783] *Gahramanov*, para. 40. According to the Court, these security checks may include having his identity papers checked or having his baggage searched, as well as waiting for further enquiries to be made in order to establish his identity or determine that he does not pose a security risk for the flight.
[784] *Gahramanov*, para. 41.
[785] Dissenting Opinion of Judge Tulkens, Spielmann and Garlicki, para. 3.
[786] *Austin*, para. 68.

no evidence of a real and immediate risk of serious injury or damage—thus requirement (4) was not present.[787]

As close as possible to normality

In *Engel v. Netherlands*, the applicants were members of the military who had been confined under different regimes as a punishment for committing military offences. In determining the applicability of Article 5, the Court examined whether the applicants could continue to perform their duties within the normal environment of their army life. If they were excluded from this environment, the Court found a deprivation of liberty.[788] Similarly, in *H.M. v. Switzerland*, referring to *Nielsen v. Denmark*, the Court emphasised that 'the restriction on his freedom of movement and his contact with the outside world were not much different from those a child may experience in a regular hospital. He could also see his mother and father regularly; in general, life in the pavilion was considered to be as close as possible to life [in] a real home'.[789] This led the Court to conclude that there was no deprivation of liberty.

From these two judgments it can be inferred that a further criterion in domestic cases is whether, despite the confinement, the person can continue to live in a manner close to her own normality. The closer the circumstances of the confinement are to her normal life, the less likely it is that the Court will find Article 5 applicable.

Confinement together with persons who are formally detained

In *Engel,* one of the factors that the Court took into account in finding that the military punishment of 'committal to a disciplinary unit' amounted to detention was the fact that 'privates condemned to this penalty following disciplinary proceedings were not separated from those so sentenced by way of supplementary punishment under the criminal law'.[790] Thus, it appears that if a person is confined in the same premises as persons who are formally detained, this is an indication that Article 5 applies.

The context of an investigative procedure

In *Creangă v. Romania*, the Court stated that the 'procedural context' of a criminal investigation, where the individual is summoned and which requires several investigative measures and hearings, 'tends to indicate that the applicant [is] obliged to comply [with them]'.[791] In turn, this led the Court to find that Article 5 was applicable because the applicant had to remain on the premises in order for the proceedings to take place. This factor was

[787] *M.A. v. Cyprus*, para. 192.
[788] *Engel*, para. 61-63. Allen also notes that, in *Engel*, deviation from the 'normal conditions' of military life explained why the 'strict arrest' of soldiers in locked cells triggered Article 5 but their 'aggravated arrest' in unlocked designated places did not, despite not being free to leave (Allen 2009, p. 25, fn. 44).
[789] *H.M. v. Switzerland*, para. 43.
[790] *Engel*, para. 64.
[791] *Creangă*, para. 98.

reiterated in *Kasparov v. Russia*: 'the Court will be able to consider that he was not free to leave, *particularly when investigative measures were under way*'.[792]

Assistance by a lawyer

Interestingly, in *Creangă v. Romania*, the fact that the applicant 'needed to be assisted by a lawyer' during the criminal investigation conducted by the prosecutor was an element that led the Court to find Article 5 applicable.[793]

The adverse effects of the measure on the applicants' well-being

The Court took this element into account in two domestic cases. On the one hand, in *Stanev*, the Court found that a confinement of eight years in the psychiatric clinic was 'sufficiently lengthy for him to have felt the full adverse effects of the restrictions imposed on him'.[794] This was a factor which brought the measure within the scope of Article 5. On the other hand, in *Austin*, the Court found that the effects of the containment of the applicants within the police cordon 'in terms of physical discomfort' pointed towards a deprivation of liberty.[795]

Positive obligations under Article 2

In *Stanev*, the Government submitted that, following the judgment *Dodov v. Bulgaria*,[796] the State had a *positive obligation* under Article 2 ECHR (right to life) to protect the life and health of persons housed in social care homes. This meant that the limitations on applicant's freedom were 'part of this duty of protection', and therefore did not amount to detention.[797] The Court responded to this argument as follows:

'The Court notes that, in the above-mentioned case, the applicant's mother suffered from Alzheimer's disease and that, as a result, her memory and other mental capacities had progressively deteriorated, to the extent that the nursing home staff had been instructed not to leave her unattended. In the present case, however, the Government have not shown that the applicant's state of health was such as to put him at immediate risk, or to require the imposition of any *special restrictions* to protect his life and limb.'[798]

A contrario, this seems to mean that, if the state of health of a person in a social care home [or in any other scenario where positive obligations are expected][799] is such as to put her at risk of exposure to self-harm or to criminal actions from others,[800] this triggers a *positive*

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[792] *Kasparov*, para. 35.
[793] *Creangă*, para. 97 last indent.
[794] *Stanev*, para. 129.
[795] *Austin*, para. 64. However, in the end the Court found Article 5 to be inapplicable because of the element of 'a context of generally accepted temporary restrictions', as explained above.
[796] *Dodov v. Bulgaria*, no. 59548/00, 17 January 2008.
[797] *Stanev*, para. 110.
[798] *Stanev*, para. 128.
[799] That is, scenarios in which the authorities know or ought to know of the existence of a real and immediate risk (*Dodov v. Bulgaria*, para. 100). For an in-depth analysis of positive obligations under the ECHR, see Stoyanova 2023.
[800] In *Dodov v. Bulgaria*, there was a risk that the applicant, who was unable to look after herself, would wander out of the social care home unsupervised, exposing herself to self-harm or to criminal actions from others.

obligation on the authorities under Article 2 ECHR to protect the person by taking all the preventive measures that could reasonably be required of them. If, in turn, these preventive measures take the form of control over the person's movements, the Court will be more likely to regard these measures as 'special restrictions' rather than detention.

However, if a deprivation of liberty is established on the basis of other criteria, the positive obligation under Articles 2 or 3 ECHR will not exempt the State from complying with the safeguards of Article 5. The dissenting judges in *Austin* noted this by quoting *Jendrowiak v. Germany*, a case in which the Court held that the State could not rely on its positive obligations to escape the applicability of Article 5.[801]

Material dependency

Finally, there are two judgments which appear to indicate that 'material dependency on the authorities' might lower the threshold for the applicability of Article 5 in domestic cases. In *H.L.*, the Court pointed to the complete control that the authorities exercised over the applicant's care;[802] and in *Stanev*, the fact that the staff of the social home managed the applicant's finances also played a role in finding a deprivation of liberty.[803] While not decisive in itself (material dependency does not automatically mean detention), the Court seems to imply that, in cases of dependency, there needs to be a closer scrutiny of whether there has been a deprivation of liberty.

3.4.6 Ranking of the relevance of criteria in domestic cases

To conclude this section and respond to the third research question of this chapter, I will present a ranking of the *Ilias/Z.A.* criteria which also influenced the Court when deciding on the applicability of Article 5 in pre-*Ilias* domestic cases. The ranking, from the most relevant to the least important factor, is the following:

1. Option to leave (14 cases);
2. Applicant's individual situation and choices—though initial consent is not as important as consent to the continuation of the confinement (13 cases);
3. Surveillance or control (11 cases);
4. Communication with the outside world (7 cases);
5. Personal space (6 cases);
6. Duration (5 cases);
7. Intention to detain and 'realistic option to leave' (3 cases);
8. Classification in domestic law (2 cases);
9. Purpose of confinement / Maximum time limits / Conditions of confinement (1 case).

In domestic cases, the Court never considered the elements of 'judicial review', 'conformity with international law' or 'direct threat to life or health'. Moreover, the element 'classification in domestic law' was explicitly declared irrelevant six times, and the 'purpose of confinement'

[801] Dissenting Opinion of Judge Tulkens, Spielmann and Garlicki in *Austin and Others v. UK*, para. 8.
[802] *H.L. v. UK*, para. 91.
[803] *Stanev*, paras. 124-125.

was twice explicitly rejected. The importance of the elements of 'duration' and 'personal space' was downplayed in seven and in two cases respectively. Finally, I identified eight factors that were not mentioned in *Ilias* and *Z.A.* and which the Court used in either one[804] or two[805] domestic judgments.

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Thus far, this chapter has (1) systematised and analysed the meaning of the criteria used in the 2019 Grand Chamber judgments *Ilias and Ahmed v. Hungary* and *Z.A. and Others v. Russia* to trace the boundaries between the right to free movement and the right to liberty; (2) shown that, although the Grand Chamber stated that these criteria were a summary of previous migration-related case law, *Ilias* and *Z.A.* in fact developed some new principles and changed the relevance of other factors that had previously been understood in a different way; and (3) reviewed the criteria chosen by the Court in 'domestic cases' rendered prior to *Ilias* and *Z.A.* The next section will take a comparative approach to the principles laid down in *Ilias/Z.A.* and in domestic cases.

3.5 The differences between the *Ilias* and *Z.A.* criteria and those applied in 'domestic cases'

This section will examine whether the Court has been more deferential to States in *Ilias/Z.A.* than in domestic cases, making it easier for them to detain migrants and asylum-seekers in airport transit zones and reception centres without having to comply with the safeguards of Article 5 ECHR. In doing so, it will seek to determine whether the 'migration exceptionalism' or the 'two-tier human rights system' that legal scholars have identified in other areas of the Court's case law also operates in the realm of the material scope of the right to freedom of movement or, in other words, the line-drawing between this right and the right to liberty.

To begin with, migration exceptionalism can already be observed in the rhetoric used in the first migration-related case (*Amuur v. France*), when compared to one of the first domestic cases (*Guzzardi v. Italy*). In *Guzzardi*, the Court noted that there is a clear difference 'between the applicant's treatment on [the island of] Asinara and classic detention in prison or strict arrest imposed on a serviceman';[806] just as in *Amuur* it drew a distinction between the holding of non-nationals in an international zone and their holding in immigration detention centres.[807] However, in *Guzzardi*, this distinction served as a starting point to affirm that 'deprivation of liberty may, however, take numerous forms'; while in *Amuur*, it was used as a starting point to assert that confinement in international zones 'is acceptable', albeit with certain conditions. Thus, while in the domestic case of *Guzzardi* the Court extended the applicability of Article 5 to other contexts, in *Amuur* the Court showed more deference to

[804] Confinement together with persons who are formally detained, assistance by a lawyer, positives obligation under Article 2 in relation to Article 5.
[805] A context of generally accepted temporary restrictions, as close as possible to normality, the context of an investigative procedure, adverse effects of the measure on the applicants' well-being, material dependency.
[806] *Guzzardi*, para. 95.
[807] *Amuur*, para. 43: 'holding aliens in the international zone does indeed involve a [confinement], but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation'. This paragraph was quoted in *Ilias* and *Z.A.*, hence its contemporary importance.

States by setting conditions which, if met with by the State, would exempt it from having to fulfil the substantive requirements of the right to liberty.

Beyond this difference in rhetoric, it is necessary to analyse all the criteria of the Article 5 applicability test to come to more precise conclusions as to whether there are actual disparities between the two types of cases. Based on the assumption that, since 2019, the Grand Chamber judgments *Ilias* and *Z.A.* are the ones to be followed in migration-related cases (regardless of whether or not the principles they establish are a summary of previous case law), I will compare *Ilias* and *Z.A.* (as described in Section 3.2) with pre-*Ilias* domestic cases (as explained in Section 3.4) and critically assess the Grand Chamber's reasoning.

3.5.1. The applicant's individual situation and choices

This element was very relevant in both *Ilias*/*Z.A.* and domestic cases. However, the nuances that the Court added in domestic cases, which often weighed in favour of the application of Article 5, were not present in *Ilias* and *Z.A.*

Firstly, in *Ilias* and *Z.A.* the Court affirmed that the well-established principle in domestic cases that 'initial consent does not necessarily lead to the inapplicability of Article 5' was not relevant in migration-related cases. It justified this difference between domestic and migration-related cases by arguing that, in the former group, 'the law provided for deprivation of liberty or (…) the applicants had complied with an obligation, such as, among others, to enter a prison or a police station or submit to house arrest'.[808] Therefore, it was the existence of this legal obligation that made it irrelevant whether or not the applicant had initially consented to the confinement. This statement may have been true for the domestic cases which the Court chose to quote in *Ilias* and *Z.A.* (such as *De Wilde* and *Buzadji*). However, in other domestic cases, such as *Storck* and *Rantsev*, the applicants—just as those in *Ilias* and *Z.A.*—were not complying with a legal obligation to stay in a particular place.[809] Nonetheless, in both *Storck* and *Rantsev* the Court applied the principle that initial consent does not mean a lack of protection of Article 5 (finding that the confinement had been involuntary), whereas in *Ilias* and *Z.A.* it rejected this principle (finding that the confinement had been voluntary).

Secondly, the way to determine whether or not an applicant has consented to the measure was also not the same in the two types of cases. As shown above, in some of the domestic judgments the Court made its assessment of the 'voluntariness' of the confinement dependent on whether or not the applicant had *explicitly* agreed to it.[810] In *Ilias* and *Z.A.,* however, the Court concluded that the confinement had been voluntary, even though the applicants at no point expressly stated that they consented to their holding in the Röszke transit zone or the airport. In fact, their will was clearly to enter Hungarian and Russian mainland, respectively, as was implicit in their asylum applications.

[808] *Ilias*, para. 221; *Z.A.*, para. 141.
[809] In both cases the applicants were detained by private individuals, without there being a law providing for their deprivation of liberty or a judicial decision authorising their detention.
[810] See in particular *H.M. v. Switzerland* and *Stanev v. Bulgaria.*

Thirdly, the concept of *coercion* (i.e. the physical or mental pressure exerted on a person which leads her to accept the confinement), which is central to several of the domestic cases, is absent from *Ilias* and *Z.A.*

On the one hand, in *De Wilde, Ooms and Versyp v. Belgium*, the Court affirmed that temporary distress or misery (such as that experienced by vagrants) may drive a person to give herself up to the police to be detained.[811] Similarly, in *Buzadji*, the Court noted that the applicant was ready to make concessions in order to put an end to his suffering in prison, which is why he sought to be placed under house arrest. It is arguable that, like the applicants in these two cases, asylum-seekers often find themselves in a state of misery. The trauma they may have suffered in their country of origin and during transit puts them in a weak position where they are 'ready to make concessions [i.e. to be detained] in order to put an end to it [i.e. to find protection]'.[812]

On the other hand, in *Shimovolos*, the coercive element was the 'threat of [the use of] force' by the police. This threat was sufficient for the Court to establish that the confinement had been involuntary. In *Ilias*, however, there was also a threat of force, though not from the Hungarian police: if the applicants did not enter the Hungarian transit zones, they risked being arrested by the Serbian police. As the Grand Chamber itself recognised in *Ilias* during its analysis of the Article 3 ECHR complaint (*non-refoulement*), 'the Hungarian authorities *exacerbated the risks* facing the applicants by inducing them to enter Serbia illegally (…)'.[813] They also risked being forcibly returned to their countries of origin by the Serbian authorities, given the deficiencies of the asylum system in Serbia. Moreover, if the applicants were indeed refugees, they also risked being subjected to threats of violence against them in their countries of origin. Thus, several forms of 'threats of force' were awaiting for the applicants if they did not accept to be confined in the transit zones.

Had the Court relied on the concept of coercion in *Ilias* and *Z.A.*, as it did in these and in other domestic judgments,[814] it would have recognised the pressure under which they were forced to 'choose' to enter the Hungarian transit zones or to agree to stay in the international zone of the Russian airport. Using the language of *Creangă*, it could have stated that it would be 'extremely difficult'[815] for the asylum-seekers not to flee the situation in Serbia or in their countries of origin and consent to the confinement. However, in *Ilias* and *Z.A.*, the Court seems to take this mental and physical pressure into account in very limited cases: entry to a place becomes involuntary only if there is a 'direct threat to their life or health', which seems to mean that the persecuting actor needs to be right outside the border transit zone[816] or, in the case of an airport, at the place from which the plane took off.[817]

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[811] *De Wilde, Ooms and Versyp*, para. 65.
[812] *Mutatis mutandi*, *Buzadji*, paras. 106-109. Ashford's concept of 'subsistence exchange contracts' is particularly relevant here. She defines this term as a situation where destitute individuals agree to forego their negative human rights in exchange for basic subsistence (Ashford 2015, pp. 515-534). See also Section 2.8.2 of Chapter 2, where I problematise the 'principle of conditional lawfulness' in light of this concept.
[813] *Ilias*, para. 163 [emphasis added].
[814] *M.A. v. Cyprus*; *Creangă v. Romania*; *Kasparov v. Russia.*
[815] *Creangă*, para. 97.
[816] *Ilias*, para. 242.
[817] *Z.A.*, paras. 154-155.

There are two final examples of the differences in the Court's application of the principle 'the applicant's individual situation and choices' in domestic cases and in *Ilias/Z.A.* On the one hand, in *De Wilde, Ooms and Versyp*, the Court held that the wishes of the applicants 'cannot in any event remove or disguise the mandatory, as opposed to contractual, character of the decisions complained of; this mandatory character comes out unambiguously in the legal texts'.[818] In *Ilias* and *Z.A.*, the decision to confine the asylum applicants did not have a contractual character. Even if one were to accept that requesting asylum is a voluntary act, the subsequent decision of the State to place them in a specific place is a mandatory decision which does not resemble a contract, but which 'comes out in the legal texts'.[819] On the other hand, in *H.L. v. UK*, it was important for the Court that the applicant was 'legally incapable of consenting to, or disagreeing with, the proposed action [confinement in a psychiatric hospital]'.[820] Accordingly, his initial consent to the confinement did not mean that the measure was voluntary. In *Ilias* and *Z.A.*, the Court affirmed that it would take a 'practical and realistic' approach to cases of the confinement of asylum-seekers.[821] In my view, a practical and realistic approach would have used the precedent of *H.L.* to acknowledge that the asylum-seekers, although not legally incapable like Mr. H.L., were *in practice* 'incapable of consenting to, or disagreeing with'[822] the actions of the Hungarian and Russian authorities.

All these examples show that there were many ways in which the Court could have grounded its reasoning in *Ilias* and *Z.A.* on its previous 'domestic' case law in order to establish that the confinement was not voluntary. Instead, the Court chose to base its finding that the confinement was 'voluntary' on a 'presumption of voluntariness' (exactly the opposite presumption applied in *Stanev*), without examining the factors that put pressure on asylum-seekers to accept limiting their human rights in order to find protection. In this regard, it is worth quoting the words of Judge Bianku in its partly dissenting opinion in *Ilias and Ahmed*:

'It should also be emphasised that the word "choice" means something completely different in connection with asylum-seekers (…). An asylum-seeker wants protection, and his asylum request concerns the protection of a right secured under the Convention, namely the right not to suffer treatment contrary to Article 3, or else Article 2. This process concerns a necessity, not a choice. (…) I therefore find it difficult to conceive of the fact of asylum-seekers crossing a border as a "choice"'[823]

3.5.2 The applicable legal regime, its purpose and the relevant duration in the light of that purpose and the attendant procedural protection

Classification of the measure by domestic legislation and domestic courts

There is a clear difference between the use of this criterion in domestic cases and in *Ilias/Z.A.* In the former, the classification of the measure in domestic legislation was only occasionally taken into account in cases where national law classified the measure as detention; and it was

[818] *De Wilde, Ooms and Versyp*, para. 65.
[819] *Ibid.* For instance, in *Ilias and Ahmed* the decision to confine the applicants in the border transit zones was established in Act no. LXXX of 2007 on Asylum.
[820] *H.L. v. UK*, para. 90.
[821] *Ilias*, para. 213; *Z.A.*, para. 135.
[822] *Mutatis mutandi*, *H.L v. UK*, para. 90.
[823] Partly Dissenting Opinion of Judge Bianku, p. 75.

entirely ignored as a relevant factor in cases where national law regarded the measure as a restriction on movement. In *Ilias* and *Z.A.*, not only was 'classification in domestic law' raised to the category of a 'general criterion' to be applied in all migration-related cases, but this factor was considered to weigh in favour of the non-application of Article 5 when national legislation does not classify the measure as detention. The problem with this interpretation is that it makes it easier for States to escape compliance with the safeguards of Article 5 by simply classifying the confinement in airport transit zones and reception centres as a restriction on movement.

Regarding the classification of the measure by national courts, the ECtHR stated in domestic cases that it is not constrained by their conclusions as to the applicability of Article 5. In contrast, in *Ilias* and *Z.A.*, this classification became part of the general criterion 'classification in domestic law'. While the principle of subsidiarity is one of the main pillars of the functioning of the European Court, granting such relevance to the legal conclusions of national courts reduces the possibilities for it to make an autonomous assessment of the situation. More surprisingly, in the particular case of *Ilias* the Court did not even evaluate whether the national *courts* had classified the confinement in the transit zones as detention, but simply considered that 'the Hungarian *authorities* [i.e. the Government] were apparently convinced that the applicants could realistically leave in the direction of Serbia'.[824]

Intention to detain and purpose of confinement

In domestic cases, the intention to deprive the person of her liberty played a minor role and, in the three judgments in which it was taken into account, the Government accepted that there had been detention. In *Ilias* and *Z.A.*, however, the Court found it 'relevant to note' that that the Hungarian and Russian authorities 'did not seek to deprive the applicants of their liberty'. The potential danger in terms of human rights protection of this consideration is evident: in most cases where there is doubt about the applicability of Article 5 in a transit zone or reception centre, Governments argue that they did not intend to deprive the asylum-seeker of his liberty. Therefore, taking this 'lack of intention to detain' into account may potentially leave many asylum-seekers without the protection of Article 5.

As regards the purpose of confinement, the aim of providing the person with medical care and protection was a factor that the Court weighed in *H.M. v. Switzerland* in determining that Article 5 did not apply, in a similar way to its consideration of the purpose of reviewing an asylum application in *Ilias* and *Z.A.*[825] However, the Court's focus on the applicant's *own interest* in *H.M.* was absent in *Ilias* and *Z.A.* Is it in the interest of asylum-seekers to be confined in prison-like conditions to be able to exercise their right to apply for asylum? In any event, as noted in Section 3.2, the approach in *H.M.* (a 2002 case) was explicitly rejected in later cases. My analysis thus confirms what Judge Bianku pointed out in his partly

[824] *Ilias*, para. 236.

[825] In a comment to the ECtHR cases on the applicability of Article 5 concerning psychiatric hospitals, Allen (2009, p. 25) questioned that motives should be relevant to the Court's assessment at all: 'Should the confiner's motives be relevant? Might therapeutic detention be less likely to deprive liberty than its retributive equivalent?'.

dissenting opinion in *Ilias and Ahmed*: 'On this point, the majority has clearly opted for an interpretation which turns the clock back many years on the interpretation of Article 5.'[826]

Making certain purposes weigh against a finding the applicability of Article 5 is therefore a clear sign of migration exceptionalism, as well as of a wide deference to States. It would not be difficult for Governments to argue that the purpose of confining asylum-seekers or other migrants in transit zones and reception centres is to 'prevent unlawful immigration', 'organising the practical details of the alien's repatriation' or considering the asylum-seeker's 'application for leave to enter';[827] and by simply doing so, they would have a greater chance of being exempted from compliance with Article 5.

Duration in the light of the purpose

While in domestic cases, the element of duration is a 'low profile' criterion—especially because the Court often states that even a short period of confinement may amount to detention—, the Grand Chamber in *Ilias/Z.A.* turned it into one of the main criteria to be considered in migration-related cases. The most problematic issue, however, is the fact that in *Ilias* the Court did not simply examine whether the duration itself was short or long, but whether it 'exceed[ed] significantly the time needed for the examination of an asylum request'.[828] This finding grants more leeway to States since, if the State can prove that the confinement did not significantly exceed that time, there will be a higher chance that Article 5 will not apply, even if the actual duration of the confinement is very long. Moreover, in *Z.A.*, the Court suggested that it declare Article 5 inapplicable if the long duration of confinement is 'justified by legitimate reasons',[829] opening yet another possibility for States to argue that they do not need to comply with the requirements of Article 5.

Procedural protection

The criterion 'procedural protection' is the concept where the difference between *Ilias/Z.A.* and domestic cases becomes more visible.

Firstly, while there was only one isolated domestic case where the element 'maximum time limits' was mentioned (in *Stanev*), in *Ilias* and *Z.A.* the Court made this criterion part of the general principles of migration-related cases. It is also interesting to note that in its case law on the substance of Article 5(1)(f) ECHR, the Court has repeatedly stated that maximum time limits for *detention* are not required by this provision.[830] It thus seems that the element of 'maximum time limits' is used by the Court in a way that always favours the State: If the State sets maximum time limits, there is a higher chance that the Court will find Article 5 inapplicable. But if the State does not set maximum time limits and the measure is found to

[826] Partly Dissenting Opinion of Judge Bianku, p. 77.
[827] *Ilias and Ahmed*, para. 215 and *Z.A.*, para. 137, quoting para. 43 of *Amuur*.
[828] *Ilias*, para. 227.
[829] *Z.A.*, para. 148.
[830] *J.N. v. UK,* no. 37289/12, 19 May 2016, para. 90. Subsequent cases where this was reaffirmed include *S.M.M. v. UK,* no. 77450/12, 22 June 2017, para. 70 and *K.G. v. Belgium,* no. 52548/15, 6 November 2018.

amount to detention, this 'should not give rise to any increased risk of arbitrariness' and does not necessarily weigh in favour of finding a violation of Article 5(1)(f).[831]

Secondly, the element 'judicial review' was non-existent in domestic cases at the applicability stage of Article 5. A particular problem that arises if this element is interpreted in the way the Grand Chamber did in *Ilias* and *Z.A* is that, if States set up a system of judicial review of *restrictions* on movement, there will be a higher chance that asylum-seekers will lose the protection afforded by Article 5. At first sight, this may not appear to be an issue, as in these cases asylum-seekers will be able to challenge the (non-detention) measure before the national courts anyway. However, since this judicial review will not fall under the scope of Article 5(4) (*habeas corpus*), the only option for the asylum-seeker to challenge the quality of such review before the ECtHR will be to file an application under Article 2(3) of Protocol 4 ECHR. However, as shown in Chapter 2, it is difficult for asylum-seekers to fall under the personal scope of this provision and, in any event, the speediness of the judicial review inherent in the *habeas corpus* is not required under Article 2(3) of the Protocol.[832]

Finally, in domestic cases, the Court does not make the applicability of Article 5 dependent on the conformity of the measure with other provisions of the ECHR. In contrast, in *Ilias* and *Z.A.*, it makes it less likely for Article 5 to apply when the State complies with the Refugee Convention or with Article 3 ECHR. By doing so, it makes it easier for States to detain immigrants without having to observe the guarantees of Article 5 whenever they provide effective access to refugee determination procedures or when the confinement conditions do not fall below the standards required by Article 3.

3.5.3 The nature and degree of the actual restrictions

Communication with the outside world, surveillance, personal space and conditions of confinement

Communication with the outside world is a criterion that is present in both domestic cases and in *Ilias/Z.A.* Nonetheless, the interpretation of this factor in each type of cases differs. While in *H.L. v. UK* the fact that the hospital staff controlled the applicant's contact with his carer led the Court to declare Article 5 applicable,[833] in *Ilias and Ahmed* the mere possibility of communicating with the applicants' lawyers, even if only prior authorisation from the police authorities, weighed against the admissibility of the Article 5 complaint.[834]

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[831] *J.N.*, para. 98.

[832] See Section 4.3.4 of Chapter 4. For a summary of the requirements under Article 5(4), see *Suso Musa v. Malta*, no. 42337/12, 23 July 2013.

[833] *H.L.*, paras. 91 and 93.

[834] As a side note, there is an intrinsic criticism to be made to the use of this criterion (both in domestic and in migration-related cases). This criticism was pointed out by a dissenting judge in *H.M. v. Switzerland*: people incarcerated in prisons have relations with the outside world through calls or visits, and this does not mean that they are not detained. In my view, it would be more appropriate to use the element 'communication with the outside world' as an instrument to analyse the interference of the confinement measure with the applicant's right to private and family life under Article 8 ECHR. This is what Judge Kalaydjieva did in his partly dissenting opinion in *Stanev*, where she argued that there had been a violation of the applicant's right to private life under Article 8, inter alia, because of his lack of communication with the outside world. See Dissenting Opinion of Judge Loucaides in *H.M. v. Switzerland* and Partly Dissenting Opinion of Judge Kalaydjieva in *Stanev v. Bulgaria*.

Regarding surveillance, it appears that the level of control required over asylum-seekers in airport transit zones and reception centres for it to support a finding of detention is higher than that required over individuals in domestic cases. In *Creangă*, the mere presence of gendarmes at the prosecutor's office was sufficient to be considered an element in favour of applying Article 5—even though the Government maintained that these gendarmes never supervised or guarded the applicant—,[835] and in *Buzadji* remote control by the authorities also led the Court to classify the measure as detention.[836] By contrast, in *Ilias*, even though the Court recognised that the area 'was fully guarded',[837] this did not support the applicability of Article 5. Thus, the 'mere presence' standard which the Court set in *Creangă* does not appear to be applicable in migration-related cases in the light of *Ilias*. It also seems unlikely that the Court would find Article 5 applicable if asylum-seekers in transit zones were remotely controlled. A joint reading of *Ilias* and *Z.A.* brings me to the tentative conclusion that the threshold required in migration-related cases is that of *permanent control over the whole area*, which is what led the Court to find Article 5 applicable in *Z.A. and Others v. Russia*.[838]

As for personal space, the use of this criterion in *Ilias* and *Z.A.* is comparable to that in domestic cases. *Ilias and Ahmed* can be equated to *Medvedyev* and *Nada*, as in all three cases the element of personal space was given less weigh than other factors. For its part, the finding in *Z.A.* that a small-sized area plays in favour of the applicability of Article 5 is consistent with the considerations made in six of the domestic cases.

Finally, the conditions of confinement are not only ignored in domestic cases (except in the early case *Guzzardi*), but are also explicitly rejected as a relevant factor.[839] In *Ilias*, however, the Court 'recall[ed]' that 'it dismissed the applicant's complaint that these conditions were inhuman and degrading'.[840] The main problem with this approach is that, by linking the applicability of Article 5 to the conditions of confinement, it eases the way for States that provide adequate material conditions to *de facto* detain asylum-seekers without having to comply with the safeguards of Article 5. Moreover, it creates legal uncertainty, since the conditions of *detention* are also an important element to determine whether a measure is in breach of Article 5(1)(f).[841] This raises the question of whether a finding that the conditions of a particular *confinement* facility are inadequate—which would support the applicability of Article 5—automatically means that the *detention* conditions violate Article 5(1)(f) ECHR.

Option to leave, option to leave in practice, direct threat to life or health

The option to leave is the most important criterion in domestic cases and it is also very relevant in *Ilias* and *Z.A.* However, there is a difference between the notion of 'realistic

[835] *Creangă*, para. 76.
[836] *Buzadji*, paras. 36 and 105. Similarly, in *Guzzardi*, control was also (in part) exercised remotely: the applicant had to report to the authorities twice a day and inform them of the name of the persons with whom he talked on the telephone.
[837] *Ilias*, para. 232.
[838] *Z.A.*, para. 151.
[839] *Lavents v. Latvia*, para. 64.
[840] *Ilias*, para. 233.
[841] To avoid being branded as arbitrary detention, there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. See for example *S.Z. v. Greece,* no. 66702/13, 21 June 2018, para. 53.

option to leave' as used in domestic cases and the element 'option to leave in practice' that appears in the Grand Chamber judgments.

As noted in Section 3.4, so as to determine whether there was a 'realistic option to leave' in domestic cases, the Court carried out an overall assessment of the factual and legal elements which may have influenced the choices made by the person concerned. A 'realistic option to leave' is a factor which generally favours the applicability of Article 5. By contrast, in *Ilias/Z.A.* the Court understood the concept 'option to leave in practice' to mean a mere *de facto* possibility to leave the country, where Article 5 is inapplicable *despite* the legal and factual elements which may have an influence on the choice made by the asylum-seeker. The 'option to leave in practice' is a criterion which generally favours the inapplicability of Article 5. Should such a *de facto* option to leave exist, the only chance for confined asylum-seekers to argue for the admissibility of their claim under Article 5 is to argue that leaving the place would pose a 'direct threat to their lives or health'. The threshold for applying Article 5 in these circumstances is thus set much higher in *Ilias* and *Z.A.*

The following paragraphs will compare examples of domestic cases where the 'realistic option to leave' criterion was used with the case *Ilias and Ahmed*, where the 'option to leave in practice' played an important role.

In *Ashingdane*, the applicant was allowed to leave the psychiatric hospital most of the time. However, according to the Court, there was a *legal* element which made the applicant's option to leave unrealistic: the judicial order that imposed his confinement. In *Ilias*, there was also a legal element which influenced the decision of the applicants not to leave the transit zones, as asylum-seekers in Hungary that returned to Serbia were considered irregular migrants there. The Grand Chamber itself recognised this when it stated that 'it is probable that the applicants had no legal right to enter Serbia'.[842] However, because of the lack of practical obstacles to travel and the absence of an imminent threat to life or health, the Court found that there was an 'option to leave in practice' *despite* the breach of Serbian law. Had the Court used the same reasoning of *Ilias* in *Ashingdane*, it would have probably held that the applicant could have *de facto* escaped the hospital during one of his family visits, since there were no practical obstacles to do so and his life or health would not have been at risk—*despite* the breach of the judicial order.[843]

In S*tanev*, the applicant was periodically allowed to leave the nursing home. However, for the Court, several *factual* elements made it unrealistic for him to choose not to return. Some of these elements were also present in *Ilias*, but the Grand Chamber did not refer to them. For example, in *Stanev*, the Court took into account the fact that the home's management kept the applicant's identity papers during his leave of absence. In *Ilias*, the applicants were also dependant on the Hungarian authorities for their identity papers. Assuming that asylum-seekers were issued an identification document in the Röszke transit zone, the police

[842] *Ilias*, para. 237.

[843] Similarly, in *Buzadji*, the applicant was not locked in his house and his movements were not closely monitored. However, the fact that he was under an absolute (judicial) prohibition to leave his house made his option to leave 'unrealistic'. Had the Court applied the same reasoning as in *Ilias*, it would probably have affirmed that Mr. Buzadji had an 'option to leave in practice' because there were no practical obstacles to do so, even if leaving would have been in breach of the judicial order.

authorities would have taken these document away from them if they had left towards Serbia, since leaving the transit zone meant that the asylum procedures were discontinued.[844]

Moreover, in the *Stanev* case, the Court also noted that the nursing home's location in a region far away from the nearest town made the applicant's journey difficult and expensive, in view of his income and his ability to make his own travel arrangements.[845] In *Ilias*, the nearest town to the Röszke transit zone was Subotica, some thirty-four kilometres away. Given their lack of financial resources, it is likely that, if the applicants had left the transit zone, they would have had to go on foot,[846] which would have taken them seven hours. Whether these difficulties made their option to leave 'unrealistic' was not considered by the Court.

As a final example, in *H.L v. UK*, the Court held that the applicant's option to leave the hospital was unrealistic because his doctor had stated that, if he had attempted to do so, he would have been chased and placed in formal detention ('involuntary committal') under the 1983 Mental Health Act.[847] Similarly, if the applicants in *Ilias* had tried to escape from the transit zone towards Hungarian territory, they would have been followed by the police and placed in formal asylum detention—as prescribed by Hungarian law.[848] This was not considered by the Grand Chamber, which instead affirmed that the lack of a possibility to leave towards Hungarian territory was 'unsurprising'.[849]

3.5.4 The burden of proof

In *Stanev v. Bulgaria*, the Court implied that it was for the Government to prove that the applicant had agreed to stay in the psychiatric clinic.[850] In contrast, in *Ilias* the Court did not ask the Government to show this—instead it assumed that there had been consent because there was 'no relevant prior link to the State'.[851] It appears that the lack of a prior link to the State is absolute proof that there was consent on the part of the asylum-seekers to enter and stay in the transit zone. Not only was the State relieved of the burden of proving that the applicants had agreed to stay there, but there was no possibility for the applicants to rebut this presumption. Similarly, in *Z.A.*, the lack of a prior link to the State led the Court to declare that the applicants had requested admission to Russian territory 'on their own initiative' by 'deciding' to apply for asylum; and that 'they remained in the airport because

[844] It is possible, however, that the applicants were not handed any documentation, since Article 6(2) of the Reception Conditions Directive (Directive 2013/33/EU) does not require this in border procedures. But even then, if the applicants left for Serbia, the discontinuation of the asylum proceedings would deprive them of the possibility to obtain valid documentation (protection status) in Hungary. Instead, they would be illegally staying in Serbia without valid identity papers and without the possibility to obtain them, given the systematic deficiencies in the Serbian asylum procedure.
[845] *Stanev*, para. 125.
[846] Particularly since the applicants had not arrived at the transit zones on their own, but had been brought by the Serbian authorities (probably from the Subotica camp) through informal Hungary-Serbia cooperation (Ashraf *et al.* 2019, p. 310).
[847] *H.L. v. UK*, para. 99.
[848] Refugee Info 2017.
[849] *Ilias*, para. 231.
[850] *Stanev*, para. 131.
[851] *Ilias*, para. 221. This assumption is made even clearer in para. 222 of the judgment, where it stated that 'there is no doubt that they entered the Röszke transit zone of their own initiative'. The reason why the applicant's will was so obvious, however, was not discussed.

they awaited the outcome of the asylum proceedings'.[852] At no stage did the Court require the Government to show that the applicants had agreed to remain in the international zone.

As to the existence of an option to leave, in domestic cases the burden of proof initially fell on the applicant, but shifted to the Government as soon as the applicant provided *prima facie* evidence that he was under the exclusive control of the authorities.[853] On the other hand, following *Z.A. v. Russia*, it appears that only when migrants are confined in *airport* transit zones does the Government have to 'convincingly show' that (1) there was a practical possibility for the applicants to leave and (2) there was no direct threat for their life or health if they left.[854] However, it is arguable that proving this is less onerous for the Government than, for example, proving that a person had the option to leave from the office of the prosecutor. As noted above, the concept of 'option to leave in practice' in *Ilias/Z.A.* does not require an investigation of the legal and factual circumstances that have an influence on the choices of the individual. Moreover, the 'lack of a direct threat for life or health' is also a loose concept which is easy to prove, since it does not require the Government to carry out a full individual assessment with the procedural safeguards of Article 3 ECHR.[855]

3.5.5 Other criteria not present in *Ilias* and *Z.A.*

This sub-section will assess whether the 'other criteria' that the Court used in different domestic cases could have been applied by the Grand Chamber in *Ilias* and/or *Z.A.*

A context where temporary restrictions are generally accepted

It will be recalled that this is an exceptional criterion developed in *Austin and Others v. UK* and *Gahramanov v. Azerbaijan* which, under certain conditions, automatically results in a certain situation falling outside the scope of Article 5. Arguably, situations of confinement of asylum-seekers at airport or border transit zones (such as those in *Ilias* and *Z.A.*) do not meet all the conditions for this criterion to apply to them. On the one hand, confining asylum-seekers at the border in order to carry out the initial stages of the asylum procedure is not a 'generally accepted' restriction, as evidenced by the fact that border procedures are only allowed in very specific situations under European Union asylum law.[856] On the other hand, asylum procedures at the border are not necessary to avert a real risk of serious injury or damage, unlike the 'kettling' of the violent protesters in *Austin* or the pre-flight security checks in *Gahramanov*.

As close as possible to normality

In *Ilias* and *Z.A.*, the Court could have considered whether the applicants were able to live in a manner close to their own 'normality' as asylum-seekers, i.e. in a manner similar to

[852] *Z.A.*, para. 143.
[853] *Creangă v. Romania*, paras. 94 and 99; *Kasparov v. Russia*, para. 39.
[854] *Z.A. v. Russia*, para. 154.
[855] See Section 3.2.5.
[856] Cornelisse 2016, pp. 74-90.

asylum-seekers residing in an accommodation inside the host State. In *Ilias*, the Court compared the Hungarian transit zones to 'light-regime detention facilities',[857] which is very distant from how 'normal life' should look like for individuals exercising their right to seek asylum. Thus, had the Court used this criterion, it would have weighed in favour of finding Article 5 applicable.

Confinement together with persons who are formally detained

In the Röszke transit zone, asylum-seekers were placed in a particular section. However, they were located in the same transit zone as migrants whose asylum application had been finally rejected and whose deprivation of liberty was more evident due to the removal orders issued against them.[858] They also shared common areas. However, unlike *Engel v. Netherlands*, this element was not taken into account in *Ilias* in order to declare Article 5 applicable.

The context of an investigative procedure

Although asylum procedures do not require as many investigative measures and hearings as criminal procedures, there are certain similarities: the asylum-seeker must be present for the interview for as long as it takes place, and must participate in the proceedings if asked to do so. In the context of a transit zone, the asylum-seeker has to stay in a specified area for the procedure to take place. In the Hungarian transit zone, moreover, leaving the area would have resulted in the discontinuation of the procedure. Despite these similarities, in *Ilias/Z.A.*, —unlike in *Creangă*—the Court did not consider that the asylum procedure 'tends to indicate that the applicant is obliged to comply'. [859]

Assistance by a lawyer

In *Creangă,* the fact that the applicant needed a lawyer during the criminal investigation was relevant for the finding that Article 5 applied. Throughout an asylum procedure, applicants often also need the assistance of a lawyer when they do not have the necessary knowledge to comply with the requirements of the proceedings. This is even more so when they exercise their right to an effective remedy under Article 13 ECHR following a negative asylum decision. In fact, the ECtHR has recognised the right of asylum-seekers to a lawyer in cases where the lack of legal assistance would unjustifiably hinder access to an effective remedy.[860] However, the Grand Chamber did not refer to this element in *Ilias/Z.A.*

[857] *Ilias*, para. 232.
[858] See the Opinion of Advocate General of Pikamäe (*supra* note 763), where he shows that asylum-seekers whose application was finally rejected in the transit zone were subjected to a return decision and a removal order. They could therefore only legally leave the place if Hungarian authorities performed the procedural acts necessary for their removal, thus excluding the possibility of voluntary departure.
[859] *Creangă*, para. 98.
[860] See, inter alia, *G.R. v. the Netherlands*, no. 22251/07, 10 January 2012.

The adverse effects of the measure on the applicants' well-being

While this criterion may at first glance resemble the element of 'conditions of confinement' to which the Court referred in *Ilias and Ahmed*, it is in fact different. In *Stanev* and *Austin*, the Court refers to the discomfort that the confinement *itself* caused on the applicant, and uses this as a criterion to admit the complaint under Article 5. Meanwhile, in *Ilias* the Court considered the *conditions* of the confinement under Article 3 ECHR –i.e. hygiene conditions, availability of beds etc.– as an element in the applicability assessment of Article 5. The Grand Chamber in *Ilias* (unlike in these two domestic cases) does not take into account the physical and mental effects that the confinement in the transit zones has on individuals who are potentially already traumatized by previous experiences.

Positive obligations under Article 2

This principle could not have been considered by the Court in *Ilias* or in *Z.A.* because the applicants were not asylum-seekers with health problems. Moreover, in the case of the Rözke transit zone, vulnerable asylum-seekers were allowed to enter mainland Hungary.[861]

Nonetheless, this criterion could be applied in future cases in the context of reception centres with regard to vulnerable asylum-seekers with health problems—particularly those with mental health problems. If allowing such an asylum-seeker to leave the camp unattended would create a risk of him getting lost or otherwise being exposed to self-harm or to criminal actions from others (which would have to be proved by the State), this may trigger *positive obligations* under Article 2 ECHR to, for instance, ensure that the asylum-seeker is accompanied by a professional when he leaves the camp. Although the Court will have to take all the different factors into account, it is likely that in this situation the existence of a positive obligation to protect would weigh against considering the measure as detention.

Material dependency

Like in *Stanev* and *H.L.*, in *Ilias and Ahmed* the applicants were financially dependent on the Hungarian Government and the authorities had control over their care. Meals, accommodation and medical care were provided in the transit zones. In fact, in its assessment of the complaint under Article 3 ECHR (conditions of confinement), the Grand Chamber affirmed that 'it is undisputed that while at the Röszke transit zone, the applicants were fully dependent on the Hungarian authorities for their most basic human needs and were under their control'.[862] This material dependency on the authorities would have made it very difficult for them to leave towards Serbia even if that option was *de facto* available. However, the Court did not take this into account. There was also no reference to the material dependency of the applicants under the Court's assessment in *Z.A. and Others*. The Court considered this material dependency only in its evaluation of the *detention* conditions under Article 3: it found a violation of this provision, inter alia, because the applicants, as asylum-

[861] *Ilias*, para. 205.
[862] *Ilias*, para. 186.

seekers, were in a situation of distress and yet they were left to their own devices in the airport transit zone.[863]

3.5.6 Migration exceptionalism in the Article 5 applicability test

Section 3.5 has shown the multiple fronts from which one can point to the migration exceptionalism or the two-tier human rights system applied by the Court in the Article 5 applicability test. For a start, the criteria that appear in *Ilias/Z.A.* but not in domestic cases (judicial review, conformity of the measure with other provisions of the ECHR) provide new arguments for States to object the applicability of Article 5, while the criteria mentioned in domestic cases but not in *Ilias/Z.A.* (e.g. material dependency) mostly give applicants arguments to claim that the measure amounts to detention. To continue, three factors which the Court explicitly rejected in domestic cases as relevant for the applicability test (classification in domestic legislation and domestic judgments, purpose of the measure and conditions of confinement) were taken into account in *Ilias/Z.A.* Finally, even criteria which appear in both groups of cases (the applicant's individual situation and choices, duration of confinement, communication with the outside world, surveillance and 'realistic option to leave') were given a different interpretation by the Grand Chamber, again in a way that places more obstacles on asylum-seekers than on nationals to argue that their case should be protected by Article 5. Even the burden of proof is reversed in *Ilias* and *Z.A* in favour of the State.

Some of the pre-*Ilias* migration-related cases analysed in Section 3.3 already pointed to a greater deference to States in the confinement of asylum-seekers than in that of nationals. For example, in *Amuur*, the Court noted—without referring to any statistical data—that, at the time (1996), there were 'increasingly frequent attempts to circumvent immigration restrictions'.[864] Twenty-four years later, the Court still affirmed that these attempts to enter the territory of European States were 'increasingly frequent';[865] again without supporting this argument with actual figures. Another example is *Mahdid and Haddar*, where the Court blamed the applicants for destroying their passports and preventing their expulsion, even though the appeal against the dismissal of the asylum claim was still possible.[866] The three judgments against Greece (*J.R.*, *O.S.A.* and *Kaak*) are also examples of migration exceptionalism. In these rulings, the Court found that Article 5 was inapplicable after a certain date simply because the reception centre had become semi-open, even though the applicants had to return at night and the detention order under domestic law was still in force—in a very similar manner to *Ashingdane*, a domestic case where the Court did regard the measure as detention.

Other migration-related judgments, such as *Khlaifia and Others* (Grand Chamber), served to counterbalance this trend by emphasising the independence of the ECtHR in its assessment of the applicability of Article 5, rejecting criteria such as 'classification under domestic law' and 'purpose of the measure'. However, in *Ilias* and *Z.A.* the Grand Chamber consolidated

[863] *Z.A.*, para. 192-193.
[864] *Amuur*, para. 43.
[865] *Z.A.*, para. 184.
[866] See the criticism by Cornelisse 2010, p. 282 (*supra* note 636).

the more State-deferential line of jurisprudence, facilitating new arguments for States to object the admissibility of an application under Article 5 in migration-related cases.

For all these reasons, the fourth research question of this chapter can be confidently answered in the affirmative: the criteria in *Ilias* and *Z.A.* make it (even) more difficult for asylum-seekers to claim that a confinement measure amounts to detention than the criteria in domestic cases.

3.6 The development of the migration-related case law after *Ilias* and *Z.A.*

The Grand Chamber rendered *Ilias* and *Z.A.* in November 2019. But how has the Court's case law evolved since then? As of July 2023, have the different chambers maintained the low level of protection of *Ilias/Z.A.* in subsequent migration-related decisions? This section seeks to answer the final research question of this chapter, following a slightly different structure from the others to avoid repetition. Rather than analysing each criterion separately, I will identify general trends in the jurisprudence and divide them into three categories: (1) trends that confirm the migration exceptionalism approach of *Ilias/Z.A.*; (2) mixed trends and (3) trends that may help reverse the migration exceptionalism of *Ilias/Z.A.*

The Court has found Article 5 to be applicable in one case concerning reception centres (*Nur Ahmed v. Ukraine*),[867] one case relating to the hotspot of Lampedusa (*J.A. and Others v. Italy*)[868] and five cases concerning the Hungarian transit zones (*R.R. and Others v. Hungary* and four other judgments where the Court merely quoted *R.R.* and '[did] not consider that the present case warrant[ed] a different conclusion').[869] On the other hand, it has declared that the confinement amounted to a restriction on movement in one case relating to reception centres (*Alissa and Alissa v. Romania*)[870] and five cases concerning the Hungarian transit zones (*A.S. and Others*, *N.A. and Others* and three unpublished cases).[871]

3.6.1 Trends confirming the migration exceptionalism of *Ilias/Z.A.*

The chambers of the Court have not contradicted the Grand Chamber's conclusion that entering the Hungarian transit zones was a voluntary act.[872] The Court has thus continued to apply the 'presumption of voluntariness' without examining whether the asylum-seekers were subjected to physical or mental pressure that would lead them to (implicitly) accept the confinement measure.[873] Similarly, it has reiterated that asylum-seekers in the transit zones

[867] *Nur Ahmed and Others v. Ukraine*, nos. 42779/12, 18 June 2020.
[868] *J.A. and Others v. Italy*, no. 21329/18, 30 March 2023.
[869] *R.R. and Others v. Hungary*, no. 36037/17, 2 March 202; *M.B.K. and Others v. Hungary*, no. 73860/17, 24 February 2022; *H.M. and Others v. Hungary*, no. 38967/17, 2 June 2022; *A.A.A. and Others v. Hungary*, no. 37327/17, 9 June 2022; and *W.O. v. Hungary*, no. 36896/18, no. 36898/18, 25 August 2022.
[870] *Alissa and Alissa v. Romania*, no. 48780/17, 17 December 2019.
[871] *N.A. and Others v. Hungary*, no. 37325/17, 1 February 2022; *A.S. and Others v. Hungary*, no. 34883/17, 17 May 2022; Unpublished case, no. 83/18; Unpublished case, no. 3047/18; Unpublished case, no. 8172/18.
[872] See *R.R. and Others*, para. 75 and the four other cases that were decided based on this judgment. See also *A.S. and Others* and *N.A. and Others*, quoting the findings of *Ilias and Ahmed*.
[873] In *Nur Ahmed and Others v. Ukraine*, the Court did find that the applicants ('[in] contrast [to] *Ilias and Ahmed*') had entered the accommodation centre for irregular migrants involuntarily. However, it seems that the reason for this conclusion was the fact that the Government did not raise the argument that their entry was voluntary,

were under 'no direct and immediate threat' and 'could have left in the direction of Serbia at any moment',[874] thus consolidating the false dichotomy between the 'direct threat' element under Article 5 and the principle of *non-refoulement* under Article 3 ECHR.[875]

As for the classification in domestic law, the intention to detain and the purpose of the measure, the Court has taken these elements into account in the two cases concerning reception centres: in *Nur Ahmed*, the fact that domestic law 'used the term arrest' and that the purpose was 'to prevent the residents from leaving' were important factors to find Article 5 applicable.[876] The opposite was true in *Alissa and Alissa*, where the Court, in declaring that the measure amounted only to a restriction on movement, referred to the 'conformity [of the measure] with national law'—which did not classify the measure as detention—, as well as to the facts that 'no formal decision by the Romanian authorities ordered the applicant's detention' and that the purpose of the structure was to accommodate asylum-seekers.[877] In *R.R. and Others*, the purpose of 'putting in place a waiting area while the authorities decided whether to formally admit the asylum-seekers to Hungary' was also explicitly mentioned, even if other factors led it to conclude that there had been detention.[878]

In the rulings on the Hungarian transit zones, the Court has somewhat refined the element of 'duration in light of the purpose'. It will be recalled that, in *Ilias and Ahmed*, the Grand Chamber stated that confinement 'did not exceed significantly the time needed for the examination of an asylum request'. In subsequent judgments, the Court has held that, if the authorities act 'in a diligent manner' in the processing of the asylum claim, there will be a greater chance that the confinement measure will be classified as merely as a restriction on movement.[879] Conversely, a 'lack of diligence' in the asylum procedure will weigh in favour of the applicability of Article 5.[880] There is, however, no indication as to how long an asylum-seeker must wait for the Court to find that the asylum claim was not diligently examined. For example, in the three unpublished cases against Hungary, the period of confinemet was extremely long (sixty-three days, fifty-eight days and one hundred and thirty-five days, respectively), but the Court held that the measure did not amount to detention.

The judgment *Alissa and Alissa v. Romania* confirms the line of case law that began with *J.R. and Others v. Greece*—and which contrasts with domestic cases such as *Ashingdane*—that 'a semi-open centre, allowing people to leave during the day and return at night, [is] a simple restriction on movement'.[881]

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since the Court stated that '*it has not been suggested* that the applicants entered the centres of their own initiative or ever consented to their placement there' (para. 85). In any event, the applicants were placed in the centre by the police following a court order, and therefore (unlike *Ilias* and *Z.A.*) this case did not leave any room for the Court to rule on the subjective element of the confinement.

[874] *R.R. and Others*, para. 75 and the four subsequent cases that refer to it; *A.S. and Others*, para. 15 and *N.A. and Others*, para. 14.

[875] See Section 3.2.5.

[876] *Nur Ahmed*, paras. 86 and 89.

[877] *Alissa and Alissa*, paras. 26 and 27.

[878] *R.R. and Others*, para. 76 and, by reference to *R.R.*, in *M.B.K.*, *A.A.A.*, *W.O.* and *H.M.*.

[879] *A.S. and Others*, para. 15 and *N.A. and Others*, para. 14: 'it has not been shown (…) that Hungarian authorities failed to act in a speedy and diligent manner'.

[880] *R.R. and Others*, para. 80 (and the judgments that build on it): 'the applicant's situation was (…) influenced by [the] inaction or lack of diligence on the part of the Hungarian authorities'.

[881] *Alissa and Alissa*, para 28.

Finally, maximum time limits and conformity of the conditions of confinement with Article 3 ECHR remain relevant factors, as evidence by *R.R. and Others v. Hungary* and *J.A. and Others v. Italy*, where the facts that 'the maximum duration of their stay in the crisis centre was not defined by any law'[882] and that the material conditions amounted to a violation of Article 3 weighed in favour of finding that the applicants had been detained.[883]

3.6.2 Mixed trends

In *R.R. and Others* and the four cases that build on it, the Court gave more weight to the factors 'personal space' and 'surveillance or control' than to other criteria and found Article 5 applicable. This could be seen as a positive trend for the Article 5 applicability test in migration-related cases, as these are factual elements that do not depend on the domestic legal framework of the State or on questionable criteria such as the 'voluntary entry' of asylum-seekers to the transit zone or the 'option to leave in practice'.

However, it could also be argued that *R.R.* and the other cases do not depart from the migration exceptionalism approach of *Ilias and Ahmed*, because the Court's general assessment of the confinement in the transit zones was the same as in the Grand Chamber judgment (as shown in the above sub-section), the difference being that, in the most recent cases, there were particular facts which were so intrusive on personal liberty that it would have been virtually impossible for the Court to argue that the measure amounted only to a restriction on movement. These facts were:

(a) In *R.R.*, the applicant spent one and a half months in the isolation section of the transit zone;
(b) In *M.B.K.*, the applicant was handcuffed when he left the transit zone to accompany patients to a hospital in Hungary in order to assist with interpretation;
(c) In *A.A.A.* and *H.M.*, the applicants could not leave the 'family section' of the transit zone unless escorted;
(d) In *W.O.*, the applicant could not leave the family section and was later transferred to the deportation section, where space was even smaller.

These cases therefore do not contradict my above conclusion that, following *Ilias* and *Z.A.*, the level of control required over asylum-seekers for it to support a finding of detention appears to be higher than that required over individuals in domestic cases (where the 'mere presence' of the police or the 'remote control' by the authorities was sufficient).[884]

3.6.3 Trends that may help reverse the migration exceptionalism of *Ilias/Z.A.*

I have identified two trends which may bring migration-related cases more into line with domestic cases as regards the Article 5 applicability test.

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[882] *J.A. and Others*, para. 94.
[883] *R.R. and Others*, para. 82 ('the Court also refers to its finding of a violation of Art. 30); *J.A. and Others*, para. 94 ('all the more so if one considers that (…) in addition, the material conditions have been deemed to be inhuman and degrading').
[884] See Section 3.5.3.

On the one hand, in *J.A. and Others v. Italy*, the Court examined domestic law and came to the conclusion that 'hotspots, namely existing reception facilities used to implement the "hotspot approach", were not intended (…) to serve as detention centres' and that the Lampedusa hotspot was not 'classified as a CIE (where migrants, under certain conditions, might be lawfully detained)'.[885] Despite the fact that the measure was not classified as 'detention' under national law, that there was no 'intention to detain' and that the purpose of the hotspots was 'merely [to] swiftly identify, register and fingerprint incoming migrants',[886] the Court held that the confinement amounted to detention. It therefore carried out an autonomous interpretation of the notion of deprivation of liberty, in line with its repeated emphasis in domestic cases that the Court must look 'beyond (…) the characterisation or lack of characterisation given by a State to a factual situation'.[887]

On the other hand, the Court seems to be moving towards an interpretation of the 'practical option to leave' criterion that favours the applicability of Article 5 (or at least does not operate against it) in cases where the migrant needs *explicit permission* each time he wishes to leave the reception centre, i.e. where the authorities have discretionary power over the migrant's possibility to leave. Indeed, in *Nur Ahmed v. Ukraine*, the Court emphasised that

'Individuals placed there are not free to leave without the centre's management's written permission. Contrary to what is suggested by the Government, the fact that centre residents can leave the centre with permission is not, in itself, a feature which excludes characterisation of an institution as a place of deprivation of liberty.'[888]

Similarly, in *J.A. and Others v. Italy*, the Court ruled that confinement in the hotspots amounted to detention, inter alia, because the only option for the applicants to leave the centre was to lodge a request with the Prefect.[889]

Finally, it is a welcome step for asylum-seekers that, unlike in *Ilias*, where the Grand Chamber accepted the Government's argument that migrants could simply walk out towards Serbia, in *J.A. and Others* the Court did not respond to the Prefect's submission that 'migrants did have in any event the possibility to leave the centre through an opening in the fence'.[890]

3.7 Conclusions

This chapter has delved into the third key objective of this study, which was to examine the *material scope* of the right to free movement within the country. If we imagine two concentric circles, where the smaller circle is the right to liberty and the wider one the right to free movement, I have tried to trace with a thicker marker the blurred lines where these two circles meet. This is important mainly because, as noted in the introduction, each right has a different personal scope and provides different safeguards, but it also matters at a conceptual level. As noted in Chapter 1, while the drafters of international human rights texts saw

[885] *J.A. and Others*, paras. 88 and 91.
[886] *J.A. and Others*, para. 88.
[887] *Creangă*, para. 91-92; *Buzadji*, para. 103; *M.A. v. Cyprus*, para. 187; *Kasparov v. Russia*, para. 36.
[888] *Nur Ahmed*, para. 86.
[889] *J.A. and Others*, paras. 43 and 92.
[890] *J.A. and Others*, para. 69.

freedom of movement within the country as 'the last stage of liberty',[891] they also made clear that the ultimate purpose of each right was different: the right to liberty concerns the 'physical protection' of the individual, while freedom of movement relates to 'the relation of man to his fellows', i.e. the individual's ability to make decisions about his private life, in a similar way to the rights to privacy, family and home.[892]

When I attended the Conference on Immigration Detention in the EU, held in Kos (Greece) between the 8th and 10th of June 2023, some lawyers criticised the difficulty of knowing in advance when the ECtHR will classify the confinement of asylum-seekers or other migrants as detention and when as a restriction to freedom of movement, especially given the Court's rather discouraging statement that making this distinction 'sometimes proves to be no easy task, in that some borderline cases are a matter of pure opinion'.[893] Reading the *travaux préparatoires* of Article 12 ICCPR, I found that this problem dates back to the origins of the right to free movement in international law, as the drafters themselves sometimes referred to 'the right to personal/physical liberty' when they actually meant 'freedom of movement within the country'.[894] Sections 3.2 and 3.3 have looked closely into the criteria used by the Grand Chamber of the Court in *Ilias/Z.A.* and in previous migration-related cases and systematised them so as to shed some light on this puzzling issue.

For their part, Sections 3.4 and 3.5. have also addressed the third key objective of this study by examining the Article 5 applicability test in pre-*Ilias* domestic cases and comparing it with the principles of *Ilias* and *Z.A.* I have come to the conclusion that, even if there were some sings of migration exceptionalism in earlier migration-related cases (e.g. in *J.R. and Others v. Greece*), the 2019 Grand Chamber judgments widened the gap between these types of cases and those involving nationals.[895] Indeed, the Court applies two different standards in domestic cases and in migration-related cases, granting more deference to States in the latter group.[896]

One of the ways in which the Grand Chamber materialised migration exceptionalism in *Ilias/Z.A.* is by making the definition of a Convention term ('deprivation of liberty' in Article 5) dependent on the definition of the term in domestic law. In a similar vein to the Court's interpretation of the term 'lawfully within' in Article 2(1) of Protocol 4—as examined in Chapter 2—, this again undermines the principle of 'autonomous interpretation' of the Convention, which is an important doctrine in the Court's jurisprudence.[897] Other ways in which it created a 'two-tier human rights system' between nationals and asylum-seekers included the presumption that migrants who enter an airport transit zone or a reception centre to seek asylum do so 'voluntarily', and the assumption that asylum-seekers can leave these places towards third countries, even if this would 'compel the applicants to choose

[891] Mr. Chang asserted: 'in that series of articles the idea of liberty was gradually and progressively enlarged; it was applied first to the individual, then to the family, and finally to the country. That series of articles therefore served to develop and clarify the idea of liberty' (UN Doc. A/C.3/SR.10340, 15 October 1948).
[892] Statements of Mr. Cassin and Mr. Chang in UN Doc. A/C.3/SR.163145, 29 November 1948.
[893] *Ilias and Ahmed*, para. 211. Presentation of Robert Nestler, co-founder and legal coordinator of the NGO Equal Rights Beyond Borders.
[894] UN Doc. A/C.3/SR.956 (date unknown) and UN Doc. E/CN.4/SR.150 (17 April 1950).
[895] Or migrants in a non-migration-specific situation.
[896] See the summary of this comparison in sub-section 3.5.6.
[897] Letsas 2007, p. 43; Harris *et al.* 2018, p. 20. See the conclusions of Chapter 2.

between liberty and the pursuit of a procedure ultimately aimed to shelter them from the risk of exposure to treatment in breach of Article 3 of the Convention'.[898] One of the paragraphs in *Ilias* and *Z.A.* is particularly telling, as the Grand Chamber seemed to explicitly acknowledge that Article 5 will only protect asylum-seekers in exceptional circumstances:

'The right of States to control the entry of foreigners into their territory necessarily implies that admission authorisation may be conditional on compliance with relevant requirements. Therefore, absent other *significant factors*, the situation of an individual applying for entry and waiting for a short period for the verification of his or her right to enter cannot be described as deprivation of liberty imputable to the State, since in such cases the State authorities have undertaken *vis-à-vis* the individual no other steps than reacting to his or her wish to enter by carrying out the necessary verifications.'[899]

A further issue identified with regard to the *Ilias/Z.A.* criteria is that certain principles are applied both at the admissibility stage of the Article 5 assessment and in the subsequent merits evaluation of the violation of this provision. The 'purpose of the measure', the 'duration of the measure in the light of the purpose', the 'procedural protection' and the 'conditions of detention' are all relevant elements to determine whether a *detention* has complied with the substantive requirements of Article 5. Stoyanova has reflected on this problem with regard to the 'procedural protection' criterion, though her concerns are also relevant to the other elements:

'[I]nstead of scrutinizing the (…) access to procedural guarantees as part of the substantive analysis under Article 5, where a single deficiency leads to a finding of a violation (…), the Court has muddled these criteria together with other factors and made them pertinent for the definitional analysis. This ultimately weakens the roles of these criteria and creates uncertainty.'[900]

Section 3.6 has shown that, since *Ilias* and *Z.A.*, the chambers of the Court have taken some steps towards a more favourable interpretation of the Article 5 applicability test for asylum-seekers and other migrants, but overall the Grand Chamber judgments seem to have had a negative impact on migration-related cases, making it difficult for confined asylum-seekers to claim that the State should comply with the safeguards of Article 5.

These findings are particularly problematic in view of the practices referred to in the introduction of this study, such as the 'Closed Controlled Access Centres' in Greece—which are to serve as a blueprint for the EU's New Pact on Migration and Asylum—and the confinement of asylum-seekers in airport transit zones of several European States.[901] Moreover, the negative impact of *Ilias* and *Z.A.* on asylum-seekers could be felt not only in the ECHR system, but also in international human rights law more generally, as the Court's criteria to distinguish a restriction on movement from detention have been cited in the past by UNHCR and the Inter-American Court of Human Rights,[902] and it would not be

[898] Partly Dissenting Opinion of Judge Bianku in *Ilias and Ahmed*, p. 76.
[899] *Ilias*, para. 225; *Z.A.*, para. 144 [emphasis added].
[900] Stoyanova 2019.
[901] See Section 1.2 of the introduction.
[902] UNHCR 2012, p. 9; Advisory Opinion of the Inter-American Court of Human Rights OC-21/14, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, 19 August 2014, pp. 54-55.

surprising if the Human Rights Committee started to quote it at some point, given that it has not developed its own jurisprudence to distinguish Article 9 from Article 12(1) ICCPR.[903]

Nevertheless, if a measure of confinement does not fall under the scope of the right to liberty, not all is lost for the protection of 'the spirit of freedom' which, according to the drafters of the UDHR, lies at the core of both the right to liberty and the right to free movement.[904] The Refugee Convention offers refugee-specific safeguards to the freedom movement of asylum-seekers within the host State in Article 31(2) and 26. National legal systems, such as Spain and Germany, also afford guarantees to this freedom that specifically apply to asylum-seekers. Which are these safeguards, and how do they compare to the safeguards provided to nationals or to individuals in general? Are the elements of migration exceptionalism identified at the level of the *personal* and *spatial scope* of the right to free movement also present in the *safeguards* offered by the right? These are the questions that the next chapter will explore.

[903] See Section 7.3.2 of the introduction of this study.
[904] As mentioned by the Greek representative in UN Doc. A/C.3/SR.12079, 2 November 1948.

Chapter 4 – The safeguards of the right to free movement of asylum-seekers

4.1 Introduction

When I started studying Law, my professor of Fundamental Rights constantly repeated that 'there is no right without a safeguard'. Indeed, asylum-seekers may fall under the scope of the right to free movement in certain situations or under specific legal regimes. Still, this finding is empty in itself if not accompanied by the presence of solid safeguards that protect this freedom against arbitrary action of the authorities. Having considered *who* is entitled to this right and *when* this right applies (or when it ceases to apply), the last chapter of this study is devoted to an in-depth examination of the *safeguards* of the right in different legal orders. The term 'safeguards' will be understood to mean the conditions that the State has to comply with in order to lawfully interfere with freedom of movement. The chapter will be guided by two main research questions, deriving from the fourth key objective of this study:

(a) What are the safeguards of the right to free movement of asylum-seekers under international and European human rights law, Spanish law and German law?
(b) Does international and European human rights law, Spanish and German law offer higher protection to freedom of movement under the law applicable to nationals or to all individuals than under the law specifically applicable to asylum-seekers?

In a similar vein to Chapter 3, the comparison between asylum-seekers and individuals in general aims to contribute to the debate on migration exceptionalism or the two-tier human rights system, outlined in the introduction of this study. For the comparison at the international level, I will take, on the one hand, the Refugee Convention as the treaty that specifically protects the freedom of movement of asylum-seekers and, on the other hand, the International Covenant on Civil and Political Rights and the European Convention on Human Rights as the treaties that safeguard the freedom of movement of individuals in general.

I am aware that Art. 31(3)(c) of the Vienna Convention on the Law of Treaties lays down that, in order to interpret a treaty, 'there shall be taken into account, together with the context: (…) any relevant rules of international law applicable in the relations between the parties'. Given that State parties to the Refugee Convention are also Parties to the ICCPR, refugee law scholars often read the human rights standards of the ICCPR into the meaning of the terms of the Refugee Convention whenever they find a gap in the protection offered by the latter. However, I will not make use of Article 31(3)(c) VCLT and will analyse the standards of each treaty separately instead. The reason for this is that I find it doubtful that the safeguards of the right to free movement in the ICCPR and Protocol 4 ECHR can be read into the RC if asylum-seekers do not always fall under the scope of this right under general human rights law. As seen in Chapter 2, for the HRC and the ECtHR, asylum-seekers are only entitled to this right if States so decide, because they do not adopt an autonomous interpretation of the term 'lawfully within' and there is no alternative provision in the respective treaties that protects the free movement of unlawfully present migrants.

This interpretation seems to find some support in refugee law doctrine. For example, Noll and Klammer use Article 31(3)(c) VCLT and read the safeguards of the ICCPR into Article 31(2) RC. The latter provision sets out the conditions under which an 'unlawfully present refugee' may be detained *or* constrained in his freedom of movement. However, these authors only refer to the safeguards of the right to liberty under Article 9 ICCPR (which accrues to 'everyone'), not to those under Article 12 ICCPR, probably because of the fact that the latter article does not apply to 'unlawfully present refugees'.[905]

Another aspect to be addressed here is how I will analyse and compare the different treaties. Rather than simply contrasting the wording of the various texts, I will examine the interpretation of the Refugee Convention made by legal scholars (Section 4.2: the safeguards of the right to free movement of asylum-seekers) and the interpretation of the general human rights treaties carried out by the ECtHR and the HRC (Sections 4.3 and 4.4: the safeguards of the right to free movement of individuals in general).[906] Finally, I will compare the two interpretative standards (Section 4.5). I recognise that this comparison will have its flaws, given the different nature of legal doctrine (academics whose views are not binding on States[907] and who do not hold a unanimous interpretation of the RC), the HRC (a committee of experts with some elements of a judicial body, but whose decisions are not binding[908]) and the ECtHR (a court that renders legally binding judgments). Moreover, the two latter bodies may be constrained in their decisions by political pressure from States and the need to find consensus within the body itself, while academics have more freedom to express their opinions. Despite these caveats, these are the instruments that can give me the most precise and in-depth understanding of the treaties.

In the same vein as in Chapter 2, I will refer to Article 31 VCLT ('General rule of interpretation') and Article 32 VCLT ('Supplementary means of interpretation') in order to provide my understanding of the methods used by the various authors to interpret the Refugee Convention. On a different note, in the analysis of Article 26 RC, I will always use the term 'asylum-seeker', except when specifically referring to the views of the authors who

[905] Noll 2011, p. 1269 (especially fn. 125), Klammer 2022b, p. 708. Another (secondary) reason for not relying on Article 31(3)(c) VCLT is that this interpretative method is sometimes applied selectively in refugee law doctrine, i.e. only when doing so raises the standards of protection for the rights of asylum-seekers/refugees, but not when it lowers them. For instance, while Klammer reads the safeguards of Article 9 ICCPR (which are more rights-protective) into Article 31(2) RC, he states that the interpretation made by the ECtHR of the personal scope of Article 2(1) of Protocol 4 ECHR in *Omwenyeke v. Germany* (which is unfavourable to asylum-seekers) cannot be transferred to Article 26 RC. His argument is that, unlike the Refugee Convention, Protocol 4 ECHR does not distinguish between the terms 'lawfully in' and 'lawfully staying' (p. 618; see also Marx 2011, p. 1156). In contrast, Edwards (2011c, pp. 14-15) finds that the case law of the HRC on Article 12(1) ICCPR (which, in her view, is favourable to asylum-seekers) serves to interpret the personal scope of Article 26 RC. Whatever the merit of either of these arguments, they show the malleable nature of Article 31(3)(c) VCLT for interpreting the Refugee Convention.

[906] It is to be noted that in two of the HRC decisions included in this study (*Celepli v. Sweden* and *Karker v. France*), the applicant was a migrant and not a national. Nevertheless, the reason that led the States to apply restrictions on movement was their suspicion that the applicants were terrorists. Thus, the public good that the State intended to protect (national security) is one which, unlike deterrence of irregular migration or border control, may be threatened by both nationals and migrants.

[907] Even if 'the teachings of the most highly qualified publicists' are a subsidiary means for the determination of rules of international law (Article 38 of the ICJ Statute).

[908] Even if, as noted in the introduction, the ICJ and several domestic courts give considerable weight to the Committee's interpretation of the ICCPR and, in Spain, the Supreme Court has declared that decisions of UN treaty bodies have binding force on the Spanish State.

find that *only* recognised refugees fall under the personal scope of this provision, in which case I will use the term 'recognised refugee'.[909]

In the case studies of Spain and Germany (Sections 4.6 and 4.7), the comparison will be made at two normative levels. Firstly, I will study how the same primary norm (the Constitution, as interpreted by the competent courts) regulates the right to free movement of nationals and of asylum-seekers. Secondly, I will compare the regulation of this right in domestic asylum legislation with secondary law that applies to individuals in general (the Spanish Criminal Code and German *Länder*-Police Acts).

Finally, Section 4.8 will conclude this chapter with my own interpretation of the safeguards of the right to free movement under the Refugee Convention and a summary of the guarantees for asylum-seekers under the Spanish and German constitutions.

4.2 The safeguards of the right to free movement of asylum-seekers

Since the Refugee Convention regulates the right to free movement in two different provisions, this section will first examine the safeguards under Article 31(2) RC for unlawfully present asylum-seekers and subsequently explore the guarantees under Article 26 for lawfully present asylum-seekers.

4.2.1 The safeguards for unlawfully present asylum-seekers: Article 31(2) of the Refugee Convention

Article 31(2), sentence 1 [henceforth, Article 31(2)], regulates the right to free movement of unlawfully present asylum-seekers. As studied in Chapter 2, there is consensus in legal doctrine that, at least, non-criminalisable asylum-seekers[910] are protected by this provision, which reads:

> 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those *which are necessary* and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country.

The only apparent safeguard enshrined in this provision is that restrictions must be 'necessary'. This raises three questions: (1) Is there a limited number of grounds that the State can use to restrict the movement of asylum-seekers? (henceforth, a *numerus clausus* safeguard)? (2) When applying this article in practice, do authorities have to carry out a 'necessity test' before imposing the restrictive measure, and if so, what does this test entail? (3) Finally, can any other safeguards be derived from Article 31(2) beyond the term 'necessary'?

Before examining how the doctrine answers these individual questions, a preliminary thought is due: several authors make it explicit that this provision is relatively weak regarding the

[909] Indeed, the analysis in Section 4.2.2 will also include authors who believe that only recognised refugees fall under the personal scope of Article 26 (Amann, Diehl and Goodwin-Gil and McAdam), as well as those whose position is not clear (Robinson and Weis); because, regardless on their view on the issue of the personal scope, their opinions on the safeguards provided by Article 26 are useful for this chapter.

[910] That is, those who have who complied with the requirements of the non-penalisation clause in Article 31(1) RC.

safeguards it provides to asylum-seekers. For Noll, Article 31(2) 'enables States to take measures that may be far more onerous and intrusive for the individual refugee than certain penalties proscribed by Art. 31(1)'.[911] Similarly, Goodwin-Gil finds that 'States retain considerable discretion as to the measures to be applied [under this provision] pending determination of status'.[912] Amann goes one step further, suggesting that Article 31(2) is merely a 'strong recommendation' for States not to impose restrictions on unlawfully present asylum-seekers, thus effectively denying the existence of a right to free movement for this group.[913] We will now see the reasons behind these views and the interpretative techniques that different authors have (or have not) used to narrow down State discretion over the restrictions on the movement of unlawfully present asylum-seekers. The last part of this section will also analyse the—changing—ways in which UNHCR has interpreted the safeguards of Article 31(2).

Is there a numerus clausus list of restriction grounds?

In *What Is Justice?*, Kelsen warned that 'by most appropriate means, most inappropriate ends may be achieved'.[914] In the ambit of refugee law, Hathaway has also contended that 'even fungible grounds are better than no grounds at all'.[915] These reflections connect to the first main problem presented by Article 31(2): on the face of it, the provision does not list the legitimate grounds that States may invoke to restrict the movement of asylum-seekers (Article 31(1) VCLT, 'ordinary meaning of the terms'). This has led Chetail to argue that Article 31(2) RC employs very 'general and arguably vague terms'.[916] I have thus examined whether a doctrinal consensus may be traced that limits the number of permissible restriction grounds for the right to free movement by using methods of interpretation other than a textual reading of the article.

The minority view: only some reasons are legitimate

Hathaway, while recognising that the meaning of 'necessary' restrictions on freedom of movement can be 'difficult to discern',[917] resorts to the UNHCR Executive Committee (ExCom) Conclusion on the Detention of Refugees and Asylum-Seekers to argue that there is, in fact, a *numerus clausus* safeguard in Article 31(2) RC. Indeed, this document sets out that States may *only* resort to detention for five different reasons, one of them being the protection

[911] Noll 2011, p. 1246. Drawing on legal philosophy, he adds that while the exemption from penalisation under Article 31(1) RC is structurally similar to Kant's right to hospitality (which entitles a visitor not to be treated in a hostile manner solely due to their arrival on the soil of another individual), the leeway granted to States in Art. 31(2) 'thwarts the Kantian heritage'.
[912] Goodwin-Gill 2001, p. 37.
[913] Amann 1994, p. 122.
[914] Kelsen 1960, p. 9.
[915] Hathaway 2021, p. 844.
[916] Chetail 2012, p. 57.
[917] Hathaway 2021, p. 523.

of 'public order'.[918] For Hathaway, the formulation by the UNHCR ExCom is a 'helpful summary of the scope of permissible provisional denial of *freedom of movement*'.[919]

The UNHCR Executive Committee is a subsidiary organ of the UN General Assembly, conformed by States 'with a demonstrated interest in, and devotion to, the solution of the refugee problem'.[920] It is thus presumably formed, at least in large part, by States who are party to the Refugee Convention. For that reason, we may say that, when the ExCom interprets particular provisions of the Refuge Convention, its reports function as a 'subsequent agreement between the parties [of the Refugee Convention] regarding the interpretation of the treaty or the applications of its provisions'. According to Article 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT), these 'subsequent agreements' shall be taken into account when interpreting a treaty. Therefore, Hathaway uses Article 31(3)(a) VCLT to fill the gap that a textual interpretation of Article 31(2) RC creates.

Edwards also employs the UNHCR ExCom Conclusion on Detention as a means of interpretation, stating that 'the ExCom has set down a limited number of circumstances in which detention *or other restrictions on movement*'[921] may be considered necessary'.[922] The difference between both authors is that Hathaway excludes one of the restriction grounds laid down in the UNHCR ExCom Conclusion. In his view, 'the reference to public order is not justified under Article 31(2)'.[923]

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[918] Conclusion relating to the detention of Refugees and Asylum-Seekers No. 44 (XXXVII), Executive Committee of the High Commissioner´s Programme, 13 October 1986. Document approved by the UN General Assembly in its resolution No. 12A(A/41/12/Add.1). These five reasons are: To verify identity, to determine the elements on which the claim to refugee status or asylum is based, to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents to mislead the authorities of the State in which they intend to claim asylum, to protect national security and to protect public order.

[919] Hathaway 2021, p. 871, fn. 331 [emphasis added].

[920] UN Economic and Social Council Resolution E/RES/672 (XXV). Although established by ECOSOC, the UNHCR ExCom functions as a subsidiary organ of the General Assembly. Accordingly, its reports are submitted directly to the General Assembly for consideration in the Third Committee.

[921] Edwards 2011c, p. 12. However, in a previous publication written on behalf of UNHCR by Ophelia Field with her assistance, they wrote that 'article 31(2) of the 1951 Convention does not identify in what circumstances restrictions on movement would be necessary' (Field and Edwards 2006, p. 6).

[922] Edwards 2011c, p. 12 [emphasis added]. I do not entirely agree with this approach. Like Hathaway, Edwards does not explain why these guidelines should be applied to restrictions on movement. It is true that Article 31(2) RC covers both the right to liberty and the freedom of movement, thus protecting asylum-seekers against detention and against less invasive restrictions. However, the UNHCR ExCom document never mentions the term 'restriction on movement' but only refers to detention. It is likely that States in the ExCom carefully drafted the report with this language to make it clear that the *numerus clausus* safeguard only applies to detention measures and not to less stringent policies. This is confirmed by the findings of the Court of Appeal of Wellington (New Zealand) in *Attorney General v. Refugee Council of New Zealand Inc.* [2003] 2 NZLR 577 (NZ CA, 16 April 2003). Although the Court recognised that Article 31(2) applies to other restrictions on movement and not just to detention (para. 259), when referring to the UNHCR ExCom Conclusion, it found that 'the outcome reflected in the passages cited from the Statement appears to be one of stating confined grounds on which States may conclude *detention* is necessary' (para. 101) [emphasis added]. The Court thus does not extend the *numerus clausus* safeguard elaborated in the ExCom Conclusion to other restrictions on movement.

[923] Hathaway 2021, p. p. 871, fn. 331. He does not, however, give a reason for this exclusion (at least not in his analysis of the right to free movement and the right to liberty). Moreover, the *travaux préparatoires* of the Refugee Convention seem to lead to the opposite conclusion: during the discussions on the right to free movement, one of the drafters (Mr. Larsen) affirmed that 'internment and restricted residence may be enforced only in individual cases and for imperative reasons of national security *and order*' (UN Doc. E/AC.32/SR.15, 19 April 1950).

On the other hand, Hathaway resorts to the *travaux préparatoires* of the Refugee Convention, which, according to Article 32 VCTL, is a supplementary means of interpreting a treaty. As shown in Chapter 1, the drafters of the Refugee Convention had some restriction grounds in mind during their discussions on the right to free movement. In Hathaway's view, it flows from these debates that the right under Article 31(2) can *only* be constrained in the circumstances mentioned by the drafters: during the early days of a mass influx or while investigating the identity of, and possible security threats posed by, an unlawfully present asylum-seeker.[924] In a different publication, he appears to add a third ground: securing asylum seekers' cooperation for the purpose of conducting all necessary investigations into their claim to protection.[925]

Marx[926] and Maple quote Hathaway's interpretation of the *travaux préparatoires* to argue that Article 31(2) contains a *numerus clausus* safeguard. Maple's list, however, is even shorter than Hathaway's since, for him, freedom of movement can only be suspended 'when there is a period of mass influx' to allow for the State to 'set up emergency provisions for a large intake of refugees and to minimize any disruption to public order'.[927]

Finally, Weissbrodt refers to an interesting UNHCR ExCom Conclusion in which the Committee affirmed that asylum-seekers 'should not be subjected to restrictions on their movements other than those which are necessary *in the interest of public health and public order*'.[928] This might seem as an endorsement on the part of the ExCom that there is a *numerus clausus* safeguard for movement restrictions under Article 31(2) RC. However, when examining the context of this phrase, it becomes clear that the ExCom is not carrying out a legal interpretation of this provision, but rather *recommending* additional 'basic human standards' which States should take into account in situations of large-scale influx.[929] Weissbrodt also

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[924] Hathaway 2021, p. 868. However, it is arguable that the fact that the drafters kept silent on other possible restriction grounds does not mean they were excluding them. If the drafters had wished to confine the possible restriction grounds, they would have added them to the text of Article 31(2) in a similar manner to what the drafters of the ICCPR did with Article 12(3). Moreover, at the Conference of Plenipotentiaries, the President of the Conference stated that 'by inserting the words "other than those which are necessary", the Ad Hoc Committee had intended to cover considerations of security, special circumstances, such as a great and sudden influx of refugees, *or any other reasons* which might necessitate restrictions on their movement' (UN Doc. A/CONF.2/SR.14, 10 July 1951) [emphasis added].

[925] Hathaway 2003, p. 11.

[926] Marx 2011, p. 1160.

[927] Maple 2016, p. 6.

[928] Conclusion relating to the Protection of Asylum-Seekers in Situations of Large-Scale Influx No. 22 (XXXII), Executive Committee of the High Commissioner´s Programme, 1981.

[929] The ExCom Conclusion reads [emphasis added]:

1. Article 31 of the 1951 United Nations Convention relating to the Status of Refugees contains provisions regarding the treatment of refugees who have entered a country without authorization and whose situation in that country has not yet been regularized. *The standards defined in this Article do not, however, cover all aspects* of the treatment of asylum-seekers in large-scale influx situations.
2. It is therefore essential that asylum-seekers who have been temporarily admitted pending arrangements for a durable solution should be treated in accordance with the following *minimum basic human standards*:
    (a) they should not be penalized or exposed to any unfavourable treatment solely on the ground that their presence in the country is considered unlawful; they should not be subjected to restrictions on their movements other than those which are necessary in the interest of public health and public order; (…);
    (c) They should receive all necessary assistance and be provided with the basic necessities of life (…);

seems to be of this view, because he first quotes Article 31 RC and then adds that '*additionally*, in 1981 the Executive Committee of the UNHCR (EXCOM) *admonished* that asylum seekers (…) should not be subjected to restrictions on their movements other than those which are necessary in the interest of public health and public order'.[930] He therefore does not suggest that this ExCom Conclusion amounts to a 'subsequent agreement' (in the sense of Article 31(3)(a) VCLT) regarding the interpretation of Article 31(2) RC.[931]

The majority view: an unlimited number of legitimate reasons

For the majority of authors, States remain '*prima facie* unrestrained to choose the objective that renders restrictions on refugees' movements "necessary" and therewith permissible';[932] since the 'truncated wording'[933] of Article 31(2) 'does not specify for what purpose the restrictions are necessary'.[934] They therefore follow Article 31(1) VCLT ('ordinary meaning of the terms') and find that this provision allows States to impose *all* necessary restrictions on movement.[935] Noll and Klammer even consider that the word 'necessary', by not imposing any clear limits to the grounds on which States can rely, is 'redundant' and 'of no use'.[936] For this side of the doctrine, the Convention's *travaux* do not lead to the conclusion that there right to free movement contains *numerus clausus* safeguard, because the drafters were simply giving examples of possible restriction grounds, without providing an exhaustive list.[937]

Interestingly, some suggest that there is a limited number of restriction grounds under Article 31(2) for *detention* measures but not for restrictions on movement. In his explanation of the detention regime under international law, Battjes lists the *numerus clausus* detention grounds specified in the UNHCR ExCom Conclusion. However, when commenting on Article 7(1) and (2) of the former Reception Standards Directive (Council Directive 2003/9/EC), which addressed some 'less drastic restrictions on the freedom of movement', he merely states that these restrictions ought to be 'necessary' under Article 31(2) RC, without listing any particular grounds.[938] Similarly, Costello divides her analysis of this article in two separate headings:

(h) Family unity should be respected; (…).

Note that, besides the *numerus clausus* recommendation, other 'basic human standards' listed by the ExCom are not even connected to particular rights in the Refugee Convention (e.g. basic necessities of life or family unity).

930 Weissbrodt 2008, p. 126 [emphasis added].

931 Beyani (2000, p. 113) also refers to the ExCom Conclusion No. 22, but only as an example of possible restriction grounds. She argues that, besides public health and public order, 'public security (…) has assumed added significance in the light of refugee flows from internal armed conflicts which are mixed with armed military personnel and it seems acceptable to isolate or separate out the latter by means of restricted movement from the ordinary civilian refugee and the host population.'

932 Noll 2011, p. 1246.

933 Noll 2011, p. 1268.

934 Robinson 1953, p. 154.

935 Klammer 2022a, p. 617 and 708.

936 Noll 2011, p. 1269 (especially fn. 125), Klammer 2022b, p. 708. They search for a solution in human rights treaty law, to which the State 'will also be bound'. However, they only mention the limited number of *detention* grounds found in general human rights law, probably because there is no provision in general human rights law regulating the right to free movement of individuals unlawfully present in the territory.

937 Robinson (1953, p.154) and Zieck (2018, p. 74) merely refer to the restriction grounds which 'the drafters had in mind' or which 'the drafters contemplated'; Goodwin-Gil (1986, p. 206; 2001, p. 37) states some restriction grounds as 'examples' given by the drafters; McDonough (2009, p. 537) quotes Goodwin-Gil; and Klammer (2022a, p. 616; 2022b, p. 707) mentions the restriction grounds discussed by the drafters without claiming that these are the only possible justifications that States can use.

938 Battjes 2006, pp. 497 and 499.

'other restrictions on movement' and 'detention'. Under the former heading, she affirms that the purpose must be legitimate and gives two examples of such a purpose.[939] Only under the latter title does she refer to the UNHCR ExCom Conclusion.[940] Battjes' and Costello's interpretation of the ExCom Conclusion thus differs from that of Hathaway and Edwards.

Two further authors also make this distinction between detention and restrictions on movement, though less explicitly. In his analysis of Article 31(2) RC, Goodwin-Gill contends that 'further detention would be necessary *only* in cases of threats to security or of a great or sudden influx'.[941] However, every time he refers to the legitimate grounds of 'restrictions on movement', he employs terms such as 'for example' or 'would include'.[942] For his part, Diehl reasons that '*at most*, detention for the purpose of establishing identity may be necessary for a short period' but, when referring to the mandatory accommodation of unlawfully present asylum-seekers in camps, he affirms that this may be necessary, '*especially* in cases of mass migration'.[943]

Similarly, Grahl-Madsen and Zieck exclude 'convenience' as a legitimate ground for *detention*.[944] Though this does not necessarily mean that they believe that restrictions on movement can be imposed for mere 'convenience', the fact that they do not explicitly make that exclusion leaves the question open.[945]

Although these authors do not read a *numerus clausus* safeguard into Article 31(2) RC, the fact that they give examples of possible restriction grounds suggests that, at least, they find that the State has to provide a reason for restricting asylum-seekers' movement. The Michigan Guidelines on Refugee Freedom of Movement, which resulted from a colloquium organised by Hathaway and Zieck, confirm that 'restrictions must secure a permissible objective'.[946] The position of Goodwin-Gil in this regard is confusing. On the one hand, he states that 'illegal entry' may be a legitimate ground for restricting movement.[947] Asserting that 'illegal entry', in itself, can be a reason for limiting the movement of *unlawfully present* asylum-seekers equates to affirming that States do not have an obligation to justify the restriction.[948] On the

[939] Costello 2017, p. 46: 'alternatives [to detention] can be designed to achieve the legitimate purposes being pursued, *particularly* if that is ensuring asylum-seekers cooperate with asylum procedures and do not abscond' [emphasis added].
[940] *Ibid.*
[941] Goodwin-Gil 2001, p. 10.
[942] Goodwin-Gil 2001, pp. 10 and 37; Goodwin-Gil 1986, p. 209. McAdam uses the same terms in her joint publication with Goodwin-Gil (2021, p. 591).
[943] Diehl 2021, p. 139.
[944] Grahl-Madsen 1963, p. 106; Zieck 2018, p. 75.
[945] See in this respect the position of the European Council on Refugees and Exiles (ECRE 2021, p. 20), for whom 'under international human rights *and refugee law*, reasons of administrative convenience (…) cannot justify an obligation to live in a specific place'. However, it is unclear to which provision of the Refugee Convention ECRE is referring here. In this paper, they only quote Article 26 as the provision in the Refugee Convention which protects freedom of movement, without mentioning Article 31(2).
[946] Hathaway *et al.* 2018, p. 17 [emphasis added]-
[947] Goodwin-Gil 2001, p. 37: 'The 1951 Convention explicitly acknowledges that States retain the power to limit the freedom of movement of refugees, for example, in exceptional circumstances, in the interests of national security, *or if necessary after illegal entry*'.
[948] See in this regard Costello 2015. In her article, she criticises the detention ground enshrined in Article 5(1)(f) ECHR, according to which a migrant may be detained 'to prevent his effecting an unauthorised entry'. Costello argues that this general justification for preventive detention is not really a 'ground' in the sense of 'a legal justification that holds in the individual case' (p. 145).

other hand, as will be shown below, he argues that restriction grounds should be narrowly interpreted.

To conclude this section, I will list the restriction grounds that this group of authors give as examples, ordered according to the number of authors who quote that ground:

(1) A sudden influx of refugees, a mass influx, a large influx of refugees or a great and sudden influx[949]
(2) A threat to security or national security interests[950]
(3) Verification of identity[951] in order to facilitate registartion[952]
(4) A threat to public order[953]
(5) Public health[954]
(6) To check the details of the story told by the asylum-seeker[955] or to establish the basis of the claim to refugee status.[956]
(7) Ensuring that the asylum-seeker cooperates with the asylum procedure and does not abscond.[957]
(8) Special circumstances.[958]
(9) Any other reasons.[959]

What is the meaning of 'necessary'?

The second question regarding the safeguards under Article 31(2) is: which positive obligations flow from the word 'necessary'?. In other words, once the State has laid down in domestic law the purpose of restrictions on movement in the abstract,[960] which steps are the authorities required to take before applying a restriction on the movement of a particular asylum-seeker?

In constitutional and human rights law, 'necessity' is one of the elements of the principle of proportionality. Drawing from the common constitutional traditions of different States, Barak shows that any time the legislator or (more generally) the authorities wish to impose a limitation on a fundamental right, they must allege a legitimate purpose. In a constitutional democracy, a legitimate purpose is one that suits the values of a democratic society.

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[949] Respectively: Robinson 1953, p. 154; Goodwin-Gill (2001, p. 37), Diehl (2021, p. 139) and Weis (1990, p. 220); Goodwin-Gill 2001, p. 10; Zieck (2018, p. 74) and McDonough (2009, p. 537).
[950] Klammer 2022a, p. 616, Goodwin-Gil and McAdam 2021, p. 591; Zieck 2018, p. 74; Goodwin-Gil 2001, p. 37, Grahl-Madsen 1963, p. 106, Weis 1990, p. 219 and Zieck 2018, p. 74.
[951] Klammer 2022a, p. 616, Goodwin-Gil 1986, p. 209, Grahl-Madsen 1963, p. 106.
[952] Klammer 2022b, p. 707.
[953] Klammer 2022a, p. 616, Grahl-Madsen 1963, p. 106, Zieck 2018, p. 74. C.f. Hathaway's view (*supra*) that public order cannot be a ground for restricting the right to free movement under Article 31(2).
[954] Grahl-Madsen 1963, p. 106; Zieck , p. 74.
[955] Grahl-Madsen 1963, p. 106.
[956] Goodwin-Gil 1986, p. 106. It is unclear whether by 'establishing the basis of the claim' he is contending that restrictions on movement may be justified during the whole period of assessment of the asylum claim or whether those restrictions would only be warranted during the initial stages of the asylum procedure. Given that, in his view, only recognised refugees are 'lawfully present', the former conclusion is more likely.
[957] Costello 2017, p. 45.
[958] Zieck 2018, p. 75.
[959] Zieck 2018, p. 74; Robinson 1953, p. 154.
[960] Supposing this is required by this provision, which, as shown above, is contested.

Moreover, the restriction must conform to the proportionality principle, which consists of three elements:

(1) Rational connection: the use of the means to limit the right rationally leads to the realisation of the purpose. This element requires the State to provide evidence that the individual concerned presents a risk to the public good which the measure seeks to protect.
(2) *Necessity*: the authorities have to choose—of all those means that may advance the measure's purpose—that which would least limit the right in question (necessity test). In the context of restrictions on movement, the necessity test would require, for instance, that if the purpose can be as effectively achieved by either limiting the movement of an asylum-seeker to a city or to a whole region, the latter option should be chosen.
(3) Balancing or proportionality stricto sensu: the authorities must examine that a proper relation ('proportional' in the narrow sense) exists between the benefits gained by the public when the purpose is fulfilled and the harm caused to the individual (balancing act).[961]

Since the question of the purpose of the measure has already been studied in the previous section, I will now examine whether the Refugee Convention doctrine interprets that the term 'necessity' Article 31(2) RC requires the authorities to prove the rational connection between means and purpose, to look for the least intrusive measure, and to carry out a balancing act: in sum, whether legal doctrine equates the term 'necessity' in this provision with the principle of proportionality.

Option 1: A full three-step proportionality test

For Hathaway, Article 31(2) forbids not just automatic detention but also routine resort to such measures as residence restrictions or reporting requirements.[962] The prohibition of automatic restrictions on movement entails that the authorities have to follow the same criteria that inform the principle of proportionality in the context of detention: they have to make sure that the measure is adequate for the goal pursued, they ought to apply the least intrusive measure available (necessity test) and examine the circumstances which, in the individual case, are disproportionate—including the extension in time of the restriction, the vulnerability of the person and the living conditions in the assigned area (balancing act). The onus is on the State to demonstrate that these steps have been followed.[963] Klammer agrees with Hathaway on these points.[964]

For Hathaway and Klammer, however, the *evidence* that the State has to provide to prove that the particular individual presents a risk to the public good which the measure seeks to protect is less compelling than in detention cases. In other words, they consider that the element of 'rational connection' is not as strict in cases of movement restrictions as it is in detention

[961] Barak 2012.
[962] Hathaway 2021, p. 538, fn. 1238. He supports this assertion in the UNHCR Guidelines on Alternatives to Detention (UNHCR 2012) and in a statement by the European Council of Refugees and Exiles (AIDA 2017).
[963] Hathaway 2021, pp. 530, 535, 536 and 538.
[964] Klammer 2022b, p. 708, fn. 143. However,

cases. Similarly, they find that the evidence requirements relating to measures which limit movement in a less intrusive way (such as the obligation to reside in a particular region) are less strict than those relating to more restrictive measures (such as the obligation to reside in a small city).[965]

Costello also appears to support the interpretation that restrictions on movement ought to comply with all the requirements of the proportionality principle. She argues that, both for detention and restrictions on movement, the word 'necessity' in Article 31(2) RC demands an assessment of the legitimacy of the purpose, of whether less restrictive means are available and adds that 'it is a demanding test, always focused on the individual case'.[966]

These authors, however, do not make explicit the method of interpretation employed to support their view that the steps of the proportionality test under Article 31(2) RC are the same in cases of movement restrictions than in detention cases.[967]

For his part, Noll pays attention to the semantic construction of Article 31(2), whose initial words are: 'The Contracting States shall not apply to the movements of such refugees restrictions other than those (…)'. For this author, the *exceptionality* of restrictions on movement inherent in the structure of the sentence (Article 31(1) VCLT, a textual reading of the provision) implies that any decision on restrictions 'must be based on the individual case'.[968] He therefore derives the requirement of a proportionality test not from the word 'necessary' in Article 31(2) RC but from the semantic construction of the provision. To support his argument, Noll quotes a report by the Inter-American Commission on Human Rights in which the Commission interprets not only general human rights law, but also the Refugee Convention. The decision states that 'in the case of asylum seekers in particular, the Commission notes that detention *or other restrictions on the movement* of asylum seekers are permitted only as an exception under applicable *refugee* and human rights *law*'.[969]

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[965] Hathaway 2021, p. 538-539; Klammer 2022b, p. 708.

[966] Costello 2017, p. 45. When Klammer (2022b, p. 708) refers to the balancing act, he quotes Costello. McDonough (2009, p. 538) and Edwards (2011c, p. 12) do not elaborate on how they interpret the proportionality test in the context of restrictions on movement. The former simply refers to 'proportionality' in general terms, while the latter argues that restrictions may only be applied 'in an individual case'.

[967] The judgments quoted by Hathaway (which would represent 'subsequent practice in the application of the treaty' pursuant to Article 31(3)(b) VCLT) all relate to detention, not to restrictions on movement. In fact, the only judgment that he quotes which refers to restrictions on movement suggests that the proportionality test is weaker in cases of restrictions: in *Attorney General v. Refugee Council of New Zealand Inc.* (para. 265), the Court affirmed that restrictions on movement 'should be able to be imposed more freely' than detention. On the other hand, even though Hathaway quotes UNHCR for arguing that automatic restrictions on movement are not allowed, reports from UNHCR do not amount to State practice or to 'subsequent agreement[s] between the parties' in the sense of Article 31(3)(a) VCLT. This will be explained below (Section 4.2.1, sub-section *The views of UNHCR*).

[968] Noll 2011, p. 1268.

[969] IAComHR (2002), para. 380 [emphasis added]. However, to legally support that statement, the Inter-American Commission quotes Article 26 RC and not Article 31(2) (fn. 876 of the report). This is rather strange, given that, unlike Article 31(2) ('shall not impose…other than…'), Article 26 does not present restrictions on movement on (lawfully present) asylum-seekers as an exception. It merely asserts the right to free movement and subjects it to 'any regulations applicable to aliens generally in the same circumstances'.

Option 2: Rational connection and necessity test, but no balancing act

Grahl-Madsen believes that Article 31(2) RC requires States to look for the least intrusive measure among all the possible limitations on the freedom of movement. However, he only mentions the balancing act in the context of detention.[970] Similarly, the Michigan Guidelines on Refugee Freedom of Movement refer to the obligation to choose the 'least intrusive means' among those available, but they do not mention the balancing act.[971] It could thus be said that they make a textual interpretation of the word 'necessary' (Article 31(1) VCLT, 'ordinary meaning of the terms'). Since the necessity test cannot be applied without first ascertaining the risk that the particular person poses to the public good protected by the measure, it is arguable that Grahl-Madsen and the Michigan Guidelines also read this requirement into Article 31(2) RC.

It is interesting to identify the examples that these authors—and those of the previous section—give as measures that States could consider in the context of the necessity test. Some of them involve a less invasive restriction than other measures, some do not restrict movement at all:

(a) Ordering the asylum-seeker to stay in a particular town or within a limited area instead of forcing the person to remain in a reception center or in a camp with limited mobility (e.g. with a curfew).[972]
(b) The deposit or surrender of documentation.[973]
(c) The obligation to notify the authorities of planned absences from the assigned district.
(d) Notifications of hearings via the asylum-seeker's addresses and, like other classes of people, the imposition of administrative fines in case of failure to appear.[974]
(e) Open settlements.
(f) Local integration.[975]

Option 3: No proportionality test

While Goodwin-Gil agrees with the other authors that imposing limitations on movement as a general policy would be wrong in principle,[976] the requirement for the authorities to look for the least intrusive measure only begins after an 'initial period' in which Article 31(2) provides no safeguards.[977] Moreover, he finds that the necessity test does not apply, even in

[970] Grahl-Madsen 1963, p. 106: '*Detention* must not go beyond what is necessary *in the particular situation* facing the authorities (…)' [emphasis added].
[971] Hathaway *et al.* 2018, p. 17. It could be that the position found in the Michigan Guidelins resulted from a compromise between Hathaway's view (who favours the application of a necessity test and a balancing act to restrictions on movement) and that of Zieck (who considers that neither of the tests apply to movement restrictions, see below).
[972] Grahl-Madsen 1963, p. 106.
[973] Hathaway 2021, p. 539.
[974] McDonough 2009, p. 538.
[975] Maple 2016, p. 30.
[976] Goowin-Gil 1986, p. 209.
[977] Goodwin-Gil 2001, p. 37.

its lighter form, to situations of mass influx, since asking this from a State facing such a situation would 'not be reasonable or appropriate'.[978]

As noted above, for Amann, Article 31(2) RC is only a 'strong recommendation'; it imposes no obligations on the State. The reason for this is that 'the Convention leaves it up to each State to evaluate whether or not a restriction is necessary' (Article 31(1) VCLT, 'object and purpose' of the treaty).[979] Therefore, the term 'necessary' does not really provide any safeguards to the right to free movement.

Robinson asserts that 'it will depend on the specific nature of the refugee and the conditions prevailing in the country whether the restrictions [under Article 31(2)] may consist of confinement in a camp or imprisonment'.[980] The fact that he only refers to confinement in a camp and not to less intrusive measures to the freedom of movement may indicate that he does not consider that a proportionality test is required by this article.

Battjes scrutinises the different specific obligations flowing from the word 'necessity' in Article 31(2) RC in the context of detention measures (i.e. that they must be reasonable and proportional) but does not carry out this examination when he explains the restrictions on the movement of asylum-seekers. It is thus likely that he does not consider that the proportionality test applies to restrictions on movement.[981]

Finally, Zieck disagrees with Noll's view that a proportionality test can be derived from the semantic construction of Article 31(2) RC. From her perspective, the requirement of a proportionality test 'is difficult to reconcile with the intention of the drafters to cover special circumstances, such as a mass influx' (Article 31(1) VCLT, 'object and purpose').[982]

Other safeguards under Article 31(2) RC?

There are five other safeguards of the right to free movement for unlawfully present asylum-seekers which deserve our attention:

(1) Periodical review of necessity;
(2) A narrow interpretation of the restriction grounds;
(3) Administrative or judicial review; and
(4) The requirement to prescribe the restriction in law.

The existence of the first two safeguards is advocated for by some authors, and the doctrine either explicitly or implicitly rejects the latter two.

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[978] Goodwin-Gil 1986, p. 211. However, whether or not a particular consequence of the application of an article is reasonable or appropriate is not a means of interpretation of a treaty. As shown below, Zieck makes the same argument as Goodwin-Gil, but using the 'object and purpose' of the treaty (Article 31(1) VCLT) as an interpretative criterion.
[979] Amann 1994, p. 122.
[980] Robinson 1953, p. 154.
[981] Battjes 2006, p. 497 and 499.
[982] Zieck 2018, p. 75-76.

Other safeguards which might flow from Article 31(2)

(1) Periodical review of necessity

For Hathaway, restrictions on movement have to be periodically reviewed to ensure that the initial justification remains valid.[983] Diehl appears to agree with this view, given that he affirms that 'as soon as the need for the restriction on movement has ceased to exist, it must be lifted'. This can only possibly be done if the measure is revised after a certain period of time.[984]

(2) A narrow interpretation of the restriction grounds

Even though Goodwin-Gil does not consider that Article 31(2) enshrines a *numerus clausus* safeguard, he does find that 'in accordance with general principles of interpretation, restrictions should be narrowly interpreted'.[985]

Following this line of thought, McDonough argues that, when the purpose for the restriction on movement is the existence of a 'mass influx', that term should be interpreted narrowly. Indeed, he believes that the drafters of the Refugee Convention interpreted that term as meaning 'a sudden, mass flight across a particular border that might require extra time to receive and regularize [asylum-seekers]'. If the host State is a prosperous welfare State which faces an ongoing but relatively small inflow of asylum-seekers (like Germany in the 1990s and the 2000s), that situation would not be covered by the term 'mass influx'.[986] Thus, the State would have to look for a different ground to justify restrictions on movement.

For her part, Zieck refers to a judgment by the Court of Justice of the EU (*J.N. v. Staatssecretaris van Veiligheid en Justitie*) which indirectly interprets Article 31(2) RC (Article 31(3)(b) VCLT, 'subsequent practice'). In that judgment, the Court gives a very specific meaning to the terms 'public order' and 'public security' in the context of the detention of asylum seekers.[987] Thus, for Zieck, when EU countries impose a *detention* measure under Article 31(2) RC based on these grounds, they must interpret it narrowly, in the same way as the Court.[988] Similarly, in response to Chetail's view that 'national security and public order are relatively broad notions', Hathaway argues these two grounds are 'more limited than they might first appear'.[989] However, this assertion takes place in the context of a discussion on the grounds for expelling a refugee under Article 32 of the Refugee Convention. Thus, it is not clear whether Zieck and Hathaway also extend these narrow interpretations of the terms 'public order' and 'national security' to the limitations on the freedom of movement of asylum-seekers.

983 Hathaway 2021, p. 530.
984 Diehl 2021, p. 139.
985 Goodwin-Gil 2001, p. 10.
986 McDonough 2009, p. 537.
987 Judgment of 15 February 2016, *J.N. v. Staatssecretaris van Veiligheid en Justitie*, C-601/15 PPU, EU:C:2016:84.
988 Zieck 2018, p. 74, fn. 279.
989 Hathaway 2021, p. 841, fn. 174.

Other safeguards under Article 31(2) which the doctrine implicitly rejects

(1) Individual right to obtain a review of the restriction

While some authors argue that the authorities should periodically review the justification of the measure, do asylum-seekers have a right under Article 31(2) RC to individually challenge its legality before an administrative or judicial instance? As observed above, Edwards extends the *numerus clausus* safeguard, which appears in the UNHCR ExCom Conclusion on Detention, to restrictions on the movement of unlawfully present asylum-seekers. However, it seems that she does not extend the safeguard of an administrative or judicial review to these restrictions, since she affirms that

'The ExCom has further noted that "fair and expeditious [refugee status determination] procedures" can safeguard against prolonged *detention* and that any such *detention* should be subject to administrative or judicial review.'[990]

The absence of this procedural safeguard in Article 31(2) is confirmed by Zieck who, rather than interpreting the provision, makes a normative proposal when she states that 'perhaps' States should give asylum-seekers the right to obtain a review of the decision to subject them to restrictions on movement.[991]

(2) Restrictions prescribed by law

In the UNHCR ExCom Conclusion, the signing States decided that the grounds for detaining an asylum-seeker must be 'prescribed by law'. Although, as shown above, some authors deduct a *numerus clausus* safeguard for restrictions on movement from the ExCom Conclusion on Detention,[992] these same authors do not claim that this Conclusion prevents States from limiting free movement through acts which do not derive from Parliament. In fact, I have not found any author who argues that Article 31(2) obliges States to even adopt a law (in the broad sense of the term, i.e. a general norm adopted by the executive or the legislative branch of the State) in order to restrict the movement of asylum-seekers. Hathaway implicitly rejects the existence of this safeguard when (though in the context of detention) he states that the ICCPR 'adds net value [to Article 31(2)] by requiring not only that detention be non-arbitrary, but also ordered "in accordance with such procedure as [is] established by law"'.

Only Noll argues that the purpose of the limitation must be made explicit in domestic legislation. In his view, 'failing that, there will be no standard against which the necessity of the restriction can be measured, which frustrates the function of an appeal'. He supports this view in the right to appeal against detention, enshrined in Article 9(4) ICCPR.[993] Given the close link that he makes between the obligation to explicitly state the purpose of the restriction and the right to judicial review of *detention*, it is unclear whether Noll finds that this obligation also accrues to States who wish to impose restrictions on movement. In any

[990] Edwards 2011c, p. 13 [emphasis added].
[991] Zieck 2018, p. 76.
[992] Edwards 2011c, p. 12; Hathaway 2021, p. 871.
[993] Noll 2011, p. 1269, fn. 128.

case, he derives his argument from general human rights law, not from the Refugee Convention itself.

It seems, therefore, that Article 31(2) RC allows for the imposition of restrictions on movement as a matter of administrative practice, without the need for a more general law to which the authorities would have to refer in each particular case.

The views of UNHCR

This section will analyse how UNHCR has interpreted the safeguards of the right to free movement under Article 31(2) RC over time. First, it is important to distinguish between the UNHCR Executive Committee and UNHCR itself. The difference was explained by the Court of Appeal of Wellington in *Attorney General v. Refugee Council of New Zealand Inc*:

'The UNHCR Guidelines [on detention] are important as a statement of international standards for government policies and practices. (…) The Guidelines do not however have a status in relation to interpretation of the Refugee Convention that is equal to that of the resolutions of the UNHCR Executive Committee', because 'the Executive Committee is itself an assembly of states which has debated the issue [of detention] and settled on a formal statement concerning it', while the Office of the United Nations High Commissioner for Refugees is 'established by the General Assembly.'

The Court thus regards the Executive Committee's views as 'the most valuable guide for the Court, among the available international materials, as to the meaning of Article 31(2) [RC]'.[994] Therefore, unlike the ExCom resolutions, the documents which will be examined in this section may not be regarded as 'subsequent agreement between the parties [of the Refugee Convention] regarding the interpretation of the treaty' in the sense of Article 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT). Nonetheless, as has been done in Chapter 2, the views of UNHCR warrant an independent section due to the *auctoritas* that the Agency has in matters of refugee law.

As a starting point, it is notable that, when UNHCR reports on the rights of asylum-seekers, it sometimes omits any reference to the right to free movement, which might indicate that this right is less important for UNHCR than other rights derived from the Refugee Convention. For instance, in 2001, the UN Agency issued a note with the purpose of 'identifying a common framework for the reception of asylum-seekers in the context of individual asylum systems' which 'should be applicable globally'.[995] Under the section 'recommended measures for the reception of asylum-seekers', there is a sub-section called 'freedom of movement and detention', but the reference to the right to free movement does not go beyond the heading, as the recommendations relate exclusively to detention.[996] Ten years later, in its Comments to the European Commission's amended recast proposal for a Reception Conditions Directive (COM(2011) 320 final), it analyses the compatibility of the rights of asylum-seekers under the proposed Directive with their rights under the Refugee

[994] *Attorney General*, paras. 100 and 111.
[995] UNHCR 2001, p. 1.
[996] UNHCR 2001, p. 8.

Convention, but ignores the restrictions on movement foreseen under Article 7 of the proposed Directive.[997]

On other occasions, UNHCR refers to the right to free movement under general human rights law, but not under the Refugee Convention. For example, in its 2009 Urban Policy, UNHCR affirms that 'freedom of movement is a principle enshrined in *international human rights law*, and UNHCR encourages all States to respect it',[998] thus overlooking the right to free movement derived from the Convention.

UNHCR and the 'numerus clausus' safeguard

A cumulative reading of several documents leads me to conclude that, for UNHCR, Article 31(2) RC does not enshrine a *numerus clausus* safeguard. In its 2003 Annotated Comments on the former Reception Standards Directive (Council Directive 2003/9/EC), UNHCR sanctions the terms 'public interest', 'public order' and 'swift processing and effective monitoring of the application [for international protection]' as legitimate grounds for restricting the movement of asylum-seekers under Article 7 of that Directive. Although it expresses concern that 'these provisions allow for a wide measure of interpretation by Member States',[999] it does not declare that these grounds are forbidden by Article 31(2) RC or that the Refugee Convention prevents States from using other restriction grounds. Similarly, in its 2014 Policy on Alternatives to Camps, UNHCR lists the different reasons that host States use in practice to force asylum-seekers to live in camps, one of them being deterrence.[1000] Even though the Policy on Alternatives to Camps is guided by 'the rights of refugees under international law'[1001] and UNHCR recognizes that 'the camp involves some degree of limitation on the right (…) to move freely and choose where to live',[1002] the UN Agency does not assert that any of these grounds are prohibited by Article 31(2) RC.

Furthermore, in its 2015 Annotated Comments to the recast Reception Conditions Directive (referring to Article 7 of that instrument), UNHCR

'recognizes that there are circumstances (…) in which the freedom of movement or choice of residence of applicants for international protection may need to be restricted, subject to relevant safeguards under international law'.[1003]

[997] UNHCR 2011b.
[998] UNHCR 2009, p. 23.
[999] UNHCR 2003, p. 8.o
[1000] 'Host governments may insist upon the establishment of camps for reasons of *public order* or *security*. Camps may be seen as providing better control over the presence and movement of refugees and as a way *easing the potential for tension between them and local communities*. Policies restricting refugees to camps may also be motivated by *concerns that refugees will compete with nationals* for limited economic opportunities and scarce resources, such as water or land. They may also consider that allowing refugees to settle in communiteis *makes it less likely that they will return home in the future*.' (…) 'Camps can be an essential part of UNHCR's operational response (…), particularly during emergencies, to *ensure protection and save lives*' (UNHCR 2014b, pp. 4 and 6) [emphasis added].
[1001] UNHCR 2014b, p. 3.
[1002] UNHCR 2014b, p. 4.
[1003] UNHCR 2015b, p. 14.

To indicate which those permissible circumstances are, UNHCR refers to the grounds under Article 12(3) ICCPR (national security, public order, public health or morals or the rights and freedoms of others) without mentioning Article 31(2) RC.

There is only one report in which UNHCR appears to support the *numerus clausus* safeguard. In its 2007 third-party submission to the *Saadi v. The UK* case before the European Court of Human Rights, the UN Agency applies the UNHCR ExCom Conclusion on Detention to all restrictions on movement, thus implying that the *numerus clausus* grounds listed in that Conclusion are also the only permissible justifications for restricting free movement under Article 31(2) RC.[1004] However, the later reports examined above (2009, 2011, 2014 and 2015) suggest that this position is no longer maintained by UNHCR.

It is also interesting to note that, in its submission to *Saadi v. UK*, UNHCR asserts that, although restrictions 'to determine the element of the claim [to refugee status]' are permitted under Article 31(2) RC, this does not entitle States to restrict the movement of asylum-seekers during the entire status determination procedure, but only during a preliminary interview to identify the basis of the asylum claim.[1005] This could be read as a change in the UN Agency's interpretation of this provision, given that in 2003 it found it permissible for States to request asylum-seekers to reside in a particular area or location 'during the asylum procedure'.[1006] In 2015, UNHCR appears to return to the interpretation made in 2001, since it endorses the imposition of restrictions on movement 'for the swift monitoring of an application'.[1007]

UNHCR and the proportionality test

It is difficult to ascertain whether UNHCR favours an interpretation of Article 31(2) RC which includes a full necessity test and a balancing act in connection to measures which limit free movement.

One of the most recent documents examined appears to indicate that this is not the case. The only time in which UNHCR explicitly mentions the 'necessity test' in relation to movement restrictions is in its 2015 Annotated Comments to the recast Reception Conditions Directive (Directive 2013/33/EU), where the Agency (referring to Article 7 of the Directive) states that a lack of a necessity test is 'not considered in line with *general* rules

[1004] UNHCR 2007a, paras. 26 and 28. See also Hathaway (2021) and Edwards (2011c), who also extend the UNHCR ExCom Conclusion to restrictions on movement, as analysed above. In a previous report (UNHCR 2003, p. 8), the UN Agency used the ExCom Conclusion only to limit the permissible grounds for *detention* under Article 31(2), but not for restrictions on movement.
[1005] UNHCR 2007a, para. 28.
[1006] UNHCR 2003, p. 8.
[1007] UNHCR 2015b, p. 14. This needs to be read in conjunction with UNHCR's position on the personal scope of Article 26. As seen in Chapter 2, for the UN Agency, the status of asylum-seekers unlawfully present in the country is 'regularised' fairly early in the process of seeking protection, which means that Article 26 applies to them well before a decision has been made on their refugee status. If, at the same time, UNHCR sanctions 'the swift monitoring of an application' as a ground for restricting movement, this would mean that, if a State wishes to impose restrictions during the whole asylum procedure, it would have to also limit the movement of another group of migrants, in compliance with the non-discrimination safeguard enshrined in Article 26. However, as will be shown below (Section 4.2.2, sub-section *The views of UNHCR*), the Agency does not place compliance with the non-discrimination standard at the forefront of its concerns relating to free movement of asylum-seekers.

regarding freedom of movement and choice of residence'.[1008] It would seem that those 'general rules' refer to the ICCPR (which is a 'general' treaty) and not to the Refugee Convention (which is a refugee-specific treaty). Moreover, in the paragraph before this assertion, UNHCR only mentions Article 12(3) ICCPR, which enshrines a necessity test.

In other documents, UNHCR *recommends* the application of a necessity test and a balancing act to restrictions on movement without affirming that this is an obligation flowing from the Refugee Convention. For example, in its 2014 Policy on Alternatives to Camps, UNHCR calls States to look for alternatives to encampment (i.e. to apply a necessity test), while at the same time recognizing that looking for alternatives is a 'good practice' (not an obligation) which 'will not be possible or practical in all situations'.[1009] Similarly, in its 2015 report *Options for governments on open reception and alternatives to detention*, the Agency suggests that, if States decide to distribute asylum-seekers throughout their territory, they should 'take into account the personal situation of the claimant and his/her family, such as family or diaspora links, any special support or services requires, best interest of the child, etc.'.[1010] In other words, it recommends that States carry out a balancing act, but without linking this recommendation to the Refugee Convention.

Finally, on three occasions, UNHCR makes a comment which might mean that the Agency does derive a necessity test and a balancing act linked to movement restrictions from Article 31(2) RC. In its 2007 third party submission to *Saadi v. UK*, UNHCR recalls that

'in the original draft [of Article 31(2) RC], a State was permitted to apply restrictions "as it may deem necessary". The move to an objective test ("are necessary") compels *intensive scrutiny*.'

Similarly, in its 2012 Guidelines on Alternatives to Detention, the Agency states that alternatives to detention cannot become 'alternatives to release'.[1011] This could be another way of saying that restrictions on movement cannot be imposed automatically, and that an individual assessment is required.[1012]

Be it as it may, UNHCR is much more straightforward when it requires States to look for alternatives to detention than when it tackles the issue of the necessity test in the context of movement restrictions. Indeed, it has expressed on numerous occasions that looking for alternatives to detention is an obligation derived from the term 'necessity' in Article 31(2) RC.[1013] The same clarity is not found in the documents related to the topic at hand.

UNHCR and other safeguards under Article 31(2) RC

To conclude this section on UNHCR, the position of the Agency concerning two further safeguards will be explored: (1) The requirement to prescribe the restriction in a law adopted in Parliament; and (2) Due process safeguards, including administrative or judicial review.

[1008] UNHCR 2015b, p. 14 [emphasis added].
[1009] UNHCR 2014, pp. 6 and 9.
[1010] UNHCR 2015c, p. 9.
[1011] UNHCR 2012, p. 23.
[1012] In fact, Hathaway quotes this part of the 2012 Guidelines when arguing that restrictions on movement may not be automatically imposed on asylum-seekers.
[1013] UNHCR 1999, UNHCR 2007a, UNHCR 2012, UNHCR 2014c.

In its 2015 Annotated Comments to the recast Reception Conditions Directive, UNHCR expresses the view that the criteria for restricting the movement of asylum-seekers 'must be established by law'.[1014] However, it does not specify whether that 'law' has to be a norm adopted in Parliament or whether it can be an act from the executive branch of the State. Moreover, it is uncertain whether the Agency derives this standard from the ICCPR or from the Refugee Convention, since it does not explicitly quote the source for this statement.

As to the due process safeguards, this topic came up in UNHCR's third-party submission to the 2013 case *Kituo Cha Sheria and Others v. The Attorney General* before the High Court of Kenya, which related to the mandatory relocation of asylum-seekers to a camp outside a city. The Agency argued that international law imposes a series of 'due process safeguards' to any restriction on free movement, among others, the right to be informed of the measure, the right to legal counsel and the right to be brought promptly before an administrative or judicial authority with the power to review the decision. However, the legal basis for the Agency's argument is Article 2(3) ICCPR, not the Refugee Convention, which seems to indicate that, for UNHCR, Article 31(2) RC does not enshrine these guarantees.[1015]

Finally, there are other safeguards mentioned by UNHCR in 2003 and 2015 which take the form of policy recommendations, not of human rights guarantees. The Agency advises States to take the following factors into account if they decide to allocate asylum-seekers to a particular accomodation centre or area:

(a) The presence in the area of NGOs, legal aid providers, language training facilities and, where possible, an established community of the asylum-seekers' national or ethnic group;
(b) The possibilities for harmonious relations between the asylum-seekers and the surrounding communities;
(c) The need for supplementary financial support to cover the cost which the asylum-seekers will incur when they have to travel to the assigned area;
(d) The close proximity to asylum procedures.[1016]

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Having examined how legal doctrine and UNHCR interpret the safeguards of the right to free movement for unlawfully present asylum-seekers under Article 31(2) RC, the next sub-section will continue to delve into the Refugee Convention, this time focusing on Article 26, which provides different guarantees for lawfully present asylum-seekers.

[1014] UNHCR 2015b, p. 14.
[1015] UNHCR 2013, p. 17.
[1016] UNHCR 2003, p. 8; UNHCR 2015b, p. 15.

4.2.2 The safeguards for lawfully present asylum-seekers: Article 26 of the Refugee Convention

As examined in Chapter 2, according to most doctrinal interpretations, at least some categories of asylum-seekers are lawfully present in the territory, and thus fall under the scope of Article 26 RC. What are the safeguards that this article provides to them? Article 26 reads:

'Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to *aliens generally in the same circumstances*.'

The most noticeable safeguard, taken from a literal reading of the provision, is non-discrimination between asylum-seekers and 'aliens generally in the same circumstances'. The philosophical origins of the requirement to treat non-nationals on an equal footing may be traced back to Francisco de Vitoria, who argued that, since the aborigines in the Americas admitted 'all other barbarians', Spaniards should at least be treated upon a plane of equality with the 'other barbarians'.[1017]

According to Robinson, simply requiring States to treat refugees and other migrants in an equal manner was considered sufficient by the drafters of Article 26 RC 'because free residence and movement are ordinarily granted to all aliens'.[1018] However, this is not always the case: as shown in Chapter 1, there are numerous Constitutions which do not lay down the right to free movement for foreigners (Spain and Germany among them, see Chapter 2). Moreover, a systematic reading of the Refugee Convention shows that this particular form of non-discrimination ('aliens generally') is only a 'minimum standard'[1019] which 'does not provide much extra protection for refugees'.[1020] Indeed, other standards of non-discrimination used in the Refugee Convention (national treatment[1021] and most-favoured aliens[1022]). This indicates that the right to free movement bore less weight for the drafters of the Convention than other rights.

As to the relation between Article 26 and Article 31(2) RC, Diehl argues that because the former accrues to refugees who are lawfully present in the country (which, in his view, are only recognised refugees), the safeguards under that provision should be higher than those under Article 31(2).[1023] However, this section will show that the issue of the safeguards under Article 26 is just as contested as under Article 31(2). The questions that this section seeks to answer using legal doctrine are the following:

[1017] Brown Scott 2000, p. 143.
[1018] Robinson 1953, p. 133.
[1019] Goodwin-Gil and McAdam 2021, p. 573.
[1020] Slingenberg 2014, p. 106.
[1021] In many of the rights derived from the Refugee Convention, refugees must be treated in an equal manner to nationals: freedom to practise religion and as regards the religious education of children (article 4); the protection of artistic rights and industrial property (article 14); access to courts, legal assistance, and exemption from the requirement to give security for costs in court proceedings (article 16); rationing (article 20); elementary education (article 22(1)), public relief (article 23); labour legislation and social security (article 24(1)); and fiscal charges (article 29).
[1022] Refugees must be treated in parity with those foreigners who enjoy the most beneficial treatment under domestic law with regard to the right of association (article 15) and the right to engage in wage-earning employment (article 17(1)).
[1023] Diehl 2021, p. 113.

(1) Are there any circumstances in which Article 26 allows States to impose refugee-specific restrictions on the movement of asylum-seekers?
(2) To which group of migrants does the non-discrimination standard ('aliens in the same circumstances') relate?
(3) Is there a *numerus clausus* safeguard and a proportionality test inherent in Article 26?
(4) May any other safeguards be derived from this provision?
(5) Does Article 26 also protect asylum-seekers against indirect restrictions on movement?

Are refugee-specific restrictions allowed?

The majority view: no exceptions to non-discrimination

Hathaway makes it very clear that, in his view, *all* refugee-specific constraints for lawfully present asylum-seekers violate Article 26.[1024] He supports this in the *travaux préparatoires* (Article 32 VCLT) and in subsequent practice (Article 31(3)(b) VCLT). As to the former means of interpretation, one particular intervention by Turkey's delegate (Mr. Kural) is decisive for him: this delegate was concerned about the situation of States which, having adopted a very liberal attitude concerning the free movement of migrants, wished to restrict the conditions of residence of refugees. Such a State 'might be prompted to modify its legislation concerning aliens, which would be a highly regrettable measure'.[1025] It is thus evident that Mr. Kural did not contemplate for exceptions to the non-discrimination clause. Regarding subsequent practice, Hathaway quotes the judgment *Kituo Cha Sheria and Others v. The Attorney General*, in which the High Court of Kenya determined that the encampment policy of the Kenyan Government was 'a threat to their right to freedom of movement enshrined in Article 26 of the 1951 Convention'.[1026]

Zieck follows Hathaway in his interpretation of the *travaux*, but, when giving an example of subsequent practice, she quotes *Alo and Osso*,[1027] a judgment of the Court of Justice of the EU which established that Article 26 RC[1028] precludes the imposition of a residence condition

[1024] Hathaway 2021, p. 872.
[1025] UN Doc. E/AC.32/SR.15.
[1026] *Kituo Cha Sheria v. The Attorney General*, Petition No. 19 of 2013 (Ken. HC, July 26, 2013), para. 59. However, whether this judgment supports the view that non-discrimination is an absolute safeguard is questionable. The reason why the High Court found that Kenya's encampment policy infringed Article 26 RC was not the Government's disregard for the non-discrimination clause. The Court declared that 'any limitations to [Article 26] must comply with the standards set out in Article 24 [of the Kenyan Constitution]' (para. 57). It later analysed whether the mandatory encampment policiy's limitations to the right to free movement had complied with the standards of legality, legitimate purpose and proportionality (all of which derived from Article 24 of the Constitution), concluding that they had not (paras. 83-93). Arguably, if the mandatory encampment policy had met these constitutional safeguards, the Court would have found no violation of Article 26 RC, *even if the encampment policy was only applied to asylum-seekers*.
[1027] Judgment of 1 March 2016, *Warendorf v Ibrahim Alo and Amira Osso v. Region Hannover*, Joined Cases C-443/14 & C-444/14, EU:C:2016:127 (quoted in Zieck 2018, p. 85).
[1028] The EU is not a signatory to the Refugee Convention. Still, Article 78(1) TFEU provides that the Union shall develop a common policy on asylum, subsidiary protection and temporary protection that is in accordance with the 1951 Convention; and Article 18 of the EU Charter sets out that the Union shall guarantee the right to asylum 'with due respect for the rules of the Geneva Convention'. Thus, even though in *Alo and Osso* the Court was asked to interpret Article 33 of the Qualifications Directive (Directive 2011/95/EU), this provision essentially mimics Article 26 RC, which is why the Court indirectly interpreted this article as well (see para. 29 of the judgment and Judgment of 19 June 2018, *Gnandi v. État belge*, C-181/16, EU:C:2018:465, para. 53). For

exclusively on beneficiaries of subsidiary protection status for the purpose of achieving an appropriate distribution of the burden of granting social benefits.[1029] Though the judgment concerned beneficiaries of subsidiary protection, its findings are extensible to lawfully present asylum-seekers.[1030]

Maple adds a further argument: the fact that some States made reservations on Article 26 suggests that States were 'aware of their international obligations under Article 26', and that they wanted to do away with the non-discrimination safeguard (Article 31(1) VCLT, object and purpose of the provision).[1031]

Battjes also holds the view that any confinement specifically placed on lawfully present asylum-seekers violates Article 26. Applying this reasoning to Article 7 of the recast Reception Conditions Directive, he argues that this provision is at variance with Article 26 RC because it allows EU Member States to impose refugee-specific restrictions on lawfully present asylum-seekers.[1032] McDonough agrees with Battjes and further contends that the *Residenzpflicht* in Germany also infringes Article 26 RC because it affects no other category of migrants apart from asylum-seekers.[1033]

Likewise, other authors explicitly[1034] or implicitly[1035] reject the existence of possible exceptions to the non-discrimination clause under Article 26 RC.

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an examination of whether there would be added value for the protection of refugees if the EU ratified the Refugee Convention, see García Andrade 2019.

[1029] However, as will be explained below (sub-section *Equal to whom? The scope of the non-discrimination standard*), in *Alo and Osso* the Court did declare the existence of certain circumstances in which Article 26 RC allows for refugee-specific restrictions on movement.

[1030] See Diehl (2021, p. 115), who affirms that 'the fact that the CJEU would also decide this for refugees is indirectly apparent from the decision, as the Court takes the standards of its decision from (Union law in the light of) the Refugee Convention'.

[1031] Maple 2016, p. 29.

[1032] Battjes 2006, p. 498-499.

[1033] McDonough 2009 p. 530.

[1034] For Grahl-Madsen (1963, p. 64), it is clear 'beyond doubt' that Article 26 prevents State authorities from placing restrictions on movement only on lawfully present asylum-seekers; Edwards (2011c, p. 16) argues that, 'at a minimum', this provision guarantees that States may not impose special restrictions vis-à-vis asylum-seekers; the Michigan Guidelines (Hathaway *et al.* 2018, p. 9) affirm that, once lawfully present, no refugee-specific limitations are permissible; and for Diehl (2021, p. 115) States have to subject to movement restrictions 'at least one other comparable group of foreigners' to comply with Article 26.

[1035] Amann (1994, p. 144) refers in general terms to 'the requirement of equal treatment of foreigners'. In interpreting Article 7 RC, Slingenberg (2014, p. 246) asserts that 'exclusion from benefits or from access to the labour market on the sole basis of being an asylum-seeker is not in conformity with the obligation to grant refugees the same treatment as aliens generally'. Article 7 RC provides that 'except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally'. Her reasoning would thus also apply to refugee-specific restrictions on movement. Finally, Costello (2017, p. 45) maintains that 'it can be assumed that encampment breaches Article 26'. Even though she does not mention the non-discrimination safeguard, her argument appears to be based on it, since encampment is usually only imposed on asylum-seekers. See in this respect Hathaway (2021, p. 872), who claims that because refugee-specific constraints for lawfully present asylum-seekers violate Article 26, this means that 'ongoing mandatory refugee encampment is never legal'.

The minority view: a weak (or non-existent) equal treatment

Among those authors who consider that Article 26 RC allows for certain refugee-specific restrictions, Robinson and Goodwin-Gil stand out because they entirely reject the existence of a non-discrimination safeguard. For them,

'The provision of Art. 26 would also not conflict with special situations where refugees have to be accommodated in special camps or in special areas even if this does not apply to aliens generally.'[1036]

Robinson justifies this reading in a statement of the Yugoslavian delegate (Mr. Makiedo) in the *travaux préparatoires* (Article 32 VCLT), following which:

'The Yugoslav delegation had submitted an amendment to [article 26] in order to cover cases where the fact that refugees resided near the frontier of their country of origin might cause friction between two States. *Contracting States should be empowered to prescribe zones in which residence would be forbidden to refugees*'.[1037]

Goodwin-Gil and McAdam agree with Robinson and further suggest that subsequent practice (Article 31(3)(a) VCLT) has annulled the non-discrimination safeguard, given that refugee-specific restrictions 'are now the usual response, especially on the occasion of large-scale influx'.[1038] Interestingly, Maple also concludes that African States (including those who did not make a reservation to Article 26) are ignoring the non-discrimination safeguard. However, he does not see this as a change in the interpretation of Article 26 but simply as a large-scale violation of this provision.[1039]

For his part, Klammer interprets that the non-discrimination safeguard allows for exceptions, but only those grounded on 'mass influx', 'verification of identity', 'order' and 'security'.[1040] He justifies this position in 'the process of creation of this provision' (Article 32 VCLT). Indeed, in the document quoted by this author (the records of a discussion in the Ad Hoc Committee), the drafters mentioned these four justifications as possible restriction grounds to the right to free movement.[1041] It is interesting to note that Hathaway and Zieck quote the same document to argue the opposite, i.e. that the drafters supported an absolute non-discrimination clause. This twofold interpretation of the *travaux* is possible because, on the one hand, the drafters mentioned those restriction grounds (mass influx, identity, order and security) in the context of the discussion on the right to free movement on lawfully present

[1036] Robinson 1953, p. 133, fn. 207.
[1037] UN Doc. A/CONF.2/SR.11. However, this amendment was withdrawn by the Yugoslavian delegation (as noted by Hathaway 2021, p. 877 and Klammer 2022a, p. 622). Moreover, even if it had not been withdrawn, from the context of the statement, it is clear that Mr. Makiedo only wished to make an exception for areas bordering the refugee's country of origin, not a general exception to allow for refugee-specific restrictions. Zieck (2018, p. 84) finds Robinson's view 'unsettling'.
[1038] Goodwin-Gil 1986, p. 207; Goodwin-Gil and McAdam 2021, p. 578, fn. 53.
[1039] Maple 2016, p. 29. He also questions Goodwin-Gil and McAdam's legal justification for their argument. He claims that while State practice does aid in the interpretation of a treaty provision, the practice of States alone should not give rise to a legal norm (Maple 2016, p. 8).
[1040] More specifically, he writes that 'the obligation of equal treatment with other *lawful* foreign nationals can only be waived (…) during a mass influx, during the verification of identity or during the verification of whether the asylum-seeker poses a threat to public order and security' (Klammer 2022a, p. 616) [emphasis added].
[1041] UN Doc. E/AC.32/SR.15.

refugees (Article 26). However, at a certain point, the US representative (Mr. Henkin) said that

'the question now before the Committee was not that of the policies of governments with regard to the reception of refugees more generally, but rather the rights of an individual refugee who was at the border or actually in a given country *to which they had not been admitted legally*.'

Because of this change in the debate, Hathaway and Zieck consider that, in the end, the restriction grounds mentioned in that document were codified in Article 31(2) RC (the right to free movement of unlawfully present refugees), not in Article 26.[1042]

Finally, Marx adopts what could be seen as a contradictory position. At first, he quotes Grahl-Madsen and agrees with him that 'it is clear beyond doubt that a contracting State may not impose such restrictions applicable only to refugees'.[1043] Later on, however, he affirms that Article 7 of the recast Reception Conditions Directive (which foresees refugee-specific restrictions on the movement of both lawful and unlawfully present asylum-seekers) would be in line with Article 26 RC if it limited the restriction grounds to situations of mass influx, or to the procedural situation of investigating the identity of, and possible security threat posed by an asylum-seeker.[1044]

Equal to whom? The scope of the non-discrimination standard

As noted by Grahl-Madsen and Slingenberg, 'aliens generally' is not a well-defined term.[1045] This concept appears in Article 7 of the Refugee Convention, pursuant to which 'except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally'. Article 26 refers not only to 'aliens generally', but to 'aliens generally *in the same circumstances*'. Is there any difference between the two? And to which group of migrants should the authorities compare asylum-seekers when they wish to restrict their movement in compliance with the non-discrimination safeguard?[1046]

Equal to all migrants

Amann, Klammer, Marx and Beyani do not specifiy which category of migrants asylum-seekers should be compared to for the purposes of Article 26 RC. In doing so, they seem to indicate that restrictions on movement must be equally applied to all lawfully present non-

[1042] Hathaway 2021, p. 870, fn. 328 and 330; Zieck, pp. 84-85. Note that, for Klammer, Article 31(2) RC allows for an open-ended number of restrictions, while Article 26 only permits limitations on movement for the reasons cited by the drafters. In contrast, as shown above, Hathaway interprets that the situations mentioned in the *travaux* are the only legitimate grounds for restricting movement under Article 31(2).
[1043] Marx 2011, p. 1149.
[1044] Marx 2011, p. 1164. These two contradictory statements have led other authors to position him on both sides of the discussion concerning the non-discrimination clause. While Maple (2016, p. 8) cites Marx as an example of an author who believes that refugee-specific restrictions are forbidden, Zieck (2018, p.84-85) quotes him as an example of the exact opposite, criticising his position as being 'plainly wrong'.
[1045] Grahl-Madsen 1963, p. 16; Slingenberg 2014, p. 106.
[1046] As shown above, Robinson and Goodwin-Gil do not think that Article 26 contains a non-discrimination safeguard. Therefore, their views have not been included in the analysis in this section.

nationals.[1047] For their part, Pelzer and Pichl explicitly argue that 'Article 26 of the Refugee Convention proclaims equal treatment with all other foreigners'.[1048]

Equal to labour workers or to another specific category of migrants

Referring to the circumstances of the treaty's conclusion (Article 32 VCLT), Edwards suggests that movement restrictions on asylum-seekers must be compared to those imposed on foreign labour workers since, at the time of drafting of Article 26, many of these workers were present in the territory of State parties to the Convention under pre- and post- war labour immigration schemes.[1049]

Grahl-Madsen, Zieck and McDonough do not illustrate the group of migrants that should be used as a point of reference, but suggest that restrictions need not be applied to all migrants, since they speak of 'certain classes of aliens'[1050] and of 'any *category* of aliens with leave to remain'.[1051]

Equal to migrants without preferential treatment

Following several authors, Article 26 obliges States to impose the same freedom of movement regime to lawfully present asylum-seekers and to all other migrants, except those coming from special partner States, i.e. those who have a special status in the country on the basis of reciprocity or of national laws instituting preferential treatment of certain groups of non-nationals.[1052] This interpretation follows from contrasting the term 'aliens generally' in Article 7 and the phrase 'the most favourable treatment accorded to nationals of a foreign country in the same circumstances', which appears in Article 17 RC, on the right to wage-earning employment (Article 31(1) VCLT, the 'contex' of a provision).[1053] Battjes alludes to EU citizens as an example of other migrants which need not be subjected to the same restrictions on movement as asylum-seekers for an EU Member State to comply with Article 26.[1054]

Equal to a group of migrants with similar features to asylum-seekers

Diehl holds that Article 26 RC cannot oblige the State to impose the same restrictions on all migrants nor on all those without preferential treatment. In his view, this would deprive the legislator of any possibility of differentiation within the law on foreigners, even if it were

[1047] Amann (1994, p. 144) speaks of '*Ausländer*' in general, as does Beyani (2000, p. 113); Klammer (2022a, p. 616) refers to 'other lawful foreign nationals' and Marx (2011, p. 1149) uses the term 'aliens in the State'.
[1048] Pelzer and Pilch 2016, p. 97.
[1049] Edwards 2011c, p. 16.
[1050] Grahl-Madsen 1963, p. 65; Zieck 2018, p. 83.
[1051] McDonough 2009, p. 529.
[1052] Hathaway 2021, p.222; Slingenberg 2014, p. 106; Grahl-Madsen 1963, p. 16.
[1053] It also follows from Article 7(2) RC (exemption from legislative reciprocity), which refers to *legislative* reciprocity but not to *diplomatic* reciprocity, meaning that asylum-seekers 'may still be excluded from rights and benefits stemming from bilateral treaties or conventions between a limited number of countries' (Grahl-Madsen 1963, p. 17; Slingenberg 2014, p. 247).
[1054] Battjes 2006, p. 476.

based on factual grounds and took into account the principle of proportionality (Article 31(1) VCLT, 'object and purpose' of Article 26).[1055]

At the same time, the features of the group of migrants taken as a point of reference cannot be identical to those of recognised refugees. If that were the case, it would be challenging for the authorities to find a comparable group of migrants, and the State would have to choose between imposing a refugee-specific restriction (in violation of Article 26 RC) and not imposing a restriction at all. This is why Diehl criticises the CJEU's reasoning in *Alo and Osso*. In that judgment, the Court had to examine two kinds of restrictive measures imposed by Germany on the freedom of beneficiaries of subsidiary protection to choose their place of residence:

(a) Residence restrictions for the purpose of achieving an appropriate territorial distribution of the burden of granting social benefits. The Court compared the beneficiaries of subsidiary protection to other migrants who receive social benefits and concluded that, since the residence restrictions were not imposed on this other group of foreigners, the measure violated Article 26 RC.
(b) Residence restrictions for the purpose of achieving integration. The Court compared the beneficiaries of subsidiary protection to other migrants *with the exact same level of integration* and found that, since there was no other group of migrants with an 'objectively comparable' level of integration, the non-discrimination clause did not apply, and therefore the State was justified in imposing restrictions *only* on beneficiaries of subsidiary protection.[1056]

Thus, by linking the non-discrimination clause to a non-existent group of migrants with the same level of integration as beneficiaries of subsidiary protection, the Court 'completely dispensed with the requirement [under Article 26 RC] of at least one further comparable group of foreigners'.[1057] Paraphrasing McDonough, the Court created a class consisting essentially of people with beneficiary protection status, robbing the word 'generally' in Article 26 RC of all meaning.[1058]

Diehl therefore tries to find a middle way between a very broad and a very narrow conception of the term 'aliens generally in the same circumstances'. Following a judgment of the German Federal Administrative Court (Article 31(3)(b), 'subsequent practice'),[1059] he argues that States must take into account three criteria in order to find an adequate comparable group of migrants:

[1055] Diehl 2021, p. 114.
[1056] *Warendorf v Ibrahim Alo and Amira Osso v. Region Hannover*, para. 54. As noted above, the findings of this judgment are extensible to lawfully present asylum-seekers.
[1057] Diehl 2021, p. 115.
[1058] McDonough 2009, p. 530. The Advocate General came to a different conclusion than the Court, but for reasons unrelated to the non-discrimination clause. In fact, the Advocate General did not stress the importance of complying with the non-discrimination standard in the imposition of residence restrictions on beneficiaries of subsidiary protection, but focused on the legitimacy of 'integration' as a restriction ground instead (Opinion of Advocate General Cruz Villalón of 6 October 2015, Joined Cases C-443/14 and C-444/14, EU:C:2015:665). For an analysis of the Opinion, see Zoeteweij 2016.
[1059] Judgment of the Federal Administrative Court 130, 148 (15 January 2008).

a) The length of the stay: If the refugee has a residence permit which is valid for a certain amount of time, the group for comparison would be other migrants with a residence permit with a similar validity period.
b) The reason for their stay: Since the reason why refugees are present in the territory of the host State may be classified as a humanitarian one (i.e. fleeing from persecution), the group for comparison would be other migrants who are also present in the country for humanitarian grounds.
c) The receipt of social assistance: If the refugee receives social benefits, the group for comparison would be other migrants who receive social assistance.[1060]

Although Diehl does not explicitly mention it, it appears that, in his view, these criteria could be taken into account alternatively or cumulatively. In any case, following his criticism of *Alo and Osso*, these criteria cannot be read so narrowly as to create a group for comparison consisting of only recognised refugees.

'In the same circumstances': The compensation of disadvantages

We now come to the question of whether the non-discrimination safeguard in Article 7 RC ('aliens generally') is the same as the one in Article 26 RC ('aliens generally *in the same circumstances*'). The term 'in the same circumstances' is defined in Article 6 RC (Article 31(1) VCLT, the 'context' of a provision) as meaning that

'any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, *with the exception of requirements which by their nature a refugee is incapable of fulfilling*.'

Different rights in the Refugee Convention, beyond the right to free movement, contain this clause (e.g. the rights to education, association, and housing). Slingenberg affirms that Article 6 enshrines an important exception: States may not subject the exercise of these rights to conditions that asylum-seekers are unable to fulfil due to the uprooting and dislocation associated with refugeehood.[1061] Some examples of these conditions given by the doctrine are:

(a) The presentation of documents (such as a certificate of nationality, a certificate from his home university or a security attestation) that the asylum-seeker lost during the flight and the issuance of which he cannot request to the authorities of his country of origin because that would expose him—or his relatives in the country of origin—to persecution.[1062]
(b) The acquisition of an expensive permit or license or the fulfilment of any requirement which the asylum-seeker would be unable to fulfil due to the general inability of asylum-seekers (relative to other migrants) to have planned and saved funds, among others, because of their lack of access to assets in their country of origin.[1063]

[1060] Diehl 2021, p. 114.
[1061] Slingenberg 2014, p. 249.
[1062] Grahl-Madsen 1963, p. 15; Diehl 2021, p. 114.
[1063] Hathaway 2021, p. 880; Klammer 2022a, p. 623.

(c) The requirement to have resided in the host State for a certain period before being able to exercise that right;[1064] although it has been contested whether the inability to fulfil such a condition is a refugee-specific problem.[1065]

Diehl contends that the exemptions from these conditions give additional value to Article 7 RC. That provision (a formal principle of equal treatment of foreigners) would already be satisfied by applying to recognised refugees the free movement regime contained in general immigration law even if some of them might be unable to fulfil the conditions required to exercise that right. In contrast, Article 26 (read in the light of Article 6 RC) lays down a 'special equal treatment requirement' which is intended to take into account the vulnerable situation of refugees.[1066]

Not all authors follow this view. For Amann, Article 26 RC only contains 'the requirement of a general equal treatment of foreigners in accordance with Article 7 RC', thus not making any distinction between the non-discrimination safeguards contained in both provisions.[1067] Similarly, Zieck considers that the exception foreseen in Article 6 RC does not apply to the right to free movement under Article 26. She argues that the object and purpose (Article 31(1) VCLT) of Article 26 is to assimilate lawfully present asylum-seekers to non-nationals in general; the provision does not make any observation as to the possibility of exceptions for asylum-seekers.[1068] For her, even though the exception for asylum-seekers foreseen in Article 6 RC regarding conditions such as producing a certificate of nationality or presenting a diploma is helpful in the context of other rights (such as the right to work and the right to education), it is 'hard to see' why a State would ask migrants to present such documents to exercise their right to free movement.[1069]

Is there a numerus clausus safeguard and a proportionality test inherent in Article 26?

Suppose a State complies with the 'special equal treatment requirement' of Article 26 (read in conjunction with Article 6 RC) when imposing a restriction on movement on lawfully present asylum-seekers. Can it be satisfied that it has strictly followed this provision of the Refugee Convention? Or does this article also limit the possible reasons that the State may

[1064] Hathaway 2021, p. 879.
[1065] For Grahl-Madsen (1963, p. 15), an asylum-seeker may be at a disadvantage with respect to the length of residence in the country, but his condition as a refugee does not prevent his overcoming the difficulty in due course.
[1066] Diehl 2021, p. 113-114. For their part, Grahl-Madsen (1983, p. 64) and Marx (2011, p. 1149) assert that 'it might not be incompatible with [Article 7(1)] if the State passed special regulations restricting only the free movement of [asylum-seekers]'. This is an odd statement, since Article 7(1) RC clearly prescribes equal treatment between asylum-seekers and 'aliens generally', thus prohibiting refugee-specific restrictions on movement (at least from a textual reading of the provision, Article 31(1) VCLT). Perhaps the reasoning behind their argument is similar to Diehl's: Article 7(1) would allow a State to require all migrants to fulfil certain conditions (e.g. presenting a security attestation) in order to exercise their right to free movement. If the special situation of asylum-seekers who are unable to obtain that attestation were not considered, they would become the only category of migrants prevented from exercising their right to free movement. Thus, through a (formally) non-discriminatory general condition, the State would be indirectly imposing a refugee-specific restriction, which would nonetheless be in accordance with Article 7 RC. Article 26, however, obliges the State to waive asylum-seekers from such requirements.
[1067] Amann 1994, p. 144. For Diehl (2021, p. 113), if both articles meant the same, Article 26 'would be obsolete'.
[1068] Zieck 2018, p. 83.
[1069] *Ibid.*

use to restrict the movement of asylum-seekers *and* of the other group(s) of migrants? Moreover, do these restrictions need to be individualised, or can the State simply impose them on all asylum-seekers and on all persons belonging to the other group(s) of migrants?

The minority view: yes, but only in part

From the doctrine analysed, Klammer is the only author who reads a full proportionality test into Article 26 RC (though not a *numerus clausus* safeguard, as will be explained below). His argument is based on a systematic analysis of the RC (Article 31(1) VCLT, the 'context' of a provision). He contends that lawfully present asylum-seekers are also entitled to all the rights from the previous 'levels of attachment', i.e. to the rights accruing to asylum-seekers under the State's jurisdiction[1070] and to asylum-seekers who are 'simply' present[1071] in the territory.[1072] Thus, since, in his view, the word 'necessary' in Article 31(2) RC places an obligation on the authorities to seach for the least intrusive measure (necessity test) and to take all individual circumstances into account (balancing act) when deciding on restrictions on the movement of unlawfully present asylum-seekers, the same tests have to be applied when imposing restrictions on the movement of lawfully present asylum-seekers.[1073]

Diehl suggests the existence of a 'lite'[1074] version of the proportionality test in Article 26. He argues that, when imposing limitations on the movement of recognised refugees, the authorities have to observe the reasonableness of the restriction in the individual case in order to avoid 'undue hardship'. However, 'the State authorities should be entitled to a wide scope of assessment' in this regard. To support this argument, he quotes a judgment of the Dresden Administrative Court in Germany (Article 31(3)(b) VCLT, 'subsequent practice').[1075]

[1070] I.e. Article 3 (non-discrimination), Article 13 (movable and immovable property), Article 16(1) (access to courts), Article 20 (rationing), Article 22 (education), Article 29 (fiscal charges), Article 33 (prohibition of *refoulement*) and Article 34 (naturalisation). These rights do not contain any territorial attachment criterion

[1071] I.e. Article 4 (freedom of religion), Article 27 (right to receive identity papers) and Article 31. These rights accrue to all refugees who are simply 'in' or 'within' a Contracting State's territory.

[1072] Klammer 2022a, p. 619. See in this respect Hathaway (2021, pp. 174-175): 'The structure of the attachment system is incremental: because the levels build on one another (a refugee in a state's territory is also under its jurisdiction; a refugee lawfully or habitually present is also present; a refugee lawfully residing is also lawfully present; and a refugee durably residing is also lawfully residing), rights once acquired are retained for the duration of refugee status'.

[1073] *Ibid.* He does not however clarify whether Article 26 RC requires the authorities to apply a full proportionality test only when they place limitations on the movement of individual asylum-seekers, or whether it also imposes that test in relation to restrictions on persons belonging to the other comparable group(s) of migrants. In principle, Article 26 could not require States to apply a proportionality test to migrants who are not asylum-seekers, because other non-nationals fall outside the scope of the Refugee Convention. At the same time, if the proportionality test were required only for asylum-seekers under Article 26, it would modify the nature of the non-discrimination standard by situating asylum-seekers in a better position than other migrants. These questions show the complexities of applying the proportionality test to a provision whose goal is to simply level the rights of lawfully present asylum-seekers/recognised refugees and of other non-nationals.

[1074] The term 'proportionality lite' was coined by Cornelisse (2010).

[1075] Judgment of the Dresden Administrative Court 14 K 1427/01 (7 November 2001), quoted in Diehl 2021, p. 114. However, in that judgment, the Dresden court derives the proportionality test from Article 2(3) of Protocol 4 to the ECHR, not from the Refugee Convention (p. 8 of the judgment). In fact, the only safeguard that the Court infers from Article 26 RC is the non-discrimination clause, which it considers satisfied in the particular case (p. 6).

Finally, McDonough is the only author who partly limits the permissible restriction grounds under Article 26 RC. He argues that 'Article 26 does not permit confinement of any kind for reasons of public order or national security'. Carrying out a systematic interpretation of the Refugee Convention (Article 31(1) VCLT, the 'context'), he points out that the Convention allows States to invoke these two justifications in relation to lawfully present asylum-seekers only under Article 28 (States may withhold international travel documents for 'compelling reasons of national security or public order') and under Article 32 (States may expel a lawfully present asylum-seeker 'on grounds of national security or public order'). Thus, for him, the fact that these grounds are mentioned in these two other articles and not in Article 26 RC means that this provision excludes national security and public order as legitimate reasons for restricting movement.[1076]

The majority view: no numerus clausus or proportionality test

To Zieck, it is clear that Article 26 contains no *numerus clausus* safeguard: 'any whim regarding restrictions, provided it is applied in a non-discriminatory manner, would go',[1077] because that provision 'does not indicate whether particular restrictions are compatible with the rights granted in Article 26 as long as they apply in a non-discriminatory manner to [asylum-seekers] and other aliens alike'.[1078] Similarly, Marx asserts that 'it depends on the status of aliens in the State concerned as to what right [asylum-seekers] will enjoy under Article 26'[1079] and Hathaway maintains that, once lawfully present, asylum-seekers 'should be subject only to *whatever restrictions* govern the freedom of internal movement and residence of other non-citizens'.[1080]

Some authors point out that restrictions under Article 26 RC must comply with the proportionality test[1081] or with the *numerus clausus* safeguard *as enshrined in Article 12(3) ICCPR*.[1082] Thus, by having recourse to general human rights law, they are implying that the Refugee Convention itself does not include these safeguards of the freedom of movement of lawfully present asylum-seekers.

Finally, Grahl-Madsen gives examples of restrictions on movement that could be applied to both lawfully present asylum-seekers and other migrants, without stating that these are the only permissible grounds. These examples (together with those provided by Marx and Zieck) are:

(a) Natural catastrophe;

[1076] McDonough 2009, p. 536. He does not however exclude the grounds 'national security' and 'public order' in cases of restrictions under Article 31(2) RC (c.f. Hathaway, *supra* Section 4.2.1—sub-section *Is there a numerus clausus list of restriction grounds?*—, who does exclude these grounds in relation to unlawfully present asylum-seekers). On the other hand, as in the case of the proportionality test, the question arises: would Article 26 prohibit the use of the restriction grounds 'national security' and 'public order' only regarding limitations on the movement of asylum-seekers, or also on the movement of the other comparable group(s) of migrants?
[1077] Zieck 2018, p. 86.
[1078] Zieck 2018, p. 83.
[1079] Marx 2011, p. 1149.
[1080] Hathaway 2021, p. 868.
[1081] Hathaway *et al.* 2018, p. 9.
[1082] Edwards 2011c, pp. 15-16; Klammer, 2022a, p. 619; Maple 2016, p. 8.

(b) Rebellion or civil war;[1083]
(c) Large scale police operation;
(d) Frontier or strategic zones or, more generally, areas 'where strangers may be in the way, or where their safety cannot be guaranteed';
(e) The need to obtain a special license to change one's residence to overcrowded places or to restricted areas;
(f) An immigration regime under which certain classes of migrants (e.g. migrant workers) may only be admitted on the condition that for a given period they confine themselves to specified regions.[1084]

Other safeguards under Article 26 RC?

Some authors discuss the existence of other types of safeguards in Article 26 RC. Firstly, Grahl-Madsen states that the freedom of movement under Article 26 is not dependent on any particular purpose: the lawfully present asylum-seeker may move around the country for whatever reason, including business or pleasure. Moreover, he considers that the right to choose one's place of residence also contains the right to continue living in that place.[1085]

For his part, Maple argues that, to fully comply with Article 26, the nature and extent of the restrictions placed on asylum-seekers must be the same as those imposed on other migrants. He gives the example of Tanzania, where the Immigration Act makes some general references to restrictions on the free movement of migrants, but the Refugee Act lays down in detail the broad powers that authorities have to limit the movement of asylum-seekers. In his view, the application of such distinct regimes to asylum-seekers and to other migrants does not comply with the non-discrimination safeguard.[1086]

Finally, citing a judgment of the Dresden Administrative Court (Article 31(3)(b) VCLT, 'subsequent practice'), Diehl writes that, when examining whether the non-discrimination safeguard has been complied with, not only national laws but also administrative restrictions on the movement of other migrants must be taken into account.[1087] He thus seems to imply that Article 26 RC does not oblige States to impose restrictions on movement by a general law (adopted by the Parliament or the executive branch), but that they may do so through administrative practice, as long as they are applied to refugees and other migrants alike.[1088]

[1083] However, Weis (1990, p. 149) points out that 'special measures taken in time of war or other grave and exceptional circumstances are covered by Article 9 [provisional measures]'.
[1084] Grahl-Madsen 1963, p. 65; Marx 2011, p. 1160; Zieck 2018, p. 84. Regarding example (f), see Chapter 2, Section 2.5 ('the principle of conditional lawfulness'): these type of conditions exclude an asylum-seeker from the personal scope of Article 26 RC if he do not abide by them. In these cases, the asylum-seeker is no longer 'lawfully in' the territory of the State and thus none of the safeguards of Article 26 apply.
[1085] Grahl-Madsen 1963, p. 64. These safeguards would also apply to unlawfully present asylum-seekers under Article 31(2), given that Grahl-Madsen derives them from a general reflection on the concept of free movement and freedom to choose one's residence. For an examination of the right to respect for a home of migrants under Article 8 ECHR, see Slingenberg and Bonneau 2017.
[1086] Maple 2016, p. 29.
[1087] Judgment of the Dresden Administrative Court 14 K 1427/01 (7 November 2001), quoted in Diehl 2021, p. 114.
[1088] The language used in Article 26 RC (Article 31(1) VCLT) also suggests that restrictions imposed in accordance with the non-discrimination principle do not need to be prescribed by law: Article 26 subjects the right to free movement to '*any regulations* applicable to aliens generally in the same circumstances'.

Does Article 26 protect against indirect restrictions on movement?

States might impose restrictions on lawfully present asylum-seekers that do not directly relate to movement or residence, but may nonetheless affect the right under examination. Whether Article 26 protects against these indirect restrictions on movement is relevant for this chapter because, if these indirect restrictions are covered by Article 26, then the guarantees of that provision (most notably, non-discrimination) will also be applicable to those situations. For this reason, this issue will be analysed here.

Indirect restrictions seen as covered by Article 26

In Hathaway's view, withholding documentation from an asylum-seeker with knowledge that doing so prevents him from enjoying his right to free movement encroaches upon Article 26 RC.[1089]

Grahl-Madsen holds that 'lack of housing' may affect the right to freedom to choose one's residence under Article 26 RC.[1090] It appears that, for him, lack of housing would have to be a general problem which affected at least another category of migrants; if the lack of housing were a refugee-specific problem, that would violate the non-discrimination clause.

For his part, Maple finds that restricting aid and education to the borders of camps also amounts to a limitation on the right to choose one's residence under Article 26, because this creates an environment where asylum-seekers have little choice but to reside in camps.[1091]

Indirect restrictions not clearly covered by Article 26

Whether or not limitations on the ability to choose a job is an indirect restriction on the right to choose one's residence is contested in the literature. In Zieck's and Hathaway's view, the drafters of Article 26 RC (Article 32 VCLT) made it clear that a requirement to work in a specific location for a specific amount of time which is only applied to asylum-seekers breaches the non-discrimination clause.[1092] More generally, Maple contends that if the State creates insurmountable boundaries for asylum-seekers to gain a wage or makes it outright

[1089] Hathaway 2021, p. 873. He gives the example of 'the refusal of the Spanish authorities to issue documents to post-admissibility refugee claimants who sought protection in the Spanish enclaves of Ceuta and Melilla'. However, I do not think that these restrictions can be classified as indirect limitations on movement. The document to which Hathaway refers is an 'authorisation issued by the National Police allowing them to be transferred to the mainland' (AIDA 2022, p. 100). Such an authorisation pertains to the freedom of movement itself, it does not relate to a different issue which in turn affects this freedom. I thus think that these measures are *direct* limitations on the right to free movement. For a further analysis of the Spanish case, see Section 4.6.
[1090] Grahl-Madsen 1963, p. 64.
[1091] Maple 2016, p. 30. He maintains that, in several African States, UNCHR assists governments in imposing this *de facto* restriction, which is in breach of Article 26 RC.
[1092] Zieck 2018, p. 84; Hathaway 2021, p. 876, fn. 362. They refer to the Ad Hoc Committee's rejection of a clause proposed by the Chairman according to which the right of refugees to enjoy freedom of movement should be 'subject to the conditions under which they were admitted' (UN Doc. E/AC.32/SR.15, 27 January 1950).

illegal for them to work, this forces them to live in camps, thus restricting their right to choose a place of residence.[1093]

Like Zieck and Hathaway, Robinson, Goodwin-Gil and Beyani also use the *travaux* to approach this issue, but come to the opposite conclusion: the drafters expressed the view that 'such requirements do not conflict with freedom of movement'.[1094] Beyani adds that, even if residence is tied to a specific area of employment, the asylum-seeker will still be free to move within and out of the area, and therefore Article 26 RC is not affected.[1095] Interestingly, Goodwin-Gil concludes that, while restrictions on the right to choose a job do not conflict with Article 26 RC, they 'might well raise objections by reference to [human rights] treaty provisions relating to freedom of movement'.[1096]

The position of Weis and Marx in this regard is confusing. On the one hand, they state that 'Article 26 does not affect the conditions imposed on refugees for their admission'. This seems to suggest that, if a State imposes certain employment conditions on asylum-seekers, this does not affect the right to free choice of residence. However, these authors then affirm that 'inasmuch as a refugee is restricted in his freedom to seek employment, this may also entail a restriction to choose his place of residence'.[1097] Similarly, Grahl-Madsen asserts that Article 26 'does not relate to employment' but, at the same time, he argues that 'in so far as there are restrictions on the freedom to seek whatever employment one might desire, the right to choose one's place of residence may be restricted *in fact* though not in law'. [1098] The latter statement seems to imply that such measures amount to *de facto* restrictions on residence, but his position remains unclear.

Other indirect restrictions which, from Hathaway's perspective, do not affect Article 26 are policies that allow asylum-seekers to live outside receptions centres only if they are prepared to give up State welfare benefits. Such policies are 'less a constraint on freedom of movement (…) than a restriction on access to public benefits'.[1099] A different situation is presented when a State threatens asylum-seekers to deny them the necessities of life (e.g. food, basic clothing…) if he leaves the reception centre or a specific area:

'Because no state may lawfully withhold the essentials of life from [asylum-seekers], there is no legal difference between the use of such threats to compel a refugee to reside in a place not of his or her choosing and a direct order of confinement'.[1100]

[1093] Maple 2016, p. 30. He shows that in several African States, a refugee may be officially allowed to live in an urban area, but he is not permitted to work and is given no assistance by the State or international agencies. Alternatively, he can 'choose' to live in camps, where free education, health services and aid are offered (p. 24).
[1094] Robinson 1953, p. 133; Goodwin-Gil 1986, p. 207; Beyani 2000, p. 116. They quote a statement by the Canadian delegate, who pointed out that persons who migrated to Canada under group-settlement schemes were frequently required to give a pledge that they would remain in a specific job for a certain period of time. The delegate 'did not believe that such a requirement conflicted with the principle of freedom of movement' (UN Doc. A/CONF.2/SR. 11, 22 November 1951).
[1095] Beyani 2000, p. 116.
[1096] Goodwin-Gil 1986, p. 207.
[1097] Weis 1990, p. 149; Marx 2011, p 1160. Hathaway (2021, p. 876, fn. 362) classifies Weis as an author who rejects that limitations on employment affect the right to freedom to choose one's residence.
[1098] Grahl-Madsen 1963, p. 64 [emphasis added].
[1099] Hathaway 2021, p. 540.
[1100] Hathaway 2021, p. 874. The Michigan Guidelines (Hathaway *et al.* 2018, p. 9) restate this argument.

However, his argument that States may not withhold the essentials of life from asylum-seekers is based on general human rights law (ICCPR and ICESCR). The Refugee Convention itself does not oblige States to satisfy the basic needs of asylum-seekers.[1101] Therefore, taking only the Refugee Convention as a benchmark, Hathaway would probably find that a measure which threatens to leave an asylum-seeker in destitution if he does not reside in a particular place does not encroach upon Article 26 RC.

The views of UNHCR

As has been done in the examination of Article 31(2), I will now devote a separate section to analyse the views of UNHCR on the safeguards contained in Article 26 RC for the right to free movement of lawfully present asylum-seekers.

UNHCR and refugee-specific restrictions

In a report written in 2007 on its position regarding restrictions on the residence of refugees in Germany, UNHCR recognises the importance of the non-discrimination safeguard under Article 26.[1102] However, in other documents, it appears that the UN Agency disregards this standard.

Firstly, in its submission to the case *Saadi v. UK* (coincidentally, the same year as the report on Germany), UNHCR declares that

'Article 26 provides for a (presumptive) and general right of free movement for those asylum seekers lawfully present in the host State, with only necessary restrictions permitted to be imposed by implication (see also Art. 12 ICCPR, Art. 2(1) Protocol 4 ECHR).'[1103]

Following this statement, refugee-specific restrictions on the movement of lawfully present asylum-seekers would not violate Article 26, since the UN Agency only refers to the safeguards contained in the ICCPR and in Protocol 4 ECHR.

Similarly, in its submission to the case *Kituo Cha Sheria and Others v. The Attorney General* before the High Court of Kenya, UNHCR quotes Edwards and affirms that 'at a minimum, Article 26 guarantees that a Contracting State may not impose restrictions that are applicable only to [asylum-seekers] (…). The only possible exception to the rights of choice of residence and free movement in Article 26 of the 1951 Convention would be via Article 9'.[1104] However, when UNHCR proceeds to assesses whether the particular policy of the Kenyan Government of forcibly encamping asylum-seekers was in accordance with Article 26, it does not mention the fact that this policy was exclusively imposed on asylum-seekers and

[1101] Hathaway 2021, pp. 586-590, p. 610 *et seq*.
[1102] UNHCR 2007b, p. 3. While this report related to a measure imposde by the German governmnet on recognised refugees, the Agency's conclusion would have been the same if the policy had been directed at asylum-seekers, given that, for UNHCR, almost all asylum-seekers are 'lawfully present' (see Chapter 2).
[1103] UNHCR 2007a, p. 8.
[1104] UNHCR 2013, p. 15. Article 9 RC relates to provisional measures that States can take in times of war or other grave and exceptional circumstances.

recognised refugees. Instead, it only criticises the Government for vulnerating the guarantees contained in Article 12(3) ICCPR.[1105]

This 'general human rights law-focused' reasoning is repeated in UNHCR's 2015 Annotated Comments to the recast Reception Conditions Directive. At first, the report mentions Article 26 RC as one of the provisions in international law regulating the right to free movement.[1106] However, when it later states that any restrictions must be 'subject to relevant safeguards under international law', the Agency only refers to the safeguards under Article 12(3) ICCPR.[1107]

A similar disregard for the non-discrimination clause is apparent in policy documents. For instance, in its 2014 'Policy on Alternatives to Camps', the UN Agency makes a list of factors that UNHCR operators must consider when advising governments on encampment policies. Some of these factors are: the perspectives and intentions of asylum-seekers and host communities, the scale of displacement and the national and local economy.[1108] Even though compliance with the Policy on Alternatives to Camps is mandatory for UNHCR officers, and while the Policy itself affirms that it is guided by refugees' rights under international law,[1109] no mention is made to the need of operators to check whether the State complies with the non-discrimination safeguard, i.e. whether other migrants are also subjected to encampment.

These findings suggest that, in most cases, refugee-specific restrictions are not problematic for UNHCR as long as they comply with international general human rights law.

UNHCR and the scope of the non-discrimination standard

In the aforementioned 2007 report on the residence restrictions in Germany, UNHCR interprets the scope of the non-discrimination safeguard in a way that resembles Diehl's approach, since it mentions different criteria for identifying the group of migrants against which to compare asylum-seekers when imposing restrictions on residence. However, unlike Diehl, UNHCR considers that, even if the same limitations are imposed on asylum-seekers and on other migrants with a humanitarian permit, this still violates the non-discrimination clause. Indeed, the Agency finds that 'the purpose of the residence permit' cannot be a factor to take into account when examining whether a State has complied with Article 26. This argument is based on the wording of Article 6 RC (Article 31 VCLT, the 'context' of Article 26), pursuant to which

'For the purposes of this Convention, the term "in the same circumstances" implies that any requirements (including requirements as to *length* and *conditions of sojourn or residence*) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.'

[1105] UNHCR 2013, p. 26.
[1106] UNHCR 2015b, p. 13.
[1107] UNHCR 2015b, p. 14.
[1108] UNHCR 2014b, p. 9
[1109] UNHCR 2014b, p. 3.

Because that article only mentions requirements regarding 'length' and 'conditions of sojourn or residence', UNHCR interprets that the criterion for comparing asylum-seekers to other non-nationals should be the length of the stay (i.e. the validity period of the residence permit), not the purpose of the stay. In other words, restrictions on the free choice of residence of lawfully present asylum-seekers should be the same as those imposed on other migrants whose residence permit has a similar validity period (be it for work, family or other reasons).[1110]

UNHCR and other safeguards under Article 26

Like the majority of the doctrine, UNHCR does not read a *numerus clausus* safeguard or a proportionality test into Article 26. In its submission to the case *Kituo Cha Sheria and Others v. The Attorney General* before the High Court of Kenya, the Agency referred to the 'aliens generally' standard under Article 26 and added that 'in turn, any such limitation [imposed on asylum-seekers and on other migrants] would need to conform with international law'.[1111] Thus, the Agency does not derive any additional safeguards from Article 26 itself.

Finally, like Diehl, UNHCR does not find that Article 26 obliges States to use a general law (adopted either in Parliament or by the executive power) to limit the movement of asylum-seekers and of a comparable group of migrants. In its 2007 report on the residence restrictions in Germany, it affirmed that, when examining the compliance of the State with the non-discrimination standard, not only laws must be taken into account, but also administrative practices.[1112]

UNHCR and indirect restrictions

The aforementioned report on the German policy of imposing residence restrictions on refugees leads to the conclusion that, in contrast to Hathaway, UNHCR considers that Article 26 RC is affected by policies which entitle asylum-seekers to live outside a specific residence or area only if they are prepared to give up State welfare benefits. Indeed, this was exactly the type of measure that UNHCR was analysing, given that these residence restrictions are exclusively placed on refugees 'whose subsistence is not secured' (Section 60(1) Residence Act), not on all refugees.[1113]

***

In summary, Sections 4.2.1 (on Article 31(2) RC) and 4.2.2 (on Article 26 RC) have shown the complexities surrounding the safeguards of the right to free movement of asylum-seekers: on the one hand, there are two provisions in the Refugee Convention providing a different set of guarantees and, on the other, interpretations differ as to the meaning of the various

[1110] UNHCR 2007b, p. 3. In support of this argument, see Pelzer and Pilch 2016, p. 97. I do not entirely agree with this view, since Article 6 RC uses the word 'including' before mentioning the 'requirements as to length and conditions of sojourn and residence'. It thus seems that Article 6 RC does not limit the criteria for comparison to the factor of 'length of the stay'.
[1111] UNHCR 2013, p. 15.
[1112] UNHCR 2007b, p. 2.
[1113] Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory (BGBI. I p. 162, last amended on the 20-4-2023).

terms in each of these articles. Sections 4.3 and 4.4 will proceed to analyse the safeguards of the right to free movement of individuals in general under Protocol 4 to the ECHR and the ICCPR. Section 4.5 will then summarise and compare all these findings and answer the question, framed within the theory of migration exceptionalism, as to whether the guarantees of freedom of movement for all individuals are higher than those for asylum-seekers.

4.3 The safeguards of the right to free movement of individuals in general: the European Court of Human Rights

In the context of the Council of Europe, the guarantees that protect the right to free movement of individuals in general are found in the last two paragraphs of Article 2 of Protocol 4 to the ECHR, which read:

> 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> 4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

While paragraph 3 also accrues to the right to leave the country (Article 2(2) of Protocol 4), paragraph 4 applies exclusively to the right to free movement within the State. The European Court of Human Rights has summarised the content of these provisions in the following manner: any measure restricting free movement must (1) be lawful, (2) pursue one of the legitimate aims referred to in this article and (3) strike a fair balance between the public interest and the individual's rights.[1114] In this section, I will zoom in on these three elements through a detailed exploration of the Court's case law. However, a preliminary question must first be addressed: who holds the burden of proof regarding these elements?

In most judgments, if the Government does not claim before the Court that it has complied with all these safeguards, the ECtHR will find a violation of Article 2, which indicates that the burden of proof falls on the State.[1115] There was one case in which, even though the Government did not attempt to justify the restrictive measures, the Court analysed *ex officio* whether Article 2(3) could be applicable.[1116] However, this was one of the first cases on the subject and the Court has not adopted this approach since.

4.3.1 In accordance with law

A general law

For a restrictive measure to be 'lawful', the Court requires States to authorise it by means of general law, adopted by either the legislative or the executive branch of the State. The authorities may only restrict a person's movement in a particular case if it is authorised by

[1114] *Gochev v. Bulgaria*, no. 34383/03, 26 November 2009, para. 44.
[1115] *Denizci and Others v. Cyprus*, nos. 25316-25321/94 and 27207/95, 23 May 2001, para 405; *Tatishvili v. Russia*, no. 1509/02, 22 February 2007, para. 49; *Stamose v. Bulgaria*, no. 29713/05, para. 35.
[1116] *Raimondo v. Italy*, no. 12954/87, 22 February 1994, para. 39.

such a general norm. Two factors lead me to this conclusion. On the one hand, in the cases examined, the Court accepted that a measure was lawful only when it was covered by a law enacted by Parliament. On the other hand, in *Timishev v. Russia*, the restriction on movement had been imposed by an oral order given by the Deputy Head of the Public Safety Police. The Court held that this limitation was unlawful because the legal basis of the order was unknown.[1117] Thus, the order itself—an individualised act—was not sufficient for the measure to be 'in accordance with law'.

Although it is primarily for national courts to interpret national legislation,[1118] the ECtHR has the final word on whether a particular norm provides an adequate legal basis to a restriction on free movement. Some of the norms that the Court has qualified as an adequate legal basis are the following:

(a) Italian Law no. 1423 of 27 December 1956, which lays down various preventive measures in respect of 'persons presenting a danger for security and public morality'; complemented as *lex specialis* by Law no. 575 of 31 May 1965, related to the fight against Mafia organisations.[1119]
(b) The Dutch Municipality Act of 1 January 1994, which empowers the Burgomaster to issue orders deemed necessary for the maintenance of public order.[1120]
(c) The Dutch Inner City Problems (Special Measures) Act of 1 January 2006, which empowers municipalities to restrict the right to choose residence in certain areas. [1121]

The law, in turn, has to comply with the Constitution; this assessment corresponds to the relevant national court (in continental systems, generally to the Constitutional Court).[1122]

Even if an official is authorised by a general law to limit one's movement or residence, he must act within the margins of that authorisation. This requirement was not met in two cases against Russia concerning a policy that obliged ethnic minorities to register their residence at police stations. In *Bolat*, the police officer who had fined the applicant for allegedly moving out of his registered place of residence was acting outside his territorial jurisdiction.[1123] Similarly, in *Tatishvili*, the applicant wished to register a new address, but the police required him to show certain documents to proceed with the registration which were not laid down in the law.[1124]

[1117] *Timishev v. Russia*, para. 48. See also the *travaux préparatoires* of Protocol 4 ECHR, where the drafters explained that the phrase 'in accordance with law' left room for administrative action, but only as long as this action was 'within the law of the land' (Coe Doc. DH/Exp (61) 15, 7 August 1961).
[1118] *Landvreugd v. The Netherlands*, no. 37331/97, 4 June 2002, para. 55; *Olivieira v. The Netherlands*, no. 33129/96, 4 June 2002, para. 51.
[1119] *Raimondo v. Italy*, *Labitia v. Italy* (no. 26772/95, 6 April 2000) and *Vito Sante Santoro v. Italy* (no. 36681/97, 1 July 2004).
[1120] *Landvreugd v. The Netherlands*, *Olivieira v. The Netherlands*.
[1121] *Garib v. The Netherlands*, no. 43494/09, 6 November 2017.
[1122] *Tatishvili v. Russia*, para. 53.
[1123] *Bolat v. Russia*, no. 14139/03, 5 October 2006, para. 69.
[1124] *Tatishvili v. Russia*, para. 50-51.

A restriction validly imposed by an organ authorised by law will become unlawful if a higher instance annuls that organ's decision—from the moment of the higher instance's judgment[1125]—or if it is prolonged after the end of its validity period.[1126]

Accessibility and foreseeability

The law restricting movement must be accessible to the person concerned, as well as the domestic case law interpreting that law.[1127] Not only the main law restricting movement, but also any delegated legislation based thereon must be accessible to the individual.[1128]

The law must also be foreseeable, i.e. it must be formulated with sufficient precision to enable any individual to regulate his conduct—if need be with appropriate advice. In *Landvreugd* and in *Olivieira v. The Netherlands*, the Court seemed to take a quite flexible interpretation of this term, because it found that the Municipality Act was foreseeable even if the provisions contained therein were 'admittedly rather general in terms'. The reason for this flexibility was that 'the circumstances which call the Burgomaster to issue the orders (…) are so diverse that it would scarcely be possible to formulate a law to cover any eventuality'.[1129] In *De Tommaso v. Italy*, however, the Court strengthened the foreseeability requirement, clarifying that:

(1) If the terms of the law are vague, administrative and/or judicial practice must interpret and apply those terms to make the law foreseeable.
(2) If the law confers discretion to the authorities, it must indicate the scope of that discretion.
(3) The law (or the practice applying it) must be detailed with regard to:
    a. The type of situations and behaviours that will lead to the imposition of a restriction on movement.
    b. The content of the restriction. For instance, if the law allows domestic courts to apply 'any measure' on the movement of individuals, the content of the restriction will not be foreseeable.[1130]

4.3.2 The legitimate aims

In *Baumann*, the French Government attempted to justify a limitation on the right to leave on the fact that the measure had only lasted for a short time. In response, the Court stressed the *numerus clausus* nature of the reasons that States can give under Article 2(3):

[1125] *Raimondo v. Italy*, para. 40. The judgment of the Catanzaro Court of Appeal annulling the decision of the District Court, which acquired legal force on the 2nd of December 1986 (when it was filed with the registry), was not communicated to the applicant until the 20th of December. Thus, the ECtHR found that the measure had not been lawful from the 2nd to the 20th of December.
[1126] *Vito Sante Santoro v. Italy*, para. 44. In this case, the measure was time-barred. The Court of Cassation declared that the measure had ceased to apply on the 2nd of May 1995. The ECtHR thus concluded that the measure had ceased to be lawful on the 2nd of May 1995.
[1127] *Landvreugd v. The Netherlands*, para 58; *Olivieira v. The Netherlands*, para. 51.
[1128] *Garib v. The Netherlands*, para. 114.
[1129] *Landvreugd v. The Netherlands*, paras. 60-61; *Olivieira v. The Netherlands*, paras. 53-54.
[1130] *De Tommaso v. Italy*, no. 43395/09, 23 February 2017, paras. 107, 109, 117 and 121.

'Article 2 of Protocol No. 4 does not provide for any restriction on freedom of movement based on the length of deprivation of that right. Only reasons relating to the aims referred to in the third paragraph constitute, where applicable, lawful grounds.'[1131]

Whether or not an aim is 'legitimate' is not a question to which the Court gives much consideration. In the cases examined, the Court often avoids dealing with this issue, especially if it can conclude through other means of interpretation that Article 2 has been violated.[1132] However, the margin of appreciation granted to States to choose a restriction ground (as long as it can be subsumed under one of the aims in paragraphs 3 and 4 of Article 2) is compensated by requiring them to specify that ground in detail in domestic law, as shown above under 'foreseeability'.[1133]

I will now examine some of the aims that the Court has found to be legitimate for restricting freedom of movement and residence within the country.

First, the suspicion of belonging to a Mafia organisation: for the Court, this was 'clearly' a legitimate aim because of the threat posed by Mafia to the democratic system.[1134] The Court found that these reasons were covered by the grounds 'public order' and 'prevention of crime', in connection with the term 'in a democratic society', which also appears in Article 2(3) of Protocol 4. In *De Tommaso*, the Court constrained the scope of this restriction ground in line with the developments in the Italian Constitutional Court, stating that mere suspicion of belonging to a Mafia organisation is not enough for this aim to fall under 'public order' and 'prevention of crime': it is necessary to establish the existence of specific conduct indicating that the individual concerned poses a real and not merely theoretical danger.[1135]

Secondly, the prevention of drug consumption and sale: interestingly, even though the restriction ground in the Dutch Municipality Act was 'public order', the Court categorised this aim as a 'public interest' ground (Article 2(4) Protocol 4).[1136] This observation leads to the conclusion that 'public interest' is an umbrella term that encompasses all the restriction grounds laid down in paragraph 3, the difference between the two paragraphs being that paragraph 4 deals with limitations that apply to many people in a particular area rather than to one person in the whole territory of the country. The Court described this distinction in *Garib v. The Netherlands* with the following words: 'paragraph 3 provid[es] for restrictions for specified purposes but without limiting their geographical scope and paragraph 4 provid[es]

[1131] *Baumann v. France*, no. 33592/96, 22 May 2001, para. 60. The same reasoning would apply to Article 2(4) (restrictions on public interest grounds).
[1132] *Stamose v. Bulgaria*, para. 32: 'Even if the Court were prepared to accept that the interference pursued the legitimate aims of maintainance of *ordre public* or the protection of the rights of others, in the instant case it is not necessary to pursue this point further since in any case, as explained below, the travel restrictions failed the "necessary in a democratic society" test'. The official Guide on Article 2 of Protocol 4 ECHR also claims that 'the legitimate aims set out in paragraph 3 (…) have been interpreted with a degree of flexibility (…) and, in most cases, the Court deals with the point summarily. The cases in which the Court has voiced doubts about the cited aim are rare' (Council of Europe/European Court of Human Rights 2022, p. 34).
[1133] See in this regard *Riener v. Bulgaria*, no. 46343/99, 23 May 2006, para 113: 'foreseeability of legal acts is closely linked to the issue of proportionality'.
[1134] *Raimondo v. Italy*, para. 39; *Labitia v. Italy*, para. 197.
[1135] *De Tommaso v. Italy*, para. 116.
[1136] *Landvreugd v. The Netherlands*, paras. 60 and 67; *Olivieira v. The Netherlands*, paras. 54 and 60.

broadly for restrictions "justified by the public interest" but limited in their geographical scope'.[1137]

Thirdly, a policy intended to reverse the decline of impoverished inner-city areas by favouring new residents with a higher income: the Court found that this purpose fell under the restriction ground 'public interest'. It also confirmed what has been advanced in Chapter 1: that the drafters of Article 2 of Protocol 4 had added paragraph 4 to enable States to restrict movement in certain areas for reasons of 'economic welfare', 'whereas economic reasons could never justify restrictions on the right to leave one's country'.[1138] Therefore, the term 'public interest' covers all the restriction grounds in paragraph 3, *plus* 'economic welfare'. Moreover, if the limitation is related to economic welfare, the Government will have a wider margin of appreciation to decide on the exact reason justifying the measure. This is because, for the Court, socio-economic policies involve complex social, economic and political issues 'on which opinions within a democratic society may reasonably differ widely'. Therefore, in these instances, the Court 'will respect the legislature's judgment as to what is in the "public" or 'general' interest unless that judgment is *manifestly without reasonable foundation*'.[1139]

4.3.3 The proportionality principle

For the Court, the requirements deriving from the terms 'necessary in a democratic society' (Article 2(3) of Protocol 4) and 'justified by the public interest in a democratic society' (Article 2(4) of Protocol 4) are the same as those flowing from the principle 'commonly referred to as the test of proportionality'.[1140]

Regarding the question of *who* has to implement the proportionality principle, we may speak of a 'triple proportionality test'. Indeed, for the Court, this principle 'must apply in law and practice'.[1141] At the outset, this means that the legislator must find a 'balance between the competing public and private interests' in the abstract, and the Court can 'examine carefully the arguments taken into consideration during the legislative process'.[1142] Then, before taking the administrative[1143] or judicial decision to restrict movement, it is the 'authorities' duty'[1144] to balance the legitimate aim pursued by the law with the right of the individual concerned.

[1137] *Garib v. The Netherlands*, para. 110.
[1138] *Garib v. The Netherlands*, para. 109. We observe once again the lesser protection offered to the right to free movement within the country as opposed to the right to leave one's country (see Chapter 1).
[1139] *Garib v. The Netherlands*, paras. 137 and 139 [emphasis added]. The reference to 'reasonableness' also appears in the *travaux* of Protocol 4, where the drafters argued that restrictions on movement and residence had to be 'reasonable'. In fact, this was included in the initial draft of Article 2(3) of the Protocol, but later deleted (CoE Doc. AS/Jur XIII (10) 3, 10 November 1958).
[1140] *Bartik v. Russia*, no. 55565/00, 21 December 2006, para. 46. The Court's approach of assimilating paragraphs 3 and 4 of Article 2 contrasts with the view of the drafters of Protocol 4, who stated that, while States would be allowed to impose restrictions on particular persons under Article 2(3), any limitations based on the public interest under Article 2(4) would have to be 'of general application and not directed against individuals'. This interpretation followed from the wording of paragraph 4, which deals with restrictions in 'particular areas' (DH/Exp (61) 35 Final of 7 October 1961). See however the explanation below of *Garib v. The Netherlands*, where the Court found proportional a measure imposed on a single individual based on the public interest.
[1141] *Riener v. Bulgaria*, para. 128.
[1142] *Garib v. The Netherlands*, para. 138.
[1143] *Riener v. Bulgaria*, para. 126.
[1144] *Földes and Földesné Hajlik v. Hungary*, no. 41463/02, 31 October 2006, para. 36.

Finally, during periodic re-examinations of the measure or if the measure is challenged by the affected individual before a court, the judge once again has to implement this principle.[1145]

As to the content of the principle of proportionality, it can be divided into four elements: (1) Rational connection between the measure and the purpose; (2) The search for the least intrusive measure; (3) The balancing act and (4) Adequate safeguards against abuse.

Rational connection between measure and purpose

Any measure limiting movement must be *appropriate* to achieve its protective function.[1146] In order to know whether that is the case, there needs to be 'concrete evidence' that the person concerned poses a 'real risk' to public order, national security, public interest or any other goal protected by the law.[1147] For instance, in *Labitia v. Italy*, the fact that the applicant's wife was the sister of a Mafia boss was not sufficient evidence to establish that he posed a real risk to public order.[1148] Indeed, public order will not be safeguarded if the State limits the movement of a person who does not pose a real threat to public order, which makes the measure inadequate to achieve its prospective function. By contrast, in *Garib v. The Netherlands* the Court evaluated the different evidence available to it and concluded that the measures adopted (i.e. restrictions on the right to choose one's residence in certain areas) were effective in reducing the problem (the impoverishment of those areas); which meant that there was a rational connection between the measure and the purpose.[1149]

There will, of course, be no rational connection if the measure is imposed automatically[1150] without taking into account all the relevant information.[1151] The Court has qualified blanket and indiscriminate restrictions as being 'draconian'.[1152]

The search for the least intrusive measure

When the Court refers in a general manner to the proportionality principle, it does not stress the need for the authorities to look for the least intrusive measure available.[1153] However, there are elements in the case law which lead me to conclude that a 'necessity test' (in the sense of 'least intrusive measure test') is also part of the proportionality test required by the Court.

Firstly, there is one judgment in which the Court affirmed that, as a general principle, the authorities have to show that 'the interference with the rights protected *was no greater than was necessary* to achieve it'.[1154] Secondly, in that same case, the Court compared the proportionality principle enshrined in Article 2(3) of Protocol 4 to that in Article 12 ICCPR. It expressly

[1145] *Battista v. Italy*, no. 43978/09, 2 December 2014, para. 44.
[1146] *Bartik v. Russia*, para. 46.
[1147] *Labitia v. Italy*, para. 196.
[1148] *Labilita v. Italy*, para. 196.
[1149] *Garib v. The Netherlands*, para. 149.
[1150] *Riener v. Bulgaria*, para. 127.
[1151] *Gochev v. Bulgaria*, para. 53.
[1152] *Stamose v. Bulgaria*, para. 34.
[1153] *Gochev v. Bulgaria*, para. 44; *Garib v. The Netherlands*, para. 138.
[1154] *Bartik v. Russia*, para. 46.

referred to a paragraph of the Human Rights Committee's General Comment on Article 12, where the Committee stated that restrictive measures 'must be the least intrusive instrument amongst those which might achieve the desired result'.[1155] Thirdly, in *Landvreugd* and in *Olivieira v. The Netherlands*, one of the circumstances that led the Court to find no violation of the proportionality principle was the fact that the authorities had searched for less intrusive alternatives before imposing a more severe limitation on the right to free movement. The Amsterdam police, authorized by the Burgomaster, first issued to the applicants—persons involved in the drug scene—an eight-hour prohibition order (a less intrusive measure) which would prevent them from approaching an area of the city where drugs were often sold and consumed. It was only after the applicants returned to that area to use hard drugs in public for the fourth time that the Burgomaster himself issued a fourteen-day prohibition against them (a more severe measure).[1156]

It seems, however, that the 'necessity test' is not required when the purpose of the measure is the protection of economic well-being. In *Garib v. The Netherlands* (which concerned this type of measure) the Court stated that

'[it] is prepared to accept that it would have been possible for Parliament to regulate the situation differently. However, the central question under Article 2(4) of Protocol No. 4 is *not whether different rules might have been adopted* by the legislature, but whether, in striking the balance at the point at which it did, Parliament exceeded the margin of appreciation afforded to it under that Article'.[1157]

Perhaps the reason for this exception is that, in economic matters, it is more difficult to establish—compared to other policy areas—whether a less severe measure would have achieved the same result pursued by the law.

The balancing act

The proportionality test under both paragraphs (3) and (4) of Article 2 requires taking into account the particular circumstances of the applicant, so that the harm suffered by him is not disproportionate (in the strict sense) to the benefits gained by the public. For instance, in *Landvreugd* and in *Olivieira v. The Netherlands*, before imposing the fourteen-day prohibition order on the applicants, the Burgomaster had taken into account that they did not live or work in the area concerned, and had made provision for them to enter the neighbourhood with impunity for the purpose of collecting their social-security benefits. These factors led the Court to establish that the balancing act had been complied with.[1158]

The Court has not explicitly confirmed that the proportionality test implies a right to an individual decision on a case-by-case basis. Therefore, it appears that this test can be met by legislative balancing, i.e. by a law that takes into account the (abstract) individual interests of the persons that will be affected by the restrictions. Nevertheless, in both *Landvreugd* and *Olivieira v. The Netherlands*, the Court did examine the legislative balancing *and* the particular

[1155] *Bartik v. Russia*, paras. 30 and 46.
[1156] *Landvreugd v. The Netherlands*, para. 72; *Olivieira v. The Netherlands*, para. 65.
[1157] *Garib v. The Netherlands*, para. 157.
[1158] *Landvreugd v. The Netherlands*, para. 72; *Olivieira v. The Netherlands*, para. 65.

decision taken by the Burgomaster. Therefore, the existence of an individual decision is, at the very least, a relevant factor for assessing compliance with the proportionality principle.

When the purpose of the measure is the protection of economic welfare, the Parliament and the authorities have a wider margin of appreciation in the implementation of the balancing act. However, 'this does not mean that the solutions reached by the legislature [and the authorities] are beyond the scrutiny of the Court'.[1159] For instance, in *Garib v. The Netherlands* the Court examined several factors before deciding that the balancing act had been respected. Some of these elements were:

a) The fact that the measure foreseen in the Dutch Inner City Problems Act, according to which Dutch Burgomasters could limit the possibilities to move into impoverished areas of town, only affected relatively new settlers, i.e. those who had resided for less than six years in the city.
b) The fact that the Burgomaster could derogate from the length-of-residence-requirement in cases where strict application of the policy would be excessively harsh for the person concerned. The hardship clause was intended to meet medical and social emergencies, including situations of violence.
c) The fact that, in the particular case, the applicant had not specified why it was important for her to live in the area from which she had been excluded, and thus her unspecified personal preference could not override the public interest in reversing the economic decline of that area.[1160]

4.3.4 Procedural safeguards

In addition to the principle of proportionality, we may derive several procedural safeguards from the Court's case law which must be in place for a restrictive measure to comply with Article 2 of Protocol 4:

(1) If the domestic law does not foresee any limitations on the duration of the restriction, the Court will more likely find a violation of Article 2 of Protocol 4.[1161]
(2) If the measure is maintained over a lengthy period, the authorities must periodically carry out a re-examination of its justification and proportionality.[1162] For instance, if the person that initially posed a danger to public order stops presenting that danger, the restriction will cease to be appropriate to achieve its protective function.[1163] This re-examination must meet a certain quality standard. For example, in *Riener v. Bulgaria* the Court considered that merely informing the applicant of the prolongation of the restriction did not amount to a genuine review of the proportionality of the measure.[1164] Moreover, the re-examination must be carried out, at least in the final instance, by the courts.[1165]

[1159] *Garib v. The Netherlands*, para. 138.
[1160] *Garib v. The Netherlands*, paras. 144, 154 and 166.
[1161] *Riener v. Bulgaria*, para. 128; *Gochev v. Bulgaria*, para. 57 and *Battista v. Italy*, para. 47.
[1162] *Riener v. Bulgaria*, para. 124.
[1163] *Baumann v. France*, para. 66. In that case, the Court took note of the fact that the seizure of the applicant's passport, initially taken as part of an on-the-spot investigation on whether the person presented a danger to public order, had continued even after the investigation had been closed.
[1164] *Riener v. Bulgaria*, para. 124.
[1165] *Gochev v. Bulgaria*, para. 50; *Battista v. Italy*, para. 42.

(3) The principle of legal certainty must be respected. This means that the applicant must be able to ascertain the reason why his movement has been limited[1166] and that the authorities must communicate to the individual the decision to impose the restriction and all its extensions.[1167]
(4) The affected individual must be able to institute proceedings against the measure before an independent court[1168] that complies with the requirements of Article 6 ECHR.[1169] That court must be able to take account of all the factors involved, including those concerning the proportionality of the measure.[1170] The domestic procedures must guarantee due process safeguards[1171] and offer redress for the damage suffered if the measure is found to be unlawful or disproportionate.[1172]

4.4 The safeguards of the right to free movement for individuals in general: the Human Rights Committee

At the universal level, the guarantees offered to the right to free movement for individuals in general are laid down in paragraph 3 of Article 12, which reads:

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided 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.

The same safeguards correspond to the right to leave the country (Article 12(2) ICCPR). There is no equivalent to Article 2(4) of Protocol 4 (restrictions for public interest grounds) in the Covenant. In a similar manner to the previous section, I will scan the case law ('views') of the Human Rights Committee in order to fully understand how the Committee interprets these safeguards.[1173] Where relevant, the views will be compared to the General Comment No. 27: Article 12 (Freedom of Movement).

[1166] *Baumann v. France*, para. 65.
[1167] *Riener v. Bulgaria*, para. 129.
[1168] *Landvreugd v. The Netherlands*, para. 65; *Olivieira v. The Netherlands*, para. 58.
[1169] *Garib v. The Netherlands*, para. 155.
[1170] *Stamose v. Bulgaria*, para. 35; *Battista v. Italy*, para.42; *Gochev v. Bulgaria*, para. 50.
[1171] *Bolat v. Russia*, para. 69.
[1172] *Vito Sante Santoro v. Italy*, para. 45.
[1173] A case which was declared inadmissible for lack of jurisdiction but which is nonetheless interesting to note was *Basem Ahmed Issa Yassin et al. v. Canada* (Communication No. 2285/2013, 7 December 2017). The applicants were ten Palestinians who had been subjected to an order from the Israeli military commander of the occupied West Bank prohibiting them from entering a neighbourhood of the Palestinian village of Bil'in, which had been expropriated by Israel and transformed into an Israeli settlement area. By preventing the applicants from residing in a neighbourhood where their community had lived for centuries, Israel was restricting their right to choose their residence. Since Israel is not a Party to the Optional Protocol to the ICCPR (which entitles individuals to present communications before the HRC), the applicants focused on the fact that the two private corporations that had constructed the settlement area were registered in Canada. They thus filed a complaint against Canada alleging that this State had violated its extraterritorial obligation to ensure respect for Article 12(1) ICCPR by failing to provide the authors with effective remedies in holding the two corporations accountable for the violation of their right to choose their residence. However, the Committee found that the nexus between the State party's obligations under the Covenant, the actions of the two companies and the alleged violations of the authors' rights had not been sufficiently substantiated (para. 6.7.).

Once again, we need first to address the issue of the burden of proof: who needs to show before the Committee that the requirements of Article 12(3) ICCPR have been met?

In a high number of cases, the fact that the Government did not advance any justification for the movement restriction led the Committee to find an outright violation of Article 12. Though in theory, the Committee could examine *motu propio* whether the measure was lawful and proportionate 'on the basis of the material before it',[1174] it has never actually done so. For instance, in three early cases against Zaire (currently, the Democratic Republic of the Congo), the applicants were political opponents of dictator Mobutu. So as to hamper their political activism, they were subjected to 'administrative banning measures', which forced them to stay in their native villages. Since the Government did not 'furnish any information and clarifications'[1175] nor 'address the substance of the allegations',[1176] the Committee gave 'due weight to the author's allegations'[1177] and declared that Zaire had infringed the right to free movement. The opposite measure was taken against political dissident Mr. Ackla by Togo's dictator Gnassingbe: instead forcing him to stay in his home town, the President adopted a decision to deny him entry to his native town (allegedly) because of 'personal grudges' against the applicant. The Committee declared that, in the absence of an explanation justifying the restriction pursuant to paragraph 3 of Article 12, the right to free movement had been violated.[1178]

If a State rejects in general terms the applicant's allegations as unfounded[1179] or merely denies that the authorities ever targeted the person,[1180] this will not be considered a justification under Article 12(3) and the Committee will directly find a violation of the provision. Even if the State puts forward the legal basis for the restriction and the legitimate aim, not explaining how the proportionality principle has been implemented will also lead the Committee to find a violation of the right to free movement.[1181]

There is one safeguard, however, with which governments only have to demonstrate compliance if the applicant specifically mentions it in his application. Indeed, in *Peltonen v. Finland*, the Committee noted that the applicant had 'not claimed that the authorities' decision (…) infringed any of his other rights under the Covenant', and it thus did not require the State to show that this guarantee had been respected.[1182]

[1174] *El Dernawi v. Libya*, Communication No. 1143/2002, 31 August 2007.
[1175] *Mpaka-Nsusu v. Zaire*, Communication No. 157/1983, 26 March 1986, para 9.1.
[1176] *Birindwa Ci Birhashwirwa and Tshisekedi Wa Mulumba v. Zaire*, Communication No. 242/1987, 2 November 1989, para. 12.4.
[1177] *Mpandanijila Thsise et al. v. Zaire*, Communication No. 138/1983, 26 March 1986, para 9.
[1178] *Ackla v. Togo*, Communication No. 505/1992, 25 March 1996, para. 10. See also these two cases concerning the right to leave (Article 12(2) ICPPR) where the lack of arguments by the Government led the Committee to find a violation of Article 12(3): *Zoolfia v. Uzbekistan*, Communication No. 1585/2007, 30 July 2009, para. 8.3. and *El Ghar v. Libya*, Communication No. 1107/2002, 2 November 2004, para. 7.
[1179] *Olo Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, 20 October 1993, para 8.2.
[1180] *Yklymova v. Turkmenistan*, Communication No. 1460/2006, 20 July 2009, para 7.5.
[1181] *Claude Ory v. France*, Communication No. 1960/2010, 28 March 2014, para. 8.5.
[1182] *Peltonen v. Finland*, Communication No. 492/1992, 21 July 1994, para. 8.4.

4.4.1 Provided by law

A general law

As shown in Chapter 1, several drafters of Article 12 ICCPR considered that the only State organ empowered to impose limitations on the right to free movement should be the Parliament, given its role as the institution that channels the will of the people.[1183] However, the HRC does not seem to have followed the path opened by these drafters. The Committee has noted that States may restrict free movement 'if *the law* so provides', but without specifying what it means by this term.[1184]

It is true that, in some cases in which the Committee found that the measure had been lawful, the restriction had been imposed by a law enacted by Parliament:

a) In *Celepli v. Sweden*, the 1980 Aliens Act authorised the Government to prescribe restrictions against non-nationals for reasons of national security.
b) In *Claude Ory v. France*, the legal basis for the restriction was Law n° 69-3 of January 3 1969, relating to the exercise of itinerant activities and the regime applicable to persons circulating in France without domicile or fixed residence.
c) In *Peltonen v. Finland* (concerning the right to leave the country), the limitations were foreseen in the Passport Act. In its submissions to the Committee, the Government stressed that this law had been passed by Parliament.[1185]

Nonetheless, in *Karker v. France*, the only norm referred to by the Government that sanctioned the movement restrictions on the applicant was Governmental Decree (*ordonnance*) of 2 November 1945. No mention was made in the case files as to whether that Decree had been passed by the executive branch of the State in the exercise of powers delegated by a law enacted by Parliament. A reading of the Decree suggests that it was not, since its preamble does not refer to its legal basis and instead notes that the Decree had been passed as a matter of urgency by the 'provisional Government', i.e. the Government that was formed in the last year of the II World War and which lasted until the establishment of the French Fourth Republic in October 1946.[1186] Despite the odd legal basis of the restriction, the Committee considered that the measure was 'provided by law'.[1187] In sum, it appears that for the Committee, the requirement 'provided by law' will be satisfied if the restriction is laid down in a general rule originating either from the legislative or the executive power.

[1183] The Belgian, Argentinian and Danish delegates in the *travaux préparatoires* of the ICCPR, referring to Article 12(3), argued that it should be for the legislative power to apply limitations on the right to free movement, either in the constitution or in legislative acts, and that the adoption of restrictive measures should not be left to the discretion of the government unless it is empowered to do so by the legislation or the constitution (UN Docs. A/C.3/SR.955, 12 November 1959; A/C.3/SR.956, 13 November 1959 and A/CN.4/SR.955, 17 June 1968).

[1184] *El Ghar v. Libya*, para. 7 [emphasis added] and General Commment No. 27. The Oxford Dictionary defines 'the law' in a very broad manner, not constraining it to laws enacted by Parliament: 'The body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects (in this sense usually *the law*)'.

[1185] *Peltonen v. Finland*, para. 6.7.

[1186] Ordonnance n° 45-2658 du 2 novembre 1945 relative aux conditions d'entrée et de séjour des étrangers en France

[1187] *Karker v. France*, Communication No. 833/1998, 30 October 2000, para. 9.2.

What is important, however, is that the law covers the restriction for the entire duration of the measure. For instance, in *Marques de Morais v. Angola*, the National Criminal Investigation Division (NCID) confiscated the applicant's passport (thus limiting his right to leave the country) in accordance with the Penal Code. Although the decision limited the measure to a specific period, the NCID did not give him back his passport after that period had elapsed. For that reason, the Committee found that the restriction had ceased to be 'provided by law'.[1188]

No requirement of foreseeability

The HRC stated in General Comment No. 27 that the law which limits free movement must 'use precise criteria' and 'may not confer unfettered discretion on those charged with their execution'. Furthermore, the 'relation between right and restriction must not be reversed'.[1189]

However, the Committee does not strictly apply these safeguards in its views. In *Celepli v. Sweden*, the law merely foresaw that 'where it is required for reasons of national security, the Government may (…) prescribe restrictions and conditions regarding his place of residence'.[1190] It did not use precise criteria defining the behaviours that were to be considered a danger to national security, thus conferring unfettered discretion on the Government. Despite this, the Committee found that the measure complied with the requirements of the term 'provided by law' in Article 12(3). In *Claude Ory v. France*, the law obliged persons without a fixed abode to own a travel card, which had to be stamped every three months 'in order for them to be able to travel in France'.[1191] This measure thus restricted the freedom to move and to choose one's residence, however, the law reversed the relation between right and restriction, since the general rule was that everyone belonging to this class of persons was subjected to a restriction. Still, the Committee declared that the measure was lawful.[1192] Therefore, we may conclude that Article 12(3) does not contain a requirement of foreseeability of the law.[1193]

4.4.2 The legitimate aims

The HRC has made clear that restrictions may *only* be imposed for the reasons that appear in Article 12(3); this list is, therefore, *numerus clausus*.[1194] It should be noted that, unlike Article 2(4) of Protocol 4 ECHR, the ICCPR does not provide for restrictions on the ground of 'public interest'. On paper, this means that the ICCPR limits the situations in which States

[1188] *Marques de Morais v. Angola*, Communication No. 1128/2002, 29 March 2005, para. 6.9.
[1189] General Comment No. 27, para. 13.
[1190] *Celepli v. Sweden*, Communication No. 456/1991, 26 July 1994, para. 4.2. C.f. the ECtHR, which recognises that the law might use vague terms, but only if subsequent practice and case law narrows them down.
[1191] The reason for the measure was only disclosed by the Government in the proceedings before the Committee, as will be shown below.
[1192] *Claude Ory v. France*, paras. 2.1., 8.3. and 8.4.
[1193] C.f. the foreseeability safeguard in the case law of the ECtHR on Article 2(3) of Protocol 4.
[1194] *Sayadi and Vinck v. Belgium*, Communication No. 1472/2006, 22 October 2008, para. 10.5. See also the *travaux préparatoires* of the ICCPR, where the Belgian delegate explained that, with the phrase 'shall not be subject to any restrictions *except* those which…', the drafters 'had intended to emphasise that those where the only cases in which the right could be limited' (UN Doc. A/CN.4/SR.955, 17 June 1968). The first draft of Article 12(3) used the wording 'adopted for the specific reasons of…' (UN Doc. E/800, 28 June 1948).

can restrict movement to a greater extent than the European Convention.[1195] However, the case law of both human rights bodies points to a different conclusion. On the one hand, as shown above, the ECtHR allows for movement restrictions based on public interest only if these are limited to discrete areas of the country. On the other hand, in practice, the Committee has given States a large margin of appreciation for deciding which concrete measures fall under the grounds listed in Article 12(3).

For instance, in *Celepli v. Sweden*, the Committee simply '[bore] in mind that the State party has invoked reasons of national security to justify the restrictions on the author's freedom of movement' and in *Claude Ory v. France* it merely '[took] note of the State party's statement that the objective of these measures is to help to maintain public order'.[1196] The Committee thus does not call into question whether the reason provided by the State actually falls under one of the grounds in Article 12(3): it is sufficient that the State invokes one of these restriction grounds therein.[1197]

The aims that the Committee has found to amount to legitimate grounds for restricting movement within the country are:

(a) A measure imposed on a person suspected of being involved in terrorist activities, which falls under the restriction ground 'national security'.[1198]
(b) A measure imposed on a person suspected of maintaining close links with an Islamic organisation which uses violent methods. This measure also falls under the legitimate aim 'national security'.[1199]
(c) A measure imposed on persons who regularly change their place of residence in order to make sure that they remain identifiable and contactable. Such a measure falls under the ground 'public order'.[1200]

4.4.3 The proportionality principle

In its General Comment on Article 12, the Committee stresses that the principle of proportionality has to be respected 'not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law'.[1201] Therefore, it seems that

[1195] Bast, Von Harbou and Wessels 2022, p. 103.
[1196] *Celepli v. Sweden*, para. 9.2; *Claude Ory v. France*, para. 8.4. In the case against France, the lack of a stated legitimate aim was particularly salient, given that the French law did not provide any justification on why persons without a fixed abode were subjected to regular police controls over their movements.
[1197] The leeway granted to States by the Committee appears to confirm what the UK delegate had already anticipated during the drafting process of the ICCPR. This representative affirmed that the limitations under Article 12(3) were so broad and vague that 'they could be construed as permitting the imposition of almost any restriction' (UN Doc. A/C.3/SR.288, 18 October 1950).
[1198] *Celepli v. Sweden*, para. 9.2
[1199] *Karker v. France*, para. 9.2.
[1200] *Claude Ory v. France*, para. 8.4. The Committee's broad conception of the term 'public order' does not correspond to that of the drafters of Article 12(3) ICCPR, who agreed that this term covered only the absence of disorder, public safety and peace. They gave as examples of restrictions on movement based on public order traffic regulations and related matters, and limitations on the movement of persons in an overcrowded place where their physical safety was at stake (UN Docs. A/C.3/SR.957, 16 November 1959 and A/C.3/SR.958, 17 November 1959).
[1201] General Comment No. 27, para. 15.

a 'triple proportionality test' is required for a restriction measure to conform to Article 12(3).[1202]

Nonetheless, I have found one case in which the HRC did not ask the State to implement the proportionality principle: in *Peltonen v. Findland*, the mere fact that the aim adduced by the Government (national security and public order) amounted to a legitimate restriction ground was sufficient for the HRC to declare that the State had complied with Article 12(3). In its submissions, the State party had alleged that the measure was proportional (albeit without explaining why), but the Committee did not analyse whether that was actually the case.[1203]

I will now examine the elements of the proportionality principle in light of the views of the Committee.

Rational connection between measure and purpose

Measures put in place by States which restrict free movement must be 'appropriate to achieve their protective function'.[1204] This element is related to the evidence concerning whether the particular person poses a threat to the interest protected by the law. For instance, in *Sayadi and Vinck v. Belgium*, the fact that a criminal investigation which had been initiated against the applicants was later dismissed for lack of evidence meant that 'the authors [did] not pose any threat to national security or public order',[1205] and therefore the restriction on the movement on these particular persons did not serve to protect national security or public order.

At times, however, the Committee is not very demanding when it comes to asking governments to show that the particular person is a threat to the interest protected by the law. For example, in *Karker v. France*, the Committee was contempt that 'the State party produced evidence to the domestic courts that Mr. Karker was an active supporter of a movement which advocated violent action'. The Committee was referring to the judgment of the Administrative Tribunal of Paris which sanctioned the measure in response to Mr. Karker's lawsuit. However, before the Committee, the applicant produced new evidence: a judgment of a Parisian court convicting a newspaper for having called Mr. Karker an active terrorist without substantiating that accusation.[1206] The HRC did not discuss whether this other evidence was relevant for ascertaining the dangerousness of the applicant.

The search for the least intrusive measure?

In General Comment No. 27, the Committee asserts that restrictions on movement 'must be the least intrusive instrument amongst those which might achieve the desired result'.[1207] However, I have not found any decision in which the HRC examined whether the purpose alleged by the State could have been achieved by less intrusive means, which makes me doubt

[1202] See also above, on the 'triple proportionality test' required by the ECtHR.
[1203] *Peltonen v. Finland*, paras. 6.8. and 8.4.
[1204] *Sayadi and Vinck v. Belgium*, para. 10.5; *Zoolfia v. Uzbekistan*, para. 8.3.
[1205] *Sayadi and Vinck v. Belgium*, para. 10.8.
[1206] *Karker v. France*, para. 9.2.
[1207] General Comment No. 27, para. 14.

whether the 'necessity test' is actually part of the proportionality test under Article 12(3) ICCPR.

A weak balancing act

The requirements of the balancing act (i.e. the balance between the harm caused to the individual and the benefit gained from it) appear to be relatively weak. The only decision in which this element was explicitly addressed was *Karker v. France*, where the HRC affirmed that 'the restrictions of movement on Mr. Karker allowed him to reside in a comparatively wide area'. This circumstance was sufficient for the Committee to find that the balancing act had been complied with, even though he had been separated from his family and had been refused permission to temporarily leave the assigned area on several occasions.[1208]

Consistency with other rights in the Covenant?

This safeguard appears in the text of Article 12(3) ICCPR, and it is connected to the balancing act, since the harm caused to the individual by the restriction on movement may, in turn, amount to a violation of another right in the Covenant. For example, an otherwise valid restriction that poses a risk to a person's physical security by requiring residence in a dangerous location would not comply with Article 12(3).[1209] However, so far, this safeguard has not offered any additional protection to applicants, given that, in the two cases in which the Committee could have addressed this element, it found that the complaints concerning the 'other rights in the Covenant' were inadmissible.

On the one hand, in *Celepli v. Sweden*, the applicant alleged that the measure restricting his movement had violated Article 7 (prohibition of degrading treatment) because

> 'he and his family have been harassed by the Swedish security police, and that they have been isolated and discriminated against in their municipality because the Government and the media have labelled them as terrorists. The author also states that his health has deteriorated and that he suffers from a "post-traumatic stress disorder" due to his experiences with the Swedish authorities.'[1210]

The Committee dismissed his claim under article 7 as unsubstantiated for the purposes of admissibility without explaining why,[1211] although we may hypothesise that the reason for the dismissal was that the allegations did not amount to degrading treatment.

On the other hand, in *Karker v. France*, the applicant argued that the restriction on movement was inconsistent with his right to family life because he had been assigned to a residence hundreds of kilometres removed from his family in a rural area. Given that he had been assigned to five different localities within two years, and that the authorities could issue a new compulsory residence order at any time, the applicant alleged that it was unreasonable to require his family to change residence and interrupt the social life and schooling of the children every time the authorities changed the conditions of Mr. Karker's order. The

[1208] *Karker v. France*, paras. 5.4., 7 and 9.2.
[1209] Hathaway *et al.* 2018, p. 9.
[1210] *Celepli v. Sweden*, paras 3.2.
[1211] *Celepli v. Sweden*, para. 6.1.

Committee noted that Mr. Karker had requested modification of his conditions on residence on several occasions so that he could join his family. These requests were denied. However, since Mr. Karker 'could have appealed the denial to the competent administrative tribunal' but failed to do so, the Committee found that the author's claim under article 17 of the Covenant (right to family life) was inadmissible.[1212]

4.4.4 No procedural safeguards

In light of the case law of the HRC, Article 12(3) ICCPR does not appear to include any procedural safeguards.[1213]

In the early cases against Zaire, the Committee underlined the fact that the measures forcing the applicants to stay in their home towns had been indefinite,[1214] that it had lasted for 'long periods'[1215] and for more than a year.[1216] Although the reason that led the Committee to find a violation of Article 12(1) ICCPR was the lack of response by the Government to the applicants' allegations, the references to the duration of the measures might have been an indication that long-term restrictions on movement do not conform to the proportionality principle under Article 12(3). However, the later decision *Karker v. France* leads to the conclusion that duration is not a relevant factor for the Committee. In that case, the applicant alleged that the measure forcing him to reside in a particular town was 'prolonged indefinitely', i.e. that it was not limited in time. In fact, the measure lasted for at least 7 years.[1217] Despite this, the Committee did not address the issue of duration and declared that the measure was in compliance with Article 12(3).

On a different note, in General Comment No. 27, the Committee affirms that States should ensure that 'reasons for the application of restrictive measure are provided' to the person concerned.[1218] However, in *Celepli v. Sweden*, the applicant alleged that the grounds for the limitation on movement were not disclosed to him, yet the HRC did not address this argument and concluded that the restriction complied with the requirements of Article 12(3) ICCPR.[1219]

Another procedural safeguard which Article 12(3) does not contain is the need for the State to carry out a periodic re-examination (*motu propio*) of the justification of the measure. In *Karker v. France*, the applicant alleged that the authorities had prolonged the restriction several times without reviewing, on each occasion, whether the continuation of the measure was proportional. The Committee, however, blamed Mr. Karker for not having challenged before domestic courts 'the necessity of subsequent restriction orders'.[1220] In *Celepli v. Sweden*, the

[1212] *Karker v. France*, paras. 5.4., 5.6. and 8.4.
[1213] Unlike Article 2(3) and (4) of Protocol 4 ECHR.
[1214] *Mpaka-Nsusu v. Zaire*, para. 9.2.
[1215] *Mpandanijila Thsise et al. v. Zaire*, para. 10.
[1216] *Birindwa Ci Birhashwirwa and Tshisekedi Wa Mulumba v. Zaire*, para. 13.
[1217] It was imposed on him in October 1993 and, at the time of the Committee's decision (30 October 2000), he was still subjected to the residence order.
[1218] General Comment No. 27, para. 15.
[1219] *Celepli v. Sweden*, paras. 3.1. and 9.2.
[1220] *Karker v. France*, paras. 5.4. and 9.2. C.f. the position of the ECtHR, which is quite strict in requiring a full periodic re-examination of the proportionality of the measure.

State argued that the domestic courts had reviewed the continued necessity of the restriction whenever he was sentenced for not complying with the residence order. This 'review' was not part of a periodic re-examination of the measure's compliance with the principle of proportionality, but took place in the context of occasional sanctions against the applicant. Despite this, the Committee considered that it amounted to a '*motu propio* review' of the justification of the measure, which played in favour of the State.[1221]

Finally, Article 12(3) does not enshrine a right to appeal the lawfulness of the restriction before a domestic court. Again in *Celepli v. Sweden*, the State party contended that 'article 12 does not contain a right to appeal against a decision restricting a person's liberty of movement' and that, in any case, there were 'compelling reasons of national security which made it necessary to restrict the author's freedom of movement *without providing a possibility of appeal*'. By concluding that the measure had complied with Article 12(3) ICCPR, the HRC implicitly accepted these arguments.[1222]

4.4.5 Indirect restrictions on movement

Indirect restrictions affecting Article 12(1) ICCPR

In several cases, the Committee has interpreted that certain circumstances not directly related to freedom of movement and choice of residence nonetheless affect Article 12(1), thus expanding the reach of Article 12(3) safeguards to new situations.

The first two such cases were *Bwalya v. Zambia* and *Kalenga v. Zambia*. In both instances, the applicant was a political activist opposed to the policies of the first President of independent Zambia, Mr. Kenneth Kaunda. The facts of the cases do not disclose that the applicants were specifically subjected to limitations on their freedom of movement; instead, they complained that they had been living under constant surveillance, harassment and intimidation by the police. These allegations were sufficient for the Committee to find interference with the right to free movement.[1223]

On the other hand, in *Jimenez Vaca v. Colombia*, the applicant was a legal adviser to several trade unions in Medellín. Because of the threats he received from some unknown men, he closed his office and moved to Bogotá. He alleged that he had been prevented from practising as a lawyer in the place of his choosing. For the Committee, such a situation affecting the right to work also interfered with the right to choose one's residence under Article 12(1). Moreover, this case also shows that the rights under Article 12 can be violated when private individuals, through the exercise of violence, interfere with the free movement of other individuals and the State does nothing to prevent or remedy it.[1224]

Lastly, in *Yklymova v. Turkmenistan* the author was the daughter of a former Minister who had been sentenced for conspiracy to overthrow the President. She had her ID confiscated. The measure was thus not explicitly directed at limiting her movement. However, since

[1221] *Celepli v. Sweden*, paras. 7.4. and 9.2.
[1222] *Celepli v. Sweden*, paras. 7.3., 7.5. and 9.2.
[1223] *Bwalya v. Zambia*, Communication No. 314/1988, 14 July 1993, paras. 3.3. and 6.5.; *Kalenga v. Zambia*, Communication No. 326/1988, 27 July 1993, paras. 2.3. and 6.4.
[1224] *Jiménez Vaca v. Colombia*, Communication No. 859/1999, 25 March 2002, paras. 3.5. and 7.4.

Turkmenistan's law obliged citizens to have an ID card in order to live in Ashgabat (the country's capital and the city where she resided), she was forced to move to a different town. For the Committee, the confiscation of her ID amounted to an indirect restriction on her right to free movement.[1225]

Indirect restrictions which do not interfere with Article 12(1) ICCPR

Not all measures having some connection to free movement and free choice of residence interfere with Article 12 ICCPR.

The case *Gillot et al. v. France* concerned a series of referendums about the political future of New Caledonia, an archipelago in the southwest Pacific Ocean that forms part of overseas France. In order to vote in these referendums, the French Government required nationals to have continuously lived in the islands for at least 20 years. The applicants in the case were not eligible for the ballots because they had lived in mainland France for some time. They argued that 'liberty of movement exists only to the extent that such movement or establishment of a new residence is not penalized by the annulment of another Covenant right, namely the right to vote'. However, the Committee accepted the State's argument that 'the procedures for determining the electorate for the referendums (…), while affecting the right to vote, have no relevance to liberty of movement or choice of residence'.[1226]

In *Williams Lecraft v. Spain*, the applicant was a black Spaniard who was stopped by a police officer at a train station for an identity check. No one else on the train platform was asked for their identity cards. She was escorted to an office within the train station to record her personal details. While the Committee found that this identity check had been carried out for racist reasons (thus violating the prohibition of discrimination on grounds of race under Article 26 ICCPR), the measure did not amount to a restriction on free movement.[1227]

Finally, in *I.T. v. Kazakhstan*, the applicant was fined for living at an address different from that which he had registered at the local Department of Internal Affairs. The Committee considered that 'the fine imposed on the author cannot be described as a restriction on the author's freedom of movement' and declared the application inadmissible. Thus, if a State requires individuals to register their address and does not place any obstacles to changing that registration, the imposition of a fine on persons who move out of their home without modifying the registration does not interfere with the right to choose one's residence.[1228]

[1225] *Yklymova v. Turkmenistan*, paras. 3.3. and 7.5.
[1226] *Gillot et al. v. France*, Communication No. 932/2000, 15 July 2002, paras. 5.2., para. 4.3. and 10.6.
[1227] *Williams Lecraft v. Spain*, Communication No. 1493/2006, 27 July 2009, paras. 6.4. and 8.
[1228] *I.T. v. Kazakhstan*, Communication No. 2140/2012, 28 March 2017, para. 6.4. C.f. *Bolat v. Russia*, where the ECtHR did consider that imposing a fine on the applicant for allegedly having moved out of his registered address without registering his new place of residence amounted to an interference with Article 2(1) of Protocol 4 ECHR.

4.5 Comparison: The safeguards of the right to free movement of asylum-seekers vs. the safeguards for individuals in general

This section deals with part of the second question posed at the beginning of this chapter: Does international and European human rights law offer higher protection to freedom of movement under the law applicable to all individuals than under the law specifically applicable to asylum-seekers?

Given that the law protecting the right to free movement of all individuals is double-layered, one conformed by the ICCPR and one by Protocol 4 to the ECHR, I will deal with each treaty separately before coming to a general conclusion.

4.5.1 The Human Rights Committee's views vs. Refugee Convention doctrine

In some respects, the case law of the HRC provides more robust safeguards of the right to free movement than the Refugee Convention (as interpreted by legal doctrine):

(a) *The need to adopt a general norm:* Legal commentators implicitly reject that Article 31(2) RC obliges States to adopt a general norm that provides a legal basis for each particular measure that limits free movement. UNHCR affirmed on one occasion that the criteria for restricting the movement of asylum-seekers 'must be established by law', but without specifying whether the source of this assertion was the ICCPR or the Refugee Convention. Regarding Article 26 RC, one author and UNHCR explicitly concede that administrative practice may limit free choice of residence of lawfully present asylum-seekers. In contrast, the HRC, while not requiring the existence of a law enacted by Parliament, does oblige States to adopt a general norm (such as a governmental Decree) that provides a legal basis during the entire duration of the restriction on movement.

(b) *Numerus clausus safeguard*: Except for four authors, there is a consensus in legal doctrine (and in UNHCR) that States have no limits as to the specific grounds they may invoke to restrict the movement of asylum-seekers. As to Article 26 RC, only one author excludes 'public order' and 'national security' from the legitimate reasons, while the rest of the authors (and UNHCR) do not set a limit to the permissible restriction grounds. In contrast, the HRC has been clear that the authorities may only invoke the restriction grounds of Article 12(3), even if the Committee grants States a large margin of appreciation for interpreting which specific situations fall under each of these grounds.

(c) *Limitations on the right to choose work*: In Refugee Convention doctrine, there are opposing views as to whether limitations on the right to select a job affect the right to choose one's residence under the Convention. For its part, the HRC has emphasised that such a situation does interfere with Article 12(1) ICCPR.

When it comes to the proportionality test and to procedural safeguards, however, the ICCPR is just as weak as the Refugee Convention. Firstly, the element of *rational connection* between the restrictive measure and its prospective function is supported by the majority of the Convention doctrine (even if only in relation to Article 31(2)) and by the HRC. Nonetheless,

under both regimes, States do not need to provide very strong evidence to show that the individual poses a threat to the public good protected by the measure.[1229]

As for the necessity test, it is contested in legal doctrine whether or not States have to look for the least intrusive measure when limiting the movement of unlawfully present asylum-seekers under Article 31(2) RC (5 authors posit that they don't, 5 authors and the Michigan Guidelines argue that they do). There is consensus that such a test is not required in relation to lawfully present asylum-seekers (Article 26 RC). UNHCR is ambiguous on the matter. For its part, the HRC states in its General Comment No. 27 that the authorities ought to apply the least limiting measure; however, in none of the decisions analysed has the Committee actually required the implementation of a necessity test.

Thirdly, there are more authors who argue that State authorities do *not* have to carry out a balancing act under Article 31(2) RC (7 authors) than those who argue that they do (4 authors).[1230] There is consensus that Article 26 RC does not contain such a test. A similar situation is apparent in the Committee's case law: the HRC has only applied the balancing act in one case, and has not been very demanding as to what that test entails—it only required from the authorities that they assign the applicant to a wide area, regardless of any other personal circumstances.[1231]

In the fourth place, some authors (and UNHCR) implicitly or explicitly reject the existence in Article 31(2) and Article 26 RC of a right to appeal the proportionality of a restrictive measure before a court.[1232] Similarly, the HRC has implicitly accepted the argument that Article 12(3) ICCPR does not contain a right to appeal a decision constraining a person's liberty of movement.[1233]

As a final observation, it is interesting to note that the text of both the Refugee Convention and the ICCPR enshrine a safeguard which is unique to that treaty. On the one hand, Article 26 RC includes a guarantee of non-discrimination, i.e. lawfully present asylum-seekers can only be subjected to the same restrictions as 'aliens generally in the same circumstances'. On the other hand, Article 12(3) ICCPR lays down that restrictions on movement must be 'consistent with the other rights recognized in the present Covenant'. However, neither of these 'exclusive'[1234] safeguards is very useful for protecting the right to free movement. Some

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[1229] Compare Section 4.2.1—sub-section *What is the meaning of necessary?*—and Section 4.4.3. While Hathaway and Klammer argue that the evidence requirements are lower in cases of restrictions on movement than in detention cases, the HRC in *Karker v. France* did not discuss some of the evidence provided by the applicant which might have proved that he was not a real danger to national security.

[1230] Moreover, those authors who derive the requirement of a full proportionality test (including a balancing act) from Article 31(2) RC do not make clear the method of interpretation used to come to this conclusion. Only Noll makes explicit that he derives this obligation from the 'semantic construction' of the provision (Article 31(1) VCLT, a textual reading of the article).

[1231] *Karker v. France*.

[1232] Most authors keep silent on the matter; Edwards implicitly rejects it; and for Zieck, the review of the decision to restrict movement is merely a desirable State policy, not a subjective right. Only Hathaway and Diehl assert that Article 31(2) RC require States to periodically re-examine the proportionality of the measure, but they do not specify whether that review has to be carried out by a court, nor do they argue that asylum-seekers have an individual right to challenge the necessity of the measure.

[1233] *Celepli v. Sweden*.

[1234] The need for consistency between restrictions on movement and other rights was also recognised by the drafters of Protocol 4 ECHR. This safeguard was not added to Articles 2(3) or 2(4) of the Protocol because 'it seemed clear (…) that the rights and freedoms protected by the Convention and its Protocols form an

legal commentators (3 or 4 authors)[1235] suggest that Article 26 in fact allows States to impose refugee-specific restrictions; and some of the authors who reject this possibility[1236] nonetheless state that the non-discrimination safeguard in Article 26 does not provide much extra protection for asylum-seekers when compared to other standards of non-discrimination used in different articles of the Refugee Convention. Similarly, the safeguard 'consistent with other rights' has never been enforced on States in the Committee's views (even when the HRC had the chance to do so). Moreover, the Committee reverses the burden of proof and requires individuals to show that the restriction on movement imposed on them was consistent with the other Covenant rights.

In sum, individuals in general enjoy a better protection of their right to free movement under the HRC's case law than asylum-seekers do under the Refugee Convention (as interpreted by legal doctrine). However, the difference between the two standards of protection is not as radical as I had expected.

4.5.2 The strong protection of the European Court of Human Rights

The deficiencies of the case law of the HRC are compensated by the strong safeguards provided by the ECtHR to the right to free movement for individuals in general under Article 2 of Protocol 4:

(a) *Accessible and foreseeable general laws*: For the Court, not only must the particular restriction have a basis in a general law, but that law, in turn, has to comply with the country's Constitution. Moreover, the law must be accessible and foreseeable. This latter element entails that the types of individual behaviours that may lead to the imposition of a restriction on movement and the exact scope of that restriction must be formulated with precision in the law (or in subsequent domestic practice interpreting that law). The requirement of foreseeability makes up for the wide margin of appreciation that the Court grants States to choose (within the margins of the *numerus clausus* grounds of Article 2(3) and (4)) the concrete aim pursued by the measure. Admittedly, the foreseeability requirement is not as strong a safeguard when the purpose of the measure is the economic well-being of the country, since the Court grants an even wider margin of appreciation to States in these cases. However, even in these instances, the Court will scrutinise whether or not the specific purpose alleged is 'manifestly without reasonable foundation'.[1237]
(b) *A strict 'rational connection' requirement*: The Court has set a high threshold of the 'concrete evidence' that States have to submit to it in order to prove that the individual poses a 'real risk' to the public good protected by the measure.[1238]

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inseparable whole'. Moreover, enshrining this phrase in Article 2 was considered dangerous because, if limited to a single article, 'it might lead to the other articles being interpreted in the opposite sense' (CoE Doc. AS/Jur XIII (10) 3, 10 November 1958). Nevertheless, the Covenant makes this safeguard more visible by including it explicitly in the text of Article 12(3).

[1235] Depending on how the position of Marx is interpreted, which, as shown above, is confusing.

[1236] Goodwin-Gil and McAdam, and Slingenberg.

[1237] *Garib v. The Netherlands*.

[1238] *Labitia v. Italy*, *Garib v. The Netherlands*.

(c) *A necessity test (possibly with one exception)*: Unlike the HRC, the Court has examined on two occasions whether the authorities had searched for the least intrusive measure on a person's freedom of movement.[1239] It seems, however, that the necessity test is not required when the purpose of the restriction is the protection of the economic well-being of the country, possibly because of the complex choices involved in this policy area.[1240]
(d) *A full balancing act:* In order to determine whether the balancing act has been complied with, the Court examines several individual factors, not merely whether the area to which the person was assigned was sufficiently wide.[1241]
(e) *Robust procedural safeguards*: The ECtHR requires not only that the individual affected by a restrictive measure has the possibility to challenge its lawfulness before an independent court, but also that the authorities (and, in the final instance, the courts) periodically re-examine its justification and proportionality. Moreover, the affected person must be informed of the reasons for the restriction imposed on her. Finally, a measure without a time-limit will more likely amount to a violation of Article 2(1).

4.5.3 Conclusion of the comparative analysis

We may now answer the question in the affirmative: international and European human rights law offers more solid safeguards to the right to free movement and choice of residence of individuals in general than of asylum-seekers specifically.

In response to this assertion, one might argue that, in fact, this conclusion is not relevant, because asylum-seekers are also protected by the ICCPR and Protocol 4 ECHR. However, as has been shown in Chapter 2, asylum-seekers only fall under the personal scope of Article 12 ICCPR and Article 2(1) of Protocol 4 ECHR if the State so decides, i.e. if the State regards them as being 'lawfully within the territory' under domestic law. In contrast, the right to free movement under the Refugee Convention *always* applies to (at least some) asylum-seekers (regardless of domestic law): as analysed in Chapter 2, there is a consensus in legal doctrine that Article 31(2) RC accrues, at a minimum, to 'non-criminalisable' asylum-seekers.[1242]

Moreover, even if the State decides to regard asylum-seekers as 'lawful' in the sense of Article 12(1) ICCPR, they may grant them 'different, lesser, rights of freedom of movement to citizens'.[1243] The different guarantees provided by Article 12(3) to nationals and to asylum-seekers flows from a statement of the Human Rights Committee, according to which 'any restrictions on his or her rights guaranteed by article 12, paragraphs 1 and 2, *as well as any treatment different from that accorded to nationals*, have to be justified under the rules provided for by article 12, paragraph 3.'[1244] Similarly, in General Comment No. 15, the HRC affirmed that 'difference in treatment between non-nationals and nationals (…) *is permissible* only in

[1239] *Landvreugd v. The Netherlands* and *in Olivieira v. The Netherlands*.
[1240] *Garib v. The Netherlands*.
[1241] *Landvreugd v. The Netherlands*, *Olivieira v. The Netherlands* and *Garib v. The Netherlands*.
[1242] I.e. those who have complied with the requirements of Article 31(1) RC: coming directly from a territory where their life or freedom was threatened, presenting themselves without delay to the authorities and showing good cause for his illegal entry.
[1243] Joseph and Castan 2013, p. 397.
[1244] General Comment No. 27, para. 4 [emphasis added].

accordance with Article 12(3)'.[1245] These assertions, albeit strange,[1246] reinforces my view that the most important treaty protecting freedom of movement of asylum-seekers is the Refugee Convention, general human rights treaties playing a very residual role.

Taking all these factors into account, the fact that the Refugee Convention offers lower standards to the right to free movement than the ICCPR and Protocol 4 ECHR reinforces the concept of 'migration exceptionalism' or a 'two-tier human rights system' which has been identified by legal scholars in other areas of human rights law.[1247]

4.6 Case study: Spain

Turning now to the Spanish case, this section will examine the guarantees that Spanish domestic law provides to the right to free movement of asylum-seekers, and compare it with those afforded to nationals and individuals in general. As a preliminary note, it is interesting to underline that Spain is one of the few European countries (together with the Netherlands, Greece, Latvia and Moldova) that has made a reservation to Article 26 of the Refugee Convention, which reads:

'Article 26 of the Convention shall be interpreted as not precluding the adoption of special measures concerning the place of residence of particular refugees, in accordance with Spanish law.'

This reservation does not necessarily mean, however, that asylum-seekers cannot derive safeguards from Spanish domestic law.

4.6.1 The Constitutional safeguards of the right to free movement of asylum-seekers and of nationals

As studied in Chapter 2, even though Article 19 of the Spanish Constitution (CE) only refers to the freedom of movement of nationals, the personal scope of the right has gradually expanded through domestic case law: in 1993, the Constitutional Court established that the legislator could extend this right to foreigners (but that it did not have an obligation to do so), and in the 2020 and 2021 the Supreme Court concluded that asylum-seekers derive their right to free movement directly from Article 19 CE, as well as from certain provisions of the

[1245] General Comment No. 15 (The Position of Aliens Under the Covenant, 11 April 1986; HRI/GEN/1/Rev.1), para. 8; also quoted in Schabas 2020, p. 30.
[1246] The text of Article 12(3) does not seem to allow for different treatment between nationals and migrants. This provision lays down the safeguards against restrictions on the right to free movement, without distinction as to the subjects of those limitations. Moreover, the assertion of the HRC seems to be at odds with Article 2(1) ICCPR, according to which 'each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*' [emphasis added]. In fact, this statement contradicts the Committee's own reasoning in paras. 6 and 7 of General Comment No. 15: 'once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant (…) They have the right to liberty of movement and free choice of residence (…) There shall be *no discrimination between aliens and citizens* in the application of these rights' [emphasis added].
[1247] See Section 6.2 of the introduction of this study

Law on the Right to Asylum (Article 18(2)(d), amongst others).[1248] And so, what guarantees does the Constitution offer to asylum-seekers in this context?

The first safeguard relates to the type of norm that may impose limitations to free movement and residence. Articles 53 and 81 CE provide that:

Article 53

1. The rights and liberties recognised in Chapter Two of the present Title are binding for all public authorities. The exercise of such rights and liberties (…) may be regulated only by law which shall, in any case, respect their essential content.

Article 81

1. Organic laws are those relating to the development of fundamental rights and public liberties, those which establish Statutes of Autonomy and the general electoral system, and other laws provided in the Constitution.

2. The passing, amendment or repeal of the organic laws shall require an absolute majority of the members of Congress in a final vote on the bill as a whole.

Therefore, restrictions on the right to free movement under Article 19 must be foreseen in a special type of law, an *organic law*, which was thought up by the constituent assembly to maintain the political consensus in the development of the essential aspects of the Constitution.[1249] In the judgments mentioned above, the Supreme Court was asked to analyse whether the Law on the Right to Asylum (LRA) provided a legal basis for the movement restrictions imposed on asylum-seekers in Ceuta and Melilla. The LRA is not an organic law, and therefore the Court could have simply concluded that the LRA cannot provide a legal basis for a constitutional right. Nonetheless, the Court did not pay attention to this aspect and instead examined the content of the law, holding that there was no provision in the law limiting the stay of asylum-seekers to a part of the national territory.[1250]

While the Constitution does not lay down a *numerus clausus* list of legitimate grounds for limiting free movement, the Constitutional Court has held that fundamental rights may only be restricted to pursue 'constitutionally relevant goods and interests'.[1251] Similarly, the proportionality test is not expressly formulated in the Constitution, but the Court has interpreted that any limitations to fundamental rights must be 'necessary to achieve the legitimate goal pursued and proportionate to attain that aim'.[1252] In the judgment on Ceuta and Melilla, the Supreme Court found that deterring irregular migration is not a legitimate

[1248] It will be recalled that the Supreme Court is distinct from the Constitutional Court (see Chapter 2).
[1249] Ruiz Robledo 2018, p. 223. The legislator must, moreover, respect the essential content of the right. Determining the essential content of each right is a question of casuistic task (Judgment of the Constitutional Court 11/1981, 8 April). However, this safeguard does not seem very relevant for the right to free movement since, unlike other complex rights such as the right to strike, the essential content of the freedom to move and to choose one's residence is quite clear-cut.
[1250] Judgment of the Supreme Court 2497/2020, 29 July, Point of Law n. 3 [emphasis added].
[1251] Judgment of the Constitutional Court 292/2000, 4 January.
[1252] *Ibid.* However, 'the requirements of proportionality must be analysed from the perspective of a different standard than that required by the right to personal liberty' (Judgment of the Constitutional Court 169/2001, 14 August 2001, Point of Law n. 2). Therefore, the proportionality test that the authorities must carry out when limiting the right to free movement is not as strict as the one they must implement when adopting a detention measure.

ground for restricting the right to free movement of asylum-seekers under Article 19 CE.[1253] It thus did not deal with the question of whether the measures complied with the proportionality test.

Finally, pursuant to Article 53(2) CE, the constitutional right to free movement must be protected by domestic courts in all types of proceedings 'by means of a preferential and summary procedure'. Persons subjected to restrictions may also submit 'an individual appeal for protection («recurso de amparo») to the Constitutional Court'.

In principle, then, once the Supreme Court clarified that asylum-seekers fall under the personal scope of Article 19 CE, all constitutional safeguards to the right to free movement are applicable to them, and it would appear that no distinction is made at the constitutional level between citizens and asylum-seekers. Nonetheless, a closer reading of the aforementioned judgment of the Constitutional Court, rendered in 1993, leads to a different conclusion. In that decision, the Court affirmed that:

'The protection of Article 19 for foreigners does not have to be on the same terms as for Spaniards.'[1254]

A year later, the same Court concluded that, unlike Spaniards, 'the *conditions* under which a foreigner has access to Article 19 rights are to be determined by the legislator'.[1255] Therefore, the Constitutional Court not only gave the legislator power to decide over the personal scope of the right to free movement of foreigners (a discretion that the Supreme Court took away in 2020/2021), but also over the safeguards to be afforded to this right.

These statements are surprisingly similar to the declaration made by the Human Rights Committee in its General Comment No. 27, which has been noted above:

'any restrictions on his or her rights guaranteed by article 12, paragraphs 1 and 2, as well as *any treatment different from that accorded to nationals*, have to be justified under the rules provided for by article 12, paragraph 3.'[1256]

The precise consequence of the Constitutional Court's assertions are unclear, given that there has not been more case law of this Court on the right to free movement of foreigners since then. Most likely, it means that the proportionality principle may be applied in a more lenient manner to asylum-seekers than to nationals. Paraphrasing Joseph and Castan (who were referring to the HRC), 'the [Constitutional Court] therefore recognises that [asylum-seekers] (…) may potentially be granted different, lesser, rights of freedom of movement to citizens'.[1257]

[1253] Judgment of the Supreme Court 2662/2020, 29 July, Point of Law n. 2. More precisely, the Court asserted that 'there exist no relevant interests that would justify limiting this fundamental right'. While the Government did not explicitly state before the Court the purpose of limiting the right to free movement of asylum-seekers in Ceuta and Melilla, there is a consensus among legal commentators and independent institutions that the aim of this measure is to control migration, avoid pull factors (Churruca Muguruza *et al.* 2020, p. 10; Spanish Ombudsman 2021, p. 65) and serve the deterrence goals dictated by the EU (Barbero 2021, p. 199; Ferrer-Garrado and Albetmas 2016, p. 529).
[1254] Judgment of the Constitutional Court 94/1993, 22 March, Point of Law n. 3.
[1255] Judgment of the Constitutional Court 242/1994, 20 July, Point of Law n. 4.
[1256] General Comment No. 27, para. 4 [emphasis added].
[1257] Joseph and Castan 2013, p. 397.

4.6.2 The legal safeguards of the right to free movement of asylum-seekers and for individuals in general

Once established that the Spanish Constitution offers fewer safeguards to the right to free movement of asylum-seekers than to nationals, this section will examine whether the same differentiation can be identified at the legislative level: I will compare certain provisions of the Decree on Reception Conditions of Refugees with specific articles of the Criminal Code, all of which relate to free movement.

Asylum-seekers: The Decre on Reception Conditions

Almost a year after the last Supreme Court judgment on Ceuta and Melilla, the Spanish Government issued a Decree on Reception Conditions of Refugees.[1258] This Decree developed the Law on the Right to Asylum (LRA) more than a decade after the law's adoption. One of the reasons that had led Spanish legal doctrine to push for the approval of this Decree was the hope that it could serve as a catalyst for halting the continuing police practice of limiting the movement of asylum-seekers in Ceuta and Melilla,[1259] which disregarded the Supreme Court judgments. However, this section will show that the effect of the Decree might be exactly the opposite.

On the one hand, Article 12 of the Decree adds a number of rights to those enshrined in Article 18 LRA but does not mention asylum-seeker's right to free movement and to choose their residence. Given that the purpose of the Decree is to develop the provisions of the LRA,[1260] it would have played in favour of legal certainty if the Government had enshrined in Article 12 the findings of the Supreme Court by adding a clause that clarified the personal scope of the right to free movement. However, in the absence of such a clause, the legal source of the right to free movement of asylum-seekers remains obscure, i.e. Article 19 CE and the obligation under Article 18(2)(d) LRA[1261] read through the interpretation of the Supreme Court.

On the other hand, can we find any restrictions on the right to free movement in the Decree? As we have seen, for the Supreme Court, the LRA does not provide a legal basis for such restrictions. Therefore, in principle, if the Decree imposed limitations on the right to free movement, it would not comply with the requirement that constitutional rights may only be restricted by an organic law passed by Parliament.[1262] Nevertheless, the Decree does precisely that and might be used by the authorities to give a (false) sense of lawfulness to the practices

[1258] Royal Decree 220/2022, of 29 March, which approves the regulations governing the reception system for international protection (BOE n. 76, 30/03/2022).
[1259] García Vitoria 2018, p. 127.
[1260] Article 1 of the Decree.
[1261] I.e. the obligation of asylum-seekers to 'communicate their domicile in Spain and any change thereof' (see Chapter 2).
[1262] Article 53(1) CE and Article 81 CE. The State Attorney's Office had advocated for explicitly including the movement restrictions in Ceuta and Melilla in the new Decree (Spanish Ombudsman 2016, p. 52). Legal doctrine, however, warned against this possibility, since it would not comply with Article 53(1) CE (García Vitoria 2018, p. 126).

in Ceuta and Melilla (as well as in the Canary Islands[1263]). Article 27 of the Decree is central in this regard, as it implicitly lays down restrictions on both the right to choose one's residence (paras. 1 and 2) and the right to free movement (para. 2).

Firstly, Article 27(1) sets out that asylum-seekers shall be assigned a specific place of residence. It then determines the criteria that authorities must follow when making this decision, these being:

(a) Personal characteristics of the applicant: some characteristics *must* be taken into account (age, sex, disability and family situation), and others must be taken into account 'as far as possible' (vulnerability and special needs, taking into account their socio-labour profile)
(b) The promotion of a balanced territorial distribution
(c) The place of filing of the asylum application and the status of its processing.

Criterion (c) might be used to continue to assign the place of residence in Ceuta and Melilla to most asylum-seekers who file their application there. If that were the case, asylum-seekers would not be able to object to the placement *before* the decision is taken, because their right to be heard during the decision-making process is not foreseen.[1264] Objecting to the decision on placement *after* it has been adopted also proves difficult, since the Decree does not establish any specific procedure for challenging the decision on the allocation of residence, nor the right to an effective remedy. Moreover, there is no obligation for the administration to take a formal decision on the allocation of residence.[1265] This means that there is no possibility to challenge that decision before a different administrative authority, since administrative appeals may only be lodged against formal acts of the administration.[1266] The only option foreseen at the legislative level to challenge the residence allocation would be to lodge a judicial appeal before an administrative court, given that these courts can deal with cases where the administration has acted *de facto*.[1267]

Moreover, criteria (a) and (b) would not pose a major obstacle to administrative officers wishing to assign Ceuta and Melilla as a place of residence to nearly all asylum-seekers who arrive there. While it is arguable that vulnerable persons (due to their age, sex and/or disability) should be kept away from the dire reception conditions in the cities, non-observance of this criterion would be easy for the authorities to justify, given that it is only to be taken into account 'as far as possible'. In fact, in the past, the Spanish authorities have been criticised for not taking vulnerability factors into account in their decisions on transferring asylum-seekers to the Peninsula.[1268] On the other hand, applicants with family

[1263] It will be recalled that the practice of limiting movement of asylum-seekers has also taken place in the Canary Islands, and the reflections that will be made in this section on the effects of the Decree in Ceuta and Melilla are also applicable to the situation in the Spanish archipelago.
[1264] Interestingly, Article 18 of the Decree gives asylum-seekers the right to participate in the process of designing his individualised integration programs, but only after they have been allocated to a particular place of residence.
[1265] As underlined by AIDA (2022, p. 100), the placement is done 'informally as a matter of administrative practice' by the Social Working Unit of the Asylum and Refugee Office or by an NGO authorised by the Ministry of Inclusion, Social Security and Migration. The Decree has not changed this situation.
[1266] Article 112 of Law 39/2015, of 2 October, of the Common Administrative Procedure of the Public Administrations (BOE n. 236, 02/10/2015,).
[1267] Article 30 of Law 29/1998, of 13 July, regulating the Contentious-Administrative Jurisdiction (BOE n. 167).
[1268] CEAR 2018, p. 22.

ties in the Peninsula may rely on the 'family situation' criterion to avoid being placed in Ceuta and Melilla, especially if this term is read in light of the general principle of family unity, also enshrined in the Decree.[1269] But if there are no such family ties, the only criterion that would invalidate this practice is Article 27(1)(b), since assigning the place of residence in Ceuta and Melilla to most asylum-seekers who arrive there can hardly be regarded as constituting a 'balanced territorial distribution'. However, this principle is elusive, and its breach may be difficult to prove because the State owns the information on the territorial distribution of beneficiaries of the reception system.[1270]

Secondly, Article 27(2) prescribes that

'Exceptionally, save in cases of force majeure, or when summoned by the authorities or the courts, the person who wishes to temporarily leave *the province* in which the host facility to which he or she was assigned is located, may request authorisation from the corresponding administrative body of the Secretariat of State for Migration when circumstances such as work-related reasons, medical reasons or situations related to family members up to the first degree are present, provided that supporting documentation is presented.'[1271]

When an asylum-seeker is assigned a place of residence in Ceuta or Melilla pursuant to Article 27(1), the second paragraph of this Article makes it very easy for the authorities to forbid them from moving to the Peninsula by continuing to stop them at airports.[1272] The reason for this is the weakness of the provision both in terms of the quality of the law and the safeguards attached to the right to free movement.

From the angle of the quality of the law, Article 27(2) places a limitation to a constitutional right without first asserting that right, which hides the nature of paragraph 2 as a restriction on free movement, especially since the Decree does not mention this freedom in any other provision. Neither does the heading of Article 27 ('allocation of resources') give any indication that this provision regulates a restriction on the right to free movement.[1273] Furthermore, the core of the measure (i.e. the containment of asylum-seekers within a province) is not made explicit: instead of stating that 'asylum-seekers shall remain within the limits of the province where his residence is located', Article 27(2) takes for granted that asylum-seekers have to stay within a province, and only regulates the circumstances under which they made abandon it. Thus, the manner in which the provision is drafted may make

[1269] Article 6(f), on 'general principles of action'.
[1270] The information on the number of beneficiaries of the asylum reception system has to be made public, since the Decree lays down that the Ministry shall provide information 'on the overall social reception and inclusion services, their typology, provider, beneficiaries and costs' (Article 53). However, from the wording of this provision, this obligation could be met by sharing the overall number of asylum-seekers in Spain without sharing the information on their distribution among different locations.
[1271] Unofficial translation [emphasis added].
[1272] In the case of the Canary Islands, this provision may even induce authorities to control the movement of asylum-seekers between the islands, since the Canary Islands comprises two different 'provinces'. The two major airports are on two islands that belong to separate provinces (Gran Canaria and Tenerife). Most asylum-seekers arrive in Gran Canaria, so the State would not need to place strong police controls in the Tenerife airport: it would be sufficient to place police controls at the Gran Canaria airport and the port crossings between Gran Canaria and Tenerife to keep asylum-seekers within the island of Gran Canaria.
[1273] C.f. Article 7 of the Reception Conditions Directive, titled 'free movement and residence'. See Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ L 180/96).

it difficult for asylum-seekers who wish to challenge the restrictions in Ceuta and Melilla before a court to even frame the problem as a limitation to a constitutional right.

From the point of view of fundamental rights safeguards, the free exercise of any fundamental right should constitute the general principle, and limitations should be the exception. Article 27(2), however, reverses this principle by construing the restriction as the general rule and only 'exceptionally' allowing for the exercise of the right to free movement (not of the right to choose one's residence, which Article 27 simply abolishes without exceptions). The wording of this provision thus gives authorities the option to interpret the right to free movement narrowly (as an exception) rather than interpreting the restriction narrowly.[1274] Moreover, Article 27(2) places a procedural obstacle to exercising the right to free movement: asylum-seekers must show documentary proof to justify their request to leave the province, which may sometimes be difficult to obtain.

The most problematic aspect of Article 27(2) from the perspective of fundamental rights guarantees is that, even if an asylum-seeker were to present the relevant documentation proving that he has a legitimate reason for leaving the province, the authorities do not have an obligation to allow him to go. Note that the provision only states that asylum-seekers 'may request authorisation' when certain personal circumstances are present. However, there is no obligation for the authorities to allow them to leave when the required documents have been presented, nor is there a duty to give reasons for denying the exit permit.[1275] The deference of this Article towards State discretion is blatant: while asylum-seekers have to give documentary evidence merely to ask for permission to exercise their constitutional right to free movement, the authorities can restrict that right at will, without justification.

As noted in the introduction of this study, as of May 2023, restrictions in Ceuta and Melilla are gradually being lifted. In other words, it seems that the judgments of the different Spanish courts rendered since 2010 are finally being complied with. Nonetheless, given the history of non-compliance by the Spanish police with the prohibition on restricting the freedom of movement of asylum-seekers, there is no guarantee that the practice will not be resumed at any moment for the convenience of migration control. This is all the more so as Articles 27(1) (mandatory allocation of residence) and 27(2) (near absolute prohibition from leaving the province) of the Decree give a sense of legality to restrictions that could only be imposed by an organic law in order to be constitutional. This can be linked to Sander's concept of 'plausible legality': the authorities' search for a legal cover to construct the plausible legality of human rights violations in order to ensure impunity for wrongdoing.[1276]

[1274] C.f. the case law of the ECtHR regarding Article 5 ECHR (right to liberty), where the Court has affirmed that the reasons for restricting this right must be 'narrowly interpreted' because they constitute an exception to the right (*Khlaifia and Others v. Italy*, no. 16483/12, ECtHR (Grand Chamber), 15 December 2016, para. 88).
[1275] The Decree thus violates Article 7(4) Reception Conditions Directive, pursuant to which 'Member States shall provide for the possibility of *granting* [not just asking] applicants temporary permission to leave the (…) assigned area. Decisions shall be taken individually, objectively and impartially and *reasons shall be given* if they are negative'.
[1276] Sanders 2018.

Individuals in general: The Criminal Code

In 2010, the Spanish legislator reformed the Criminal Code (CC) to add a new measure that very much resembles the limitations on movement imposed in Ceuta and Melilla: the measure of 'supervised freedom' (*libertad vigilada*).[1277] This is not a penalty but a 'security measure', which consists of subjecting the individual to judicial control *after* he has completed his prison sentence, due to the likelihood that he will continue to present a danger to society.[1278] One the forms in which Spanish courts can attempt to reduce that danger is by imposing on that person a 'prohibition to leave the place where she resides or a *prohibition to leave a certain territory* without authorisation of the judge or court' (Article 106(1)(d) CC).[1279]

The measure of supervised freedom in the Criminal Code is reserved for individuals who have committed particularly grave crimes, namely terrorism, crimes against sexual liberty, crimes against life and crimes related to domestic and gender violence.[1280] These persons are deemed to be 'highly dangerous' by the legislator, who foresees that their time in prison will not have the desired rehabilitating effect and thus creates this security measure to mitigate the risk of their reoffending.[1281] More concretely, the measure under Article 106(1)(d) has the purpose of circumscribing the danger that these persons pose to a designated area.[1282] In practice, this measure has been imposed on convicted terrorists, who were banned from leaving the designated *province* without judicial authorisation.[1283]

Note that the prohibition of leaving the province is the same as that regulated in the Decree on Reception Conditions of Refugees (Article 27(2)) which, as argued above, helps to legitimise the limitations on movement in Ceuta and Melilla. Moreover, both in 'supervised freedom' and in Ceuta and Melilla, it is police officials who verify that the individual does not leave the province.[1284] Thus, asylum-seekers in these parts of Spain, like 'highly dangerous criminals', are subjected to a measure that even criminal law doctrine has considered to be 'very restrictive of freedom of movement'.[1285] The question follows: is the right to free movement under the Criminal Code better protected than under the Decree on Reception Conditions? The answer is affirmative, for several reasons.

To begin with, criminal law restrictions are foreseen in a law enacted by Parliament (the Criminal Code), while limitations on asylum-seekers are regulated in a governmental Decree, which does not comply with the requirement that constitutional rights may only be restricted

[1277] Article 106 of Organic Law 5/2010, of June 22, which amends Organic Law 10/1995, of 23 November, of the Criminal Code (BOE n. 152, 23/06/2010).
[1278] Sanz Morán 2010, p. 289.
[1279] [Emphasis added]. Other concrete measures that fall under the scope of 'supervised freedom' are, for instance, electronic monitoring (Article 106(1)(a) and the prohibition of communicating with the victim (Article 106(1)(f)).
[1280] Nistal Burón 2020, p. 2.
[1281] Otero González 2015, p. 19.
[1282] Leal Medina 2008, p. 410.
[1283] Marco Francia (2021) quotes four cases between 2018 and 2020 in which the prohibition of leaving the province was imposed (pp. 198-205). In other cases, judges applied the prohibition of leaving the house (house arrest) or the prohibition of leaving Spanish territory.
[1284] Although the CC does not establish which administration must control the implementation of 'supervised freedom', in practice it is the police who do this (Nistal Burón 2020, p. 7).
[1285] Leal Medina 2008, p. 410.

by an organic law.[1286] Moreover, the Criminal Code explicitly states the purpose of the measure, which is to safeguard the 'security and freedoms of other citizens, potential victims of the unrehabilitated offender that the penitentiary system returns to society'.[1287] The Code also lays down the principle of rational connection between the measure and its prospective function: the judge may not impose the measure when there is a positive prognosis of reintegration of the person into society.[1288] For its part, the Decree does not put forward the purpose of the restrictions on the right to free movement and to choose one's residence, let alone refer to the principle of rational connection.

At the implementation level of the measure, 'supervised freedom' also offers more procedural safeguards than the restrictions under the Decree on Reception Conditions. For the criminal law measure to apply, there are three different steps: first, the sentencing judge must impose in its judgment the prison sentence together with the subsequent measure of supervised freedom;[1289] then, two months before the end of the prison term, another judge (called the 'prison supervision judge') must determine whether the measure of supervised freedom is still adequate to prevent reoffending in view of the individual behaviour of the convict during his time in prison. Finally, the sentencing judge must decide whether or not to confirm its initial judgment, after hearing the convict in person.[1290] Thus, the principle of rational connection between measure and purpose is re-examined in light of factual evidence on two different occasions by two different judges. The Decree on Reception Conditions, on the other hand, applies limitations on free movement and residence automatically on all asylum-seekers.[1291] An individual assessment is only foreseen for deciding on the *exceptions* to the restriction (i.e. the permission to leave the province temporarily). However, even then, there is only a right for the asylum-seeker to request that individual assessment, but no obligation on the part of the authorities to carry it out. There is also no provision on the right of the asylum-seeker to be heard during this assessment, nor is there a right to be heard when the initial allocation of residence is made.

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In sum, the different standards of the guarantees provided to the right to free movement of nationals/individuals in general and to that of asylum-seekers in Spain may be identified not only at the constitutional level, but also when comparing particular laws which apply to all individuals on the one hand (the Criminal Code) and only to asylum-seekers on the other (the Decree on Reception Conditions).

[1286] Article 53(1) CE and Article 81 CE. Furthermore, until the approval of the Decree, limitations in Ceuta and Melilla (as well as in the Canary Islands) were a matter of pure administrative practice, without any general norm to legally support it.
[1287] Preamble of Organic Law 5/2010.
[1288] Article 106(3) CC.
[1289] Article 106 CC.
[1290] Article 98 CC.
[1291] Before the adoption of the Decree, the police also applied the restrictions in Ceuta and Melilla to almost all asylum-seekers, and the decision to allow some of them to move towards the Peninsula was not based on an individual assessment but rather on the nationality of the person (Churruca Muguruza *et al* 2020, p. 10).

4.7 Case study: Germany

The last section of this chapter will study the guarantees offered by German domestic law to the right to free movement of asylum-seekers in comparison to those granted to German nationals and to individuals in general.

4.7.1 The Constitutional safeguards of the right to free movement of asylum-seekers and of nationals

Two different sets of constitutional safeguards: Article 11 vs. Article 2 GG

As shown in Chapter 2, the German Constitution (GG) distinguish between the right to free movement (Article 11) and the general freedom of action (Article 2). All individuals fall under the personal scope of Article 2, but only 'Germans' may benefit from the right enshrined in Article 11.

While both provisions protect free movement—and both are covered by the right to have recourse to the courts and, in particular, to the Federal Constitutional Court in case of a violation[1292]—each article offers a different set of safeguards. In a case in which the Federal Constitutional Court found that the personal scope of Article 11 did not preclude the application of Article 2(1) GG to migrants, it added that:

'However, the [right to free movement of migrants] is only guaranteed within the framework established by Article 2.1 GG.'[1293]

Therefore, the guarantees of Article 11 GG are not applicable to asylum-seekers via Article 2. Such an interpretation would circumvent the decision of the drafters of the Constitution to reserve the right under Article 11 for nationals;[1294] and would disregard the special relationship between Article 11 and Article 2(1), the latter being subsidiary to the former.[1295]

When a German court examines whether a measure has interfered with the free movement of a German national, it will have to determine whether that measure complies with the requirements of Article 11 GG, given that this is the *lex specialis* that protects free movement. Although the freedom of movement of nationals could, in theory, also be covered by Article 2(1) GG, due to the subsidiary nature of this provision, it will typically not be necessary for the court to analyse the case in light of it. However, for asylum-seekers, free movement is *only* protected by Article 2(1). Therefore, I will take Article 2(1) GG as the provision that protects the free movement of asylum-seekers and Article 11 GG as that which protects the right of nationals, in order to compare the safeguards granted to both groups by the German Constitution.

[1292] Article 19(4) GG and Article 93(I)(4a) GG. Moreover, as in the Spanish Constitution, the essence of the right to free movement (derived from either Article 11 or Article 2 GG) needs to be respected (Article 19(2) GG).

[1293] Judgment of the Federal Constitutional Court 35, 382 (18 July 1973), para. 61. Similarly, in a case on the right to freedom of occupation (which is also reserved for nationals), the Court found that 'the general right to freedom [under Article 2.1] is only applicable insofar as it guarantees freedom of action *within the limits regulated by it*' (Judgment of the Federal Constitutional Court 78, 179, 10 May 1099, para. 50 [emphasis added]).

[1294] Rixen 2021, p. 133.

[1295] Judgment of the Federal Constitutional Court 78, 179 (10 May 1988), para. 49.

The right to free movement of nationals: Article 11 GG

The Federal Constitutional Court defines freedom of movement under Article 11 GG as 'the right to stay and take up residence in any place within the Federal territory unhindered by German State authority'.[1296] According to some authors, this constitutional provision only covers movement that is in some way socially relevant.[1297]

The safeguards under Article 11(2)

Article 11(2) sets out the safeguards against limitations to the right to free movement and to choose one's residence:

'This right may be restricted only *by or pursuant to a law*, and *only in cases* in which (1) the absence of adequate means of support would result in a particular burden for the community, (2) or in which such restriction is *necessary* to avert an imminent danger to the existence or the free democratic basic order of the Federation or of a *Land*, (3) to combat the danger of an epidemic, (4) to respond to a grave accident or natural disaster, (5) to protect young persons from serious neglect or (6) to prevent crime.'[1298]

Thus, the right to free movement of Germans may only be limited by a law enacted by Parliament.[1299] In addition, pursuant to Article 19 GG, that law 'must specify the basic right affected and the Article [of the Constitution] in which it appears'. This obligation is called the 'quotation requirement' (*Zitiergebot*). The executive power may restrict the right only if the legislator authorises it to do so, specifying the content, purpose and scope of the authority conferred. Any act by the executive power which limits free movement must make its legal basis explicit.[1300] Moreover, the right can only be restricted for one of the purposes specified in the provision (*numerus clausus* safeguard).[1301]

As an additional guarantee, the legislator has to ensure that the restriction is 'necessary' to achieve one of the stated goals. This term has been interpreted as containing all three steps of the proportionality test: rational connection between measure and purpose, necessity test (i.e. the search for the least intrusive means) and balancing act (a proper relation between the benefits gained by the measure and the harm caused to the constitutional right of the individual).[1302] When reading Article 11(2), the first restriction ground (absence of adequate means of support) appears not to be covered by the term 'necessary'. However, according to

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[1296] Judgment of the Federal Constitutional Court 43, 203 (25 January 1977). While 'stay' (Aufenthalt) is understood as the freedom to stay in a place temporarily or permanently without establishing the place of residence, 'residence' (Wohnsitz) is interpreted as the freedom to take up permanent residence (Pagenkopf 2021, p. 467). Before German reunification, the 'Federal territory' only referred to the Federal Republic, thus excluding Eastern Germany from the territorial scope of Article 11 (Ziekow 1997, p. 446).
[1297] Alberts 1997, p. 47 and Siegel 2013, p. 1036.
[1298] [Emphasis and numeration added]
[1299] Although legislative measures relating to the right to free movement fall within the exclusive competence of the German State (Art. 73 GG), the Parliaments of the *Länder* can also enact laws that restrict the movement of persons *within* the *Land*, given that the exclusive competence of the German State only concerns movement between *Länder* (Kugelmann 2006, p. 236).
[1300] Article 80 GG.
[1301] In German constitutional law, when a constitutional provision only allows the legislator to restrict a right under specific circumstances, it is said that the right is placed under a 'qualified requirement of legal enactment' (Kunig and Graf von Kielmansegg 2021, p. 929).
[1302] Judgment of the Federal Constitutional Court 7, 377 (11 June 1958).

the Federal Constitutional Court, the principle of proportionality is an unwritten constitutional principle by which all limitations to fundamental rights ought to abide.[1303]

Indirect restrictions on free movement under Article 11

The Federal Constitutional Court and the Federal Administrative Court have interpreted and applied Article 11 in different contexts. Most of their judgments related to direct measures limiting the movement of nationals.[1304] In some cases, however, these courts have considered that certain indirect restrictions on movement may fall under Article 11. As has been previously noted in this chapter,[1305] this is, in itself, a type of safeguard for the right to free movement, because it expands the guarantees contained in the provision that protects this right to a broad range of situations where freedom of movement is in some way affected. For example, Article 11 may offer protection against the introduction of a tax on secondary residences in a different part of the country or against the non-recognition of a university entrance qualification acquired in another *Land*. The threshold for these types of measures to interfere with the right to free movement is high: they need to be objectively capable of exerting 'a dominant influence on the citizen's will'.[1306]

In the eyes of the Federal Constitutional Court, this threshold was met by the measures foreseen in the 'Residence Allocation Act'.[1307] This law, enacted in 1989, was directed at ethnic German refugees who had escaped from Eastern European countries long after the end of the II World War (*Spätaussiedler* or 'late repatriates'), as well as to Germans resettling from former Eastern Germany after the fall of the Berlin Wall. As noted in Chapter 2, these persons fell under the scope of Article 11 even if they did not (initially) have German citizenship.[1308] The Act provided that, if these Germans wished to benefit from social assistance, they had to take up permanent residence in a specific locality. The measure did not directly interfere with their right to free movement, because the law did not forbid them from residing in a different locality. Moreover, no administrative fines or criminal sanctions were foreseen for those who abandoned their allocated municipality: the only consequence in these cases was that the person concerned would cease to receive social benefits (Article 3a of the Residence Allocation Act).

[1303] *Ibid.*

[1304] See the judgments quoted in Ziekow 1997 and Pagenkopf 2021.

[1305] See Sections 4.2.2—sub-section *Does Article 26 protect against indirect restrictions on movement?*—and 4.4.5 (on indirect restrictions in the case law of the HRC).

[1306] Judgment of the Federal Constitutional Court HFR 1981, p. 579 (quoted in Ziekow 1997, p. 443). In contrast, the Spanish Constitutional Court has been more reluctant to recognise indirect restrictions on movement as falling under Article 19 of the Spanish Constitution. For instance, in one case, the applicants claimed that the different unemployment benefits for agricultural workers in the various Autonomous Communities (i.e. regions of Spain) violated their freedom to choose their residence. The Court responded that 'the diversity of legal situations in the different areas of the national territory' does not interfere with Article 19 CE, since such diversity does not actually prevent the citizen from choosing to move to a different region or to stay in the place where he already lives (Judgment of the Constitutional Court 90/1989, 14 June, Point of Law n. 5).

[1307] Act on the Determination of a Temporary Place of Residence for Repatriates and Transferees, 6 July 1989 (BGBl I S. 1378). The validity of this law was time-limited, and expired on the 31st of December 2009.

[1308] Article 16 GG (Definition of 'German' – Restoration of citizenship).

Nonetheless, a family of German repatriates who had moved to a locality different from the one assigned to them challenged the measure under Article 11 GG. They complained that they had been victims of an indirect restriction on movement. In 2004, the Federal Constitutional Court agreed with the applicants. It reasoned that:

> The challenged regulation regularly excludes granting assistance for subsistence if late repatriates choose their place of residence in a different location from the one allocated to them. The benefits under the Federal Social Assistance Act are then limited to the assistance that is unavoidably required under the circumstances. The regulation thus links the exercise of the fundamental right to freedom of movement to an economically noticeable disadvantage for recipients of social assistance in order to tie the holder of the right to the place of allocation. This is an indirect, targeted impairment of the right, the constitutionality of which is to be measured against Article 11.1 GG.[1309]

The right to free movement of asylum-seekers: Article 2(1) GG

The core content of freedom of action

The general freedom of action is contained in Article 2(1) GG. This freedom protects the right of each person to self-determination, especially against the State's interference with the individual's actions.[1310] It guarantees the freedom of decision-making in the broadest sense—insofar as no specific civil liberties apply that displace Art. 2(1), given that this article has a subsidiary function. Freedom of action is a negative freedom based on the guarantee of human dignity in Article 1 GG.[1311] Its scope of protection is not limited: it encompasses *all human behaviour*, and can therefore not be delimited in terms of content.[1312] It includes both the freedom to act and to refrain from acting.[1313] One important facet of the general freedom of action in German case law is the freedom to conclude contracts.[1314]

Freedom to move and to choose one's residence is thus only one of the many faces of general freedom of action. At the theoretical level, the free movement protected under Article 2(1) is slightly different from that covered by Article 11. As noted above, some authors consider that Article 11 is only concerned with movement that has some 'social significance', i.e. that which allows connections with others and which is relevant to the individual's social life.[1315] This entails that, for instance, choosing where to shop is only an expression of the general freedom of action (protected only by the safeguards of Article 2(1)), while visiting a place to meet friends is an expression of the right to free movement in the sense of Article 11.[1316] Following this line of thought, there is some symbolic significance in the exclusion of foreigners from Article 11 GG: unlike in the case of Germans, the Constitution pays no

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[1309] Judgment of the Federal Constitutional Court 110, 117 (5 November 2003), para. 35. C.f. Hathaway's view is that Article 26 of the Refugee Convention is not affected when lawfully present asylum-seekers are asked to take up residence in a particular place in exchange for social benefits, the only consequence for abandoning that place being the loss of those benefits (see above, Section 4.2.2, sub-section *Does Article 26 protect against indirect restrictions on movement?*).
[1310] Rixen 2021, p. 111.
[1311] Cornils 2009, p. 1181.
[1312] Kunig and Graf von Kielmansegg 2021, p. 113.
[1313] Rixen 2021, p. 112.
[1314] Rixen 2021, p. 113.
[1315] Alberts 1997, p. 47 and Siegel 2013, p. 1036.
[1316] Alberts 1997, p. 47.

special consideration to the kind of movement that would help migrants bond with others, create a social network and, ultimately, fulfil the social needs inherent to every human being.

The safeguards under Article 2(1)

Article 2(1) does not stipulate that limitations to free movement must be provided for by a law enacted by Parliament. The Federal Constitutional Court has confirmed that this freedom can be restricted by any general law, either from the executive or the legislative power of the State.[1317] This is, therefore, the first difference in safeguards: freedom of movement of nationals can only be limited by a law enacted by Parliament (*Gesetzesvorbehalt*), while asylum-seekers do not enjoy this guarantee.

Moreover, the fact that the terms 'by or pursuant to a law' do not explicitly appear in Article 2(1) affects the 'citation requirement' (*Zitiergebot*). As noted above, any law that limits a constitutional right 'must specify the basic right affected and the Article in which it appears' (Article 19(1) GG). However, this safeguard only applies to those Articles where the formula 'by or pursuant to a law' is textually enshrined.[1318] Thus, unlike in the case of nationals, when the legislator wishes to restrict the right to free movement of asylum-seekers, they do not need to make explicit that it is limiting that fundamental right, which undermines the principle of legal certainty.

On a different note, Article 2(1) protects the freedom of movement of every asylum-seeker 'insofar as he does not violate the rights of others or offend against the constitutional order or the moral law'. The terms 'right of others' and 'moral law' have been interpreted as falling within the concept of 'constitutional order'.[1319] We may therefore say that the freedom of movement of asylum-seekers can only be limited for the purpose of 'protecting the constitutional order'. However, this restriction ground is so wide-ranging (it refers to 'the entire legal system, insofar as it, in turn, conforms with the Constitution'[1320]) that it can barely be described as a restriction ground, given that almost any purpose thought up by the legislator would qualify as a legitimate ground for limiting movement. Indeed, even the drafters of the Constitution considered that restrictions on the rights dealt with in Article 2 were to be interpreted 'in the broadest sense'.[1321] For this reason, legal doctrine has claimed that, in fact, the rights protected under Article 2(1) GG 'run dry'.[1322]

The *principle of proportionality* does offer a guarantee to the right to free movement of asylum-seekers, given that, as noted above, this is an unwritten constitutional principle that accrues to all constitutional rights. However, according to legal doctrine, the proportionality principle may be applied in a less stringent manner in the case of limitations to the free movement of asylum-seekers (under Article 2(1)) than in the case of nationals (under Article 11). This is

[1317] Judgment of the Federal Constitutional Court 6, 32 (16 January 1957), paras. 15-23.
[1318] Kunig and Kämmerer 2021, p. 123.
[1319] Kunig and Kämmerer 2021, p. 126.
[1320] Kunig and Kämmerer 2021, p.124.
[1321] Judgment of the Federal Constitutional Court 6, 32 (16 January 1957), para. 22 (quoting the *travaux préparatoires* of the Constitution). The right under Article 2(1) is therefore not placed under a 'qualified requirement of legal enactment' (*supra* note 1301).
[1322] The Federal Constitutional Court referred to these criticisms in the judgment mentioned above (*Ibid.*, para. 24).

because, when interpreting this principle, the authorities 'must take into account that the Constitution chose not to protect foreigners in the specific area covered by the right to free movement under Article 11 GG'.[1323] This fact 'facilitates the justification of the interference'.[1324]

There is thus a link between the limited personal scope of Article 11 and the weakening of the proportionality principle under Article 2(1). As an example, I have found one case before the Federal Administrative Court in which this connection is apparent. The case concerned a family of asylum-seekers whose application had been rejected. They received a permit on humanitarian grounds, the validity of which was limited to the territory of one *Land*. The Court affirmed that, in their decision to grant the residence permit, the authorities had to balance the public interest in imposing the spatial restriction against the private interest in enjoying unrestricted freedom of movement. In other words, they had to apply a balancing act. The Court concluded that the balancing act had been respected, amongst others, because '*foreigners cannot invoke the fundamental right of freedom of movement under Art. 11,* which is only guaranteed to Germans'.[1325]

Finally, the Federal Constitutional Court has derived some additional safeguards from Article 2(1) GG: any law restricting movement must respect the rule of law and the principles of the welfare state, respect human dignity and not interfere with the core inviolable sphere of human freedom, which is withdrawn from the influence of all public authority.[1326] These guarantees, however, are quite generic and allow 'wide-ranging' restrictions.[1327]

Different protection in the case law of the Federal Constitutional Court?

Having shown that the provisions of the Constitution place more 'burdensome'[1328] requirements on State authorities to limit the free movement of nationals than to restrict that of asylum-seekers, this section will examine whether this distinction may also be observed in the manner that the Federal Constitutional Court has interpreted this right for each group. To do this, I will compare two judgments in which the Court dealt with, respectively, the free movement of a family of German repatriates (which were 'Germans' in the broad sense as established in Article 116 GG) and the free movement of an Afghan asylum-seeker.[1329]

In the first judgment, dating from 2004 (hereafter, the *German Repatriates case* or *G.R.*), the Court analysed the compatibility with Article 11 GG of Article 3a of the 1989 Residence Allocation Act, which made the receipt of social assistance for German repatriates

[1323] Rixen 2021, p. 133.
[1324] Rixen 2021, p. 133.
[1325] Judgment of the Federal Administrative Court 100, 335 (19 March 1996). In *Entscheidungen des Bundesverwaltungsgerichts* 1997, Berlin: Carl Heymanns Verlag, p. 342 [emphasis added].
[1326] Judgment of the Federal Constitutional Court 6, 32 (16 January 1957), para 24.
[1327] Pagenkopf 2021, pg. 468.
[1328] Alberts 1997, p. 46.
[1329] Judgments of the Federal Constitutional Court 110, 177 (17 March 2004) and 96, 10 (10 April 1997). These judgments are comparable because of the similarity of the facts: in both cases, the applicants had arrived to Germany from a different country and saw their movement restricted by the administration. However, in the first case, the applicants were Germans (in the broad sense), and in the second case, they were not, which means that in each judgment the right to free movement was assessed in the light of different constitutional provisions.

conditional on their actual residence in the locality assigned to them. As has been explained above, the Court considered this measure to amount to an indirect restriction on movement.

In the second judgment, dating from 1997 (hereafter, the *Residenzpflicht* case or *Rz.*), the Court examined the compatibility with Article 2(1) GG of the *Residenzpflicht*. The *Residenzpflicht* (legally called 'spatial restriction') represents 'a much stricter restriction on movement than an obligation to reside in a particular place'.[1330] Indeed, an obligation to live in an allocated municipality (*Wohnsitzauflage*), like the one that German repatriates were subjected to, does not affect the person's ability to move to other parts of the country temporarily, but only his capacity to choose a permanent place of residence. On the other hand, under the spatial restriction for asylum-seekers, the person may not leave a particular area at any time, unless special permission is granted. Moreover, while the consequence for asylum-seekers for not complying with the spatial restriction is a fine or even imprisonment of up to one year,[1331] an administrative or criminal sanction was not foreseen for German repatriates who permanently left their allocated place of residence.[1332]

The two provisions of the former Asylum Procedure Act[1333] which the Court assessed in the *Rz.* case still exist today in a very similar form in the Asylum Act.[1334] These were:

Article 20(1)(first sentence): Foreigners who have applied for asylum shall be permitted to stay within the area of application of this Act limited to the district of the foreigners authority.

Article 25(1): A foreigner may be permitted by the foreigners' authority to leave the area of the residence permit temporarily if compelling reasons so require or if refusal of the permit would mean undue hardship.

In both the *G.R.* and the *Rz.* judgments, the Court formally follows the same four-step test to assess the legitimacy and proportionality of the measure: (1) legitimate purpose, (2) rational connection between measure and purpose, (3) search for the least intrusive means (necessity test) and (4) balancing act. And in both cases, the Court found that the restriction did not violate the right to free movement. However, looking closely into the reasoning of these judgments, I find that the Court carried out a more careful and rights-protective proportionality test in the *German Repatriates case* than in the *Residenzpflicht* case.[1335]

Legitimate purpose

In the *German Repatriates case*, the Government alleged that the primary purpose of the residence restriction was to *prevent a disproportionate burden* on individual municipalities; in addition, the allocation had been designed to *promote integration*. This purpose had been laid down in the Residence Allocation Act (Article 1). Interference with free movement was thus

[1330] Pelzer and Pilch 2016, p. 99.
[1331] Articles 85 and 86 Asylum Act (BGBI. I p. 2477, last amended on the 21-12-2022).
[1332] The sanction for asylum-seekers was considered to be in accordance with Article 2(1) of the Constitution in the *Residenzpflicht* case. Precisely because such a sanction was not foreseen for German repatriates, we will not refer to this part of the judgment, as it is not possible to compare it with the *German Repatriates* case.
[1333] Asylum Procedure Act (BGBI. I. p. 869, 9 April 1991).
[1334] Articles 56 and 59 Asylum Act, which will be analysed in the next section.
[1335] This finding fits with the view in legal doctrine presented above, according to which the proportionality requirements under Article 2(1) are less strict than those under Article 11(1) (Rixen 2021, p. 133).

allegedly justified under the first restriction ground enshrined in Article 11(2) GG, namely 'in cases in which the absence of adequate means of support would result in a particular burden for the community'.[1336] The Court closely analysed whether this restriction ground covered the situation faced by German repatriates. It posed two questions:

(a) Was the residence restriction directed at persons without adequate means of support? The Court answered this question in the affirmative, because social benefits were only granted to German repatriates who had no job or no income to secure their livelihood. Thus, the restriction on movement only affected them.
(b) Did the lack of a means of subsistence result in a particular burden for the community? The Court also answered this question in the affirmative. On the one hand, it made a list of the *particular burdens* in which the Government, *Länder* and municipalities had incurred (e.g. housing, infrastructure, integration measures etc.). On the other hand, it asserted that those burdens had arisen due to the influx of German repatriates. It referred to the large number of repatriates that had arrived in 1987 and the following years (3 million), 'most of which were generally in need of social assistance'; and to the *high need for integration* of German repatriates, 'which was confirmed by expert respondents heard at the hearing'.[1337]

For its part, in the *Residenzpflicht* case, the Government only alleged that the spatial restriction was justified 'by objective reasons'.[1338] The Asylum Procedures Act also did not specify the purpose of the *Residenzfplicht.* The Court did not question why neither the Government nor the legislator had made the aim of the measure explicit. Instead, the Court searched itself for the legitimate purposes of the *Residenzpflicht*, stating that these purposes were: the need to *evenly distribute the burdens* associated with the reception of asylum-seekers between the *Länder* and municipalities; and the need to make sure that the asylum-seeker is *accessible at all times* at a specific location for the purpose of the asylum procedure (prevent absconding).[1339]

Thus, unlike in *G.R.*, the Court did not assess whether the factual situation of asylum-seekers in Germany fell under the scope of these two restriction grounds: it did not make a list of the burdens in which the *Länder* and municipalities had incurred, nor did it collect statements or reports on whether contacting asylum-seekers during the asylum procedure was a real problem for German authorities.

Rational connection between measure and purpose

In the *German Repatriates case,* the Court used information submitted by the Government, the *Länder* and the German Association of Cities and Towns to evaluate whether the residence restriction was suitable for achieving the purpose of *lessening the burden* for individual municipalities, and concluded that it was.[1340] Regarding the purpose of *fostering integration*, the

[1336] Judgment 110, 177 (17 March 2004), para. 14.
[1337] *Ibid*., paras. 36-39. In particular, that need derived from their inadequate language skills.
[1338] Judgment 96, 10 (10 April 1997), para. 42.
[1339] *Ibid*., para. 52.
[1340] According to these reports, since 1989, when the measure had entered into effect, the social assistance burdens had been evenly distributed and the municipalities had been able to plan their infrastructural and

Court acknowledged that the different actors involved in the case (the applicants, Governments of the *Länder* and experts at the hearing) had divergent opinions on the suitability of the measure.[1341] Thus, because the available evidence on the adequateness of the measure did not lead to a clear conclusion, the Court considered that the legislator had a wide margin of appreciation. However, the legislator was '*obliged to observe the further development and, in particular, the effects of the regulation and, if necessary, to correct them for the future*'.[1342] The Court thus imposed the authorities a procedural obligation to re-examine the rational connection between the measure and purpose in the future.

In the *Residenzpflicht* case, the Court recognised that this measure 'may not be able to prevent individual asylum-seekers from evading authorities'; nonetheless, it considered that the restriction offered an 'abstract possibility' of achieving the goal of prevention of absconding. While in *G.R.* the Court assessed whether the residence restriction was actually suitable for achieving the stated goals, discussing the different arguments and referring to reports submitted to it, in *Rz.* it simply declared (without further analysis) that the measure, in the abstract, could promote the achievement of its purpose.[1343] Moreover, I find three other differences between the judgments regarding this element of the proportionality test:

(1) Even though the Court gave the legislator a wide margin of appreciation in both cases, in *Rz.* it imposed no obligation to regularly re-examine the adequacy of the measure.
(2) In *Rz.*, the Court only referred to the adequacy of the restriction with regard to one of the purposes (prevent absconding), remaining silent on the adequacy of the measure for achieving the other purpose (distribution of the burden). How had the spatial restriction, in practice, relieved the *Länder* and municipalities from an overburdening of their welfare systems? Unlike in *G.R.,* this question was not addressed.
(3) In *G.R.* the Court did not state its own opinion on whether distributing German repatriates among different localities to achieve integration was the right policy choice—instead, it showed both sides of the argument and left it for the legislator to decide on this issue. In *Rz.*, on the other hand, it took a political stance on the matter, affirming that 'a concentration of asylum-seekers in certain metropolitan centres [was] undesirable from a regulatory point of view'.[1344]

The search for the least intrusive means

In the *German Repatriates* case, the Court concluded that less intrusive measures would not have achieved the goals of *integration* and of *lessening the burden* of individual municipalities. As to the first goal, it found that the alternative measure—a shorter allocation period—would

integration policies with foresight. Restricting the right to choose one's residence had thus proved suitable for achieving that purpose (Judgment 110, 177 (17 March 2004), para 41).

[1341] Some actors found that, by preventing large groups of ethnic German repatriates from forming 'ghettoes', the restriction incentivised the use of the German language among repatriates in their everyday lives, especially among children. Others saw this measure as a disruption of networks among German repatriates, which were important for newly arrived ones in their search for housing and a workplace (*Ibid.*, paras. 42-43).

[1342] *Ibid.*, para. 43. The Court added that the Federal Government had announced such an evaluation of the effects of the allocation for the year 2005. This evaluation was carried out, and is available at https://www.bmi.bund.de/SharedDocs/gesetzestexte/DE/Wohnortzuweisungsgesetz_Mai_2005.html

[1343] Judgment 96, 10 (10 April 1997), paras. 54-55.

[1344] *Ibid.*, para. 56.

not have been adequate because of the long time that German repatriates needed in order to fully integrate.[1345] As to the second objective, the alternative measure could have been a compensation system whereby the municipality of allocation would have reimbursed the social assistance costs to the municipality to which the person had actually moved. For the Court, this system was not suitable because of the large number of German repatriates that had reached the country, which would make reimbursement procedures very time-consuming and would lead to administrative disputes.[1346]

In the *Residenzpflicht* case, the Court discussed the alternative measure that could have been used to reach the *goal of preventing absconding*: to make only longer-term stays of asylum-seekers outside their allocated area subject to official authorisation; and to generally allow short-term stays in other municipalities or *Länder*, simply subjecting the asylum-seeker to the obligation to inform the foreigners' authority before leaving the assigned area. For the Court, the differentiation between long and short stays would be impossible to monitor in practice, and the reporting procedure would cause considerable administrative costs.[1347]

The Court thus justified in *Rz.* why a less intrusive measure was not suitable for preventing absconding. However, unlike in *G.R.,* it did not discuss why a less stringent measure—such as a compensation system between municipalities—would have been inadequate to *avoid an excessive burden* on individual municipalities. Instead, the Court merely stated that 'only a general spatial restriction on residence can achieve a decentralisation of public tasks', without commenting on why that was the case.[1348] Drawing on *G.R.*, the Court could have easily justified that a compensation system was not adequate because of the large number of asylum-seekers arriving to Germany. However, it did not do so, and the Court thus applied an incomplete necessity test.

The balancing act

In the *German Repatriates* case, the Court carefully balanced the harm caused to the interests of the persons affected by the measure with the public interest of burden-sharing. On the one hand, it recognised that, in the process of allocating German repatriates to a particular municipality, hardly any consideration was given to their wishes: the admission quotas set forth by the local authorities took precedence. On the other hand, the fact that several million German repatriates had entered Germany in a short amount of time made it necessary for the host *Länder* and municipalities to know as early as possible to what extent they had to provide for accommodation. Under these circumstances, it was acceptable that the wishes of the person were not taken into account in the initial allocation decision. Moreover, the balancing act had been respected because: (a) the measure was also intended to benefit the person (by promoting integration and allowing them to plan their lives based on the information of their future whereabouts) and (b) the measure foresaw some safeguards, since

[1345] This assessment was based on the statements of expert respondents at the hearing, who had shown that German repatriates needed at least 3 years to integrate (Judgment 110, 177 (17 March 2004), para. 45).
[1346] *Ibid.*
[1347] Judgment 96, 10 (10 April 1997), para. 56.
[1348] *Ibid.*

the allocation was limited in time and repatriates were allowed to change their residence for a short period to another municipality to search for a job.[1349]

Nonetheless, although an initial allocation decision that did not consider individual interests was permissible, the same could not be said for the *continuation* of the allocation. The Court thus imposed a further obligation on the legislator: they were required to enable repatriates to apply for a modification of their place of residence. In assessing these applications, the authorities should prevent causing *undue hardship* to the person concerned. Undue hardship would be present, in particular, if the initial allocation interfered with the right to family life (Art. 6 GG) or the right to work (Art. 12 GG). These applications were to be decided upon an administrative procedure that met the requirements of the rule of law.[1350]

In the *Residenzpflicht* case, the Court examined whether the spatial restriction was 'excessive', but it did not balance the harm caused to the asylum-seeker with the public interest protected by the measure: what were the benefits gained by the *Länder* and municipalities, and why did they outweigh this harm? By not answering this question, the Court carried out an incomplete balancing act.

Moreover, when analysing whether the restriction was 'excessive', the starting point in *R.* was different than in *G.R.*: in the latter case, the Court recognised that the allocation of residence 'considerably impaired' freedom to choose one's residence, because the existing ties to the extended family, to faith groups and to former village communities could not be continued; and the options to search work and housing were limited.[1351] In contrast, in *R.* the Court did not acknowledge the problems caused by the measure to the free movement of asylum-seekers, even though the interference was more intense than in *G.R.* Its starting point was that there was 'no reason to worry about the proportionality of the measure'.[1352]

In *R.*, the main reason that took the Court to find that the balancing act had been respected was the fact that, under the law, the authorities had the power to grant permission to the asylum-seeker to temporarily leave the area if compelling reasons so required and in cases of 'undue hardship'.[1353] While the concept of 'undue hardship' appears in both judgments, in *G.R.* the Court gives a minimum content to it (i.e. interference with the right to family life and the right to work). In *R.*, however, it leaves the definition of the concept at the discretion of the authorities. Moreover, while in *G.R.* the application for obtaining permission to move was to be carried out following the principles of the rule of law, in *R.* the Court did not mention this requirement.

[1349] Judgment 110, 177 (17 March 2004), paras. 47, 48 and 50.
[1350] *Ibid.*, para. 51.
[1351] *Ibid.*, para. 47.
[1352] Judgment 96, 10 (10 April 1997), para 57. The different emphasis placed by the Court on the social impact of the measure for German repatriates and for asylum-seekers might be explained by the symbolic difference between Article 11 and that of Article 2(1) GG, which has been pointed out above: unlike Article 11, Article 2(1) pays no special attention to the free movement that is exercised for the fulfilment of social needs.
[1353] Judgment 96, 10 (10 April 1997), para. 57.

4.7.2 Comparison at the legislative level: *Residenzpflicht* vs. Residence bans under the *Länder*-Police Acts

This final section of the German case study will explore whether two different sets of laws that apply, respectively, to asylum-seekers and to individuals in general, offer different standards of protection to the freedom to move and to choose one's residence.

Several events and laws in the 1980s and 1990s made the right to free movement in Germany come out of its 'shadowy existence'.[1354] The first asylum legislation which included a spatial restriction for asylum-seekers was adopted in 1982[1355] and, as we have seen, the 1986 Residence Allocation Act established an obligation for German repatriates to live in a particular locality. Other issues unrelated to migration also came to affect the right to free movement. In the 1980s, so-called 'open drug scenes' developed in numerous large German cities. These were locations known to drug addicts in the inner city or railway station areas, where illicit drugs were regularly trafficked and consumed under cover.[1356] On the other hand, at the beginning of that decade, punk groups organised the first 'Chaos Days' in the city of Hannover, where they violently protested against the police.[1357]

To address these problems, in the 1990s, Federal States (*Länder*) started to include a provision in their police laws which allowed their respective police units to prohibit persons from entering a specific area of the city, or even a whole town, to prevent the commission of a crime. This measure is called *Aufenthaltsverbot* (residence ban). Though the 'Chaos Days' are a thing of the past, residence bans are still used today in the police fight against open drug scenes.[1358] They are also sometimes applied against hooligans when they cause violent confrontations beyond the football stadium, in order to forbid them from entering the area surrounding the stadium or the whole municipality during a certain period.[1359]

Insofar as these police laws allow for the limitation of the right to free movement of individuals in general, they provide a good point of comparison at the legislative level with how such restrictions are regulated in the Asylum Act.[1360] More precisely, I will compare the safeguards of the right to free movement and to choose one's residence in the Police Acts

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[1354] Pagenkopf 2021, p. 466.
[1355] Bergmann 2020, p. 2754.
[1356] Cremer 2001.
[1357] Norddeutscher Rundfunk, 'August 1995: Drei Tage Chaos in Hannover', 2-8-2020. Available at: https://www.ndr.de/geschichte/August-1995-Drei-Tage-Chaos-in-Hannover,chaostage186.html
[1358] Schenke 2021, p. 83.
[1359] Siegel 2013, p. 3. The prohibition of residence is a more stringent measure than the *Platzverweis* ('banishment from a place'). The difference lies in the duration of the measure. Residence bans usually last between three and six months, while *Platzverweise* last for less than 24 hours, which is why legal doctrine and courts consider that this measure does not interfere with the constitutional right to free movement (Kunig and Graf von Kielmansegg 2021, p. 927-928).
[1360] Certainly, the measures enshrined in these laws are different: the *Residenzpflicht* forbids asylum-seekers from *leaving* a particular district, while the residence ban prohibits drug addicts and dealers from *entering* a municipality. Nonetheless, in both instances, the person subjected to the measure may experience harm due to the disruption of family or social networks or other reasons. As noted by legal doctrine, this disruption may even take place in the case of drug addicts, 'no matter how strange it may sound' (Alberts 1997, p. 3), because 'open drug scenes' are not only a place where they consume drugs: they also form their social centre of life. The same cannot be said for non-addicted drug dealers (Cremer 2001, p. 6).

of Saxony, Lower Saxony and Berlin[1361] with the guarantees to that right in Articles 56, 56, 57, 59a and 47 of the Asylum Act, which are the central provisions of the *Residenzpflicht*.[1362]

Recognition that there is a restriction on a fundamental right

The three Police Acts explicitly recognise that the residence bans limit the right to free movement. For instance, Article 10 of the Lower Saxony Police Act reads:

On the basis of this Act, the fundamental rights to (…) freedom of movement (Article 11(1) of the Basic Law) may be restricted.[1363]

The Asylum Act also contains an article in which the legislator affirms that this law restricts particular constitutional rights. However, only the rights to physical integrity and to liberty (Article 2(2) GG) are quoted, while no mention is made to the stark limitation that the *Residenzpflicht* places on the right to free movement under Article 2(1) GG.[1364] While the exclusion of this reference is not contrary to the Constitution,[1365] it is problematic from the point of view of legal certainty, especially when taking into account all the years that have passed since the Federal Constitutional Court established in 1997 that spatial restrictions on asylum-seekers encroach upon their right to free movement (even if it found the interference to be in line with Article 2(1)).

Explicit statement of the purpose

The different Police Acts explicitly state the purpose of the movement restriction, which is 'to prevent the commission of a criminal offence'.[1366] In contrast, Article 56 of the Asylum Act merely lays down the restriction on movement ('Permission to remain shall be limited to (…)') without making clear the objective that this measure aims to achieve.

The lack of an explicit purpose in the Asylum Act is made evident in the 1997 judgment of the Federal Constitutional Court analysed above. In that case, the Court had to infer the purposes of the *Residenzpflicht* from legal doctrine precisely because the law did not give any indication on the matter. Indeed the Court quoted a chapter written in 1987 by Professor Christoph Gusy, where he explained:

[1361] Article 21(2) Saxony Police Act; Article 17(3) Lower Saxony Police Act; Article 29(2) Berlin Police Act. The Saxony Police Act was adopted in 1996, while the other two laws were enacted in 1999 (Cremer 2001, p. 1218). I have chosen to focus on these three laws because they were the first Police Acts to regulate the residence ban. For an overview of all the different Police Acts which enshrine the residence ban, see Schenke 2021, p. 80.

[1362] Asylum Act (BGBI. I p. 2477, last amended on the 21-12-2022). Other provisions in the Asylum Act also regulate spatial restrictions for special categories of asylum-seekers (Article 58) and for particular cases (Article 59b). These have been omitted, since they are not as relevant in practice as Article 56 and the provisions which link to it (Röder 2021, p. 2277).

[1363] C.f. Article 79 Saxony Police Act and Article 66 Berlin Police Act.

[1364] Article 89 Asylum Act.

[1365] As noted above, the *Zitiergebot* (obligation to quote the constitutional right that is being limited) applies in the case of Article 11 GG, but not with regard to Article 2(1).

[1366] This is especially clear in Article 29(2) of the Berlin Police Act, which opens with the sentence: 'in order to prevent criminal offences (…)'. The relevant provisions in the other two Police Acts start regulating the residence ban with the statement: 'if facts justify the assumption that a person will commit a criminal offence in a certain local area (…)'.

'The purpose of Article 20 of the Asylum Procedures Act [the forerunner of Article 56 Asylum Act] is, in principle, to distribute the burden of admitting asylum-seekers equally. Cities and districts are to be equally confronted with the task of taking in refugees and providing them with sufficient means of subsistence; a task that seems all the greater as asylum-seekers are subject to a prohibition on working. In addition, reasons of procedural efficiency have been asserted: The asylum-seeker should be accessible to the authorities at all times during the procedure so that his recognition procedure is not subject to delay.'[1367]

Relying on this paragraph, the Court affirmed that the two goals of the *Residenzpflicht* were the equal distribution of the burdens associated with the reception of asylum-seekers and the prevention of absconding. Interestingly, the Court omitted a third purpose of the *Residenzpflicht*, which also appears in Gusy's chapter: to deter other migrants from submitting unfounded asylum applications by excluding asylum-seekers from freedom of movement.[1368] This reason had been considered by the Federal Constitutional Court in a previous judgment from 1983 as being the *only* restriction ground of the *Residenzpflicht*, which it found to be in line with Article 2(1) GG.[1369] The divergence between the 1983 and the 1997 judgment shows that not making the purpose of the measure explicit in the law leads to legal uncertainty, and opens the way for the authorities to use different arguments depending on political convenience. For instance, Pelzer and Pichl point out yet another ground allegedly justifying the *Residenzpflicht* that was asserted in 2016 by the then-party leader of the social-democratic party (SPD): the need to avoid 'ghetto problems'.[1370] In the case of the residence bans under the Police Acts, this volatility of reasons is avoided.

Rational connection between measure and purpose

When imposing the residence ban on drug addicts or hooligans, the police have to ascertain that there are '*facts* [which] justify the assumption that *the person* will commit a criminal offence in a certain local area'[1371] Therefore, this decision needs to be based on actual facts and not on mere suppositions, prejudices against a person or other type of considerations. It is also clear from the wording of these provisions ('the person') that the decision has to be individualised. As noted by Kugelmann, only persons who are *particularly involved* in the drug scene can be considered as addressees of the residence ban.[1372] In contrast, the *Residenzpflicht* applies automatically to all asylum-seekers, and no evaluation is needed on whether imposing a spatial restriction on an individual asylum-seeker will actually achieve the prospective purpose of the measure.

[1367] Gusy 1987, p. 32. Quoted in Judgment 96, 10 (10 April 1997), para. 52. In turn, Gusy did not refer to any case law or other sources in other to explain the purposes of the *Residenzpflicht*.
[1368] Gusy 1987, p. 32.
[1369] Judgment of the Federal Constitutional Court (Preliminary Examination Committee), 2 BvR 999/83, (7 July 1983). The Court stated that: 'In addition to the opportunity to take up employment (…), the opportunity to freely choose one's residence in the Federal territory is one of the incentives which have led to a sudden increase in the number of unfounded asylum applications in recent years' (para. 8).
[1370] Pelzer and Pilch 2016, p. 101.
[1371] Article 21(2) Saxony Police Act; Article 17(4) Lower Saxony Police Act; Article 29(2) Berlin Police Act.
[1372] Kugelmann 2006, p. 236. The same could be said for the case of hooligans.

The search for the least intrusive measure

The principle of necessity is enshrined in a special provision in all three Police Acts.[1373] Thus, before imposing the residence ban on a drug addict or a hooligan, the police have to examine whether there is a less intrusive measure available to achieve the goal of preventing the commission of crimes. For its part, when the asylum authorities decide on the *Residenzpflicht*, they have no legal obligation to search for less intrusive measures that would achieve the purpose of preventing absconding or of sharing the burden among municipalities and *Länder*.

The balancing act

The same articles that lay down the necessity requirement in the three Police Acts also refer to the balancing act.[1374] Moreover, elements of the balancing act are also present in the provisions that specifically regulate the residence ban. We may distinguish balancing *at the time of the decision-making* from balancing *during the enforcement period* of the measure. As to the first moment, residence bans 'shall be limited in time and place to the extent necessary to prevent the offence'.[1375] Thus, on the one hand, the authorities have to take the personal situation of the potential addressee into account to make a prognosis on how long they believe the individual will pose a risk of committing a criminal offence.[1376] On the other hand, they have to carefully delineate the area in which they believe there is an actual risk of *that* person committing a crime—which may even be a whole city, but this will have to be determined attending to the particular circumstances of the individual. Moreover, when defining the area, the authorities have to make sure that it does not include the person's home.[1377]

In contrast, in the *Residenzpflicht*, as noted above, the spatial restriction applies to all asylum-seekers, which excludes any balancing act in the initial decision-making process. Thus, no assessment is made on, for instance, how long the particular asylum-seeker is likely to burden the reception system.[1378] As to the area which the asylum-seeker cannot leave, Article 56 Asylum Act clearly states that it shall be the '*district of the foreigners' authority* where the reception centre responsible for hosting the foreigner is located'. This area has been described by legal doctrine as a 'narrow radius of residence' which represents a 'profound encroachment' on

[1373] Article 4 of the Lower Saxony Police Act sets out that '(1) [o]f the several possible and appropriate measures, the administrative authority or the police shall take the one that is likely to have the least adverse effect on the individual and the general public'. See also Article 11 Berlin Police Act and Article 3 Saxony Police Act.
[1374] Article 4 of the Lower Saxony Police Act continues: '(2) A measure may not lead to a disadvantage which is recognisably disproportionate to the desired result; (3) A measure shall be permissible only until its purpose has been achieved or it becomes apparent that it cannot be achieved'. See also Article 11 Berlin Police Act and Article 3 Saxony Police Act.
[1375] Article 21(2) Saxony Police Act; Article 17(4) Lower Saxony Police Act; Article 29(2) Berlin Police Act.
[1376] Cremer 2001, p. 2.
[1377] Article 21(2) Saxony Police Act; Article 17(4) Lower Saxony Police Act; Article 29(2) Berlin Police Act.
[1378] It is also to be noted that, when the authorities decide on *where* the individual asylum-seeker will have to reside, they do not have an obligation to take into account the family links or personal situation (let alone the personal preferences) of the asylum-seeker. Indeed, Article 46 Asylum Act ('determination of the responsible reception centre') merely states that this decision shall be based on 'the admission quoatas (…), the available vacancies according to these quotas and finally the processing capacities of the competent branch office of the Federal Office with regard to the foreigners' countries of origin'.

the asylum-seeker's freedom of action.[1379] Even if it an officer wished to adopt a more lenient approach towards the asylum-seeker, he would not be able to do so, because the Asylum Act does not empower the foreigners' authority to extend the area of application of the restriction, for example, by allowing him to move freely between two districts instead of one.[1380]

Regarding the application of the balancing act during the enforcement period of the residence ban, there are circumstances in which the person may access the 'forbidden area'. The different Police Acts foresee that the residence ban *shall not* affect access to the person's *right of assembly* and, in the case of the Saxony Police Act, the 'exercise of *legitimate interests* by the person concerned'.[1381] For its part, Article 57 Asylum Act provides that the Federal Office *may* (*kann*) permit an asylum-seeker to temporarily leave the area specified in his permit if *compelling reasons* so require. I find three main differences between the Police Acts and the Asylum Act in this respect:

(1) Persons related to the drug scene and hooligans have a clear right to enter the restricted area in certain circumstances (because of the 'shall' clauses)—presumably upon request, although this is not mentioned in the provisions. On the other hand, the possibility for asylum-seekers to leave their assigned area is regulated as a discretionary power of the authorities, who 'may' or may not grant that permission.
(2) While the residence ban must leave the right of assembly unaffected, in the case of the *Residenzpflicht*, 'whether and to what extent political activity constitutes grounds for permission to leave the area of the residence permit is highly controversial' and 'is generally rejected in [judicial] practice'.[1382]
(3) In the Saxony Police Act, the concept of 'legitimate interests' encompasses a large number of situations.[1383] Indeed, according to legal doctrine, even a visit to the dentist is enough for the authorities to have an obligation to grant access to the restricted area.[1384] For its part, the concept of 'compelling reasons' in the Asylum Act makes clear that the authorities' power to grant permission to leave is to be exercised only in very exceptional situations. The extraordinary nature of this authorisation is especially evident if Article 57 is compared to its predecessor, Article 25(1) of the Asylum Procedure Act: the latter provision allowed authorities to grant asylum-seekers permission to leave not only in 'compelling' cases but also in cases of 'undue hardship'. As noted above, in its 1997 judgment, the main reason why the Federal Constitutional Court found that the *Residenzpflicht* respected the balancing act was that the concept of 'undue hardship' protected the interests of the asylum-seekers. Yet by removing this term in Article 57 Asylum Act, the scope of grounds on which asylum-seekers can be granted permission

[1379] Röder 2021, p. 2266.
[1380] Bergmann 2020, p. 2755.
[1381] Article 21(2) Saxony Police Act; Article 17(4) Lower Saxony Police Act; Article 29(2) Berlin Police Act.
[1382] Gusy 1987, p. 31.
[1383] The concept of 'legitimate interests' also appears in the provisions that regulate the residence ban in the Federal States of Brandenburg, Nordrhein-Westfalen and Thüringen (Article 16(2) Brandenburg Police Act, Article 34(2) Nordrhein-Westfalen Police Act, Article 18(3) Thüringen Police Act).
[1384] Kugelmann 2006, p. 237.

to leave appears to have been narrowed, making way for an arbitrary application of the balancing act.

Procedural safeguards: a maximum time limit

The Saxony Police Act sets out a maximum time limit of three months for the duration of the measure.[1385] Similarly, Article 59a Asylum Act provides that 'the geographic restriction pursuant to Article 56 shall expire when the foreigner has resided in the federal territory for three months without interruption (…)'. However, in the course of the 'refugee crisis' in 2015/2016, the legislator increased the temporal scope of application of the measure 'through the backdoor'.[1386] Indeed, pursuant to the second sentence of Article 59a:

> In derogation from the first sentence, the geographic restriction shall not expire as long as the foreigner has to live in the reception centre responsible for hosting him.

Therefore, we must look at the period for which asylum-seekers are obliged to reside in a reception centre to ascertain the maximum time limit of the *Residenzpflicht*. Under Article 47 Asylum Act, that period is 18 months,[1387] but the Federal States can extend it up to 24 months.[1388] Without getting into a discussion on whether or not 24 months is an excessive period, what matters for our comparison is that, in principle, in both the Saxony Police Act and in the Asylum Act, a maximum time limit is set. However, when reading the small print of the law we find out that, for some asylum-seekers, the *Residenzpflicht* is not limited in time. That is the case for asylum-seekers from 'safe third countries', who are obliged to reside in the reception centre until the Federal Office has made a decision on their asylum application,[1389] as well as for asylum-seekers that violate their duty to cooperate with the asylum authorities, who are obliged to reside in a reception facility 'for more than 18 months'.[1390]

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In conclusion, there is a considerable difference in the safeguards provided to the right to free movement of nationals/individuals in general and to asylum-seekers by German domestic law, not only in the text of the Constitution but also in the case law of the Federal

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[1385] The Lower Saxony and Berlin Police Acts do not set a maximum time limit. The Lower Saxony Police Act, however, does make clear that the police needs to decide on a particular time limit when imposing the measure, since it provides that: 'he or she may be prohibited from entering or staying in this area for a *specific* period' (*für eine bestimmte Zeit*).

[1386] Röder 2021, p. 2266.

[1387] Article 47 reads: 'Foreigners who have to file an application for asylum at a branch office of the Federal Office (Section 14 (1)) shall be obliged to reside in the reception centre responsible for their reception until the decision of the Federal Office on the application for asylum and, in the case of a rejection of the application for asylum, until their departure or until the execution of the threat or order of deportation, however, for a maximum of 18 months.' An exception is made for minor children and their parents or other legal guardians, as well as their adult, unmarried siblings, for which the maximum time limit is reduced to 6 months (Article 47(1)).

[1388] Article 47(1b).

[1389] Article 47(1a). According to Pelzer and Pilch (2016, p. 100), this distinction between asylum-seekers from safe third countries and other asylum-seekers is problematic from the point of view of the principle of equality, protected under Article 3 GG.

[1390] Article 47(1) (1. and 2.).

Constitutional Court, as well as when particular laws which protect different groups of individuals are set against each other.

4.8 Conclusions

The fourth key objective of this study was to analyse the *safeguards* of the right to free movement in the law specifically applicable to asylum-seekers and compare them with the those in the law applicable to nationals or to all individuals. This chapter has developed this objective, in the first place, by asking the question: What are the safeguards of the right to free movement of asylum-seekers under international and European human rights law, Spanish law and German law? As in Chapter 2, where I examined the personal scope of the right in different legal instruments, the answer is fragmented: each instrument provides a different set of safeguards, and even similar terms (such as the term 'necessary') have different meanings in each treaty system or each legal order. This disparity in safeguards thus fits into the concept of 'multi-sourced equivalent norms' to which I referred in the introduction of this study, which is not called 'multi-sourced *equal* norms' precisely because each norm and legal order has a life of its own and follows different paths due to the different actors charged with its interpretation.

On the other hand, the second research question posed in this chapter was whether international and European human rights law, Spanish and German law offer higher protection to freedom of movement under the law applicable to nationals or to all individuals than under the law specifically applicable to asylum-seekers. Sections 4.5, 4.6 and 4.7 have shown that this question can be answered in the affirmative at all normative levels: international law (the Refugee Convention vs. the ICCPR/ECHR), constitutional law (the *Constitución Española* and the *Grundgesetz* as interpreted by the Spanish Constitutional Court and the Federal Constitutional Court, respectively) and secondary domestic law (the Spanish Decree on Reception of Refugees vs. the Criminal Code; the German Asylum Act vs. the *Länder*-Police Acts). These findings confirm the rupture in human rights law—and its equivalent at the national level, fundamental rights law—, the proclaimed universality of which is put into question by the different standards provided to individuals depending on their legal relationship with the State. Like the conclusions of Chapter 3 on the criteria for applying Article 5 ECHR, the results of the present chapter provide a further example of migration exceptionalism or of a two-tier system in human rights law, whereby States and courts apply lower standards of protection in the context of migration than in other areas regulated by the law.

Nonetheless, I would like to end this chapter on a positive note by summarising the safeguards that *do* protect asylum-seekers against arbitrary restrictions on their freedom to move and choose their residence within the country where they seek protection. This, moreover, will be the (short) answer to the other research question: What are the safeguards of the right to free movement of asylum-seekers under international law (applicable in Council of Europe Member States), under Spanish law and under German law?

Firstly, I will outline the safeguards afforded by the Refugee Convention *according to my own interpretation*, based on the interpretative methods enshrined in the VCLT. This will add value

to these Conclusions *vis-à-vis* Section 4.5 of this chapter, where I have already succinctly exposed the views of the majority of the refugee law doctrine on the matter. Secondly, I will list the guarantees in the Spanish and German constitutions, as interpreted by the respective competent courts.

4.8.1 Safeguards for asylum-seekers under the Refugee Convention

Safeguards under Article 31(2) RC for unlawfully present asylum-seekers:

(a) Even though neither the *travaux préparatoires* (Article 32 VCLT) nor the UNHCR ExCom Conclusion on Detention (Article 31(3)(a) VCLT, 'subsequent agreement') supports the existence of a *numerus clausus* safeguard,[1391] the authorities have to base their decision on evidence that the individual asylum-seeker is a threat to the public good protected by the measure (rational connection between measure and purpose).
(a) Moreover, the authorities must search for less intrusive means that would achieve the purpose before imposing a restriction on movement (necessity test).

These two safeguards derive from the ordinary meaning of the term 'necessary' (Article 31(1) VCLT, 'ordinary meaning of the terms').[1392] However, unlike detention measures, which are also covered by Article 31(2) RC, there is no obligation to implement a balancing act (i.e. the search for a proper relation between the benefits gained by the public and the harm caused to the individual). This distinction derives from the Court of Wellington's assertion (Article 31(3)(a) VCLT, 'subsequent practice') that restrictions on movement 'should be able to be imposed more freely' than detention and that 'the necessity standard is variable depending on the nature of the restriction on freedom of movement'.[1393]

Safeguards under Article 26 RC for lawfully present asylum-seekers:

(a) Restrictions which apply *only* to asylum-seekers are forbidden (non-discrimination safeguard). This conclusion flows not only from a textual reading of the terms 'subject to any regulations applicable to aliens generally in the same circumstances' (Article 31(1) VCLT), but also from the fact that 12 State parties to the Refugee Convention made reservations to Article 26 RC, stating that they reserved the 'right to designate a place or places of residence for refugees'[1394] or the 'right to designate the place or places of residence of the refugees and to restrict their movements',[1395] either generally or for

[1391] See *supra*, notes 922 and 924. The President of the Conference of Plenipotentiaries stated that Article 31(2) RC would cover 'considerations of (…) or any other reasons', while the UNHCR ExCom document never mentions the words 'restriction on movement' but only refers to detention.
[1392] As noted above, in constitutional and human rights law, 'necessity' is one of the elements of the proportionality test, and it means that the authorities have to choose—of all those means that may advance the measure's purpose–that which would least limit the right in question (Barak 2012). Moreover, the necessity test cannot be applied without first ascertaining the risk that the particular person poses to the public good protected by the measure.
[1393] *Attorney General v. Refugee Council of New Zealand Inc.*, para. 265.
[1394] Latvia, Moldova, Netherlands, Spain, Surinam, Zambia and Zimbabwe.
[1395] Malawi, Mozambique, Namibia and Rwanda. For its part, Sudan made a general reservation to Article 26.

particular purposes.[1396] Had State parties not intended to prohibit refugee-specific restrictions, there would have been no need for them to insert such reservations.[1397]

(b) As to *which other group* of migrants needs to be subjected to the same limitations on movement as asylum-seekers for the State to comply with the non-discrimination safeguard, these are the two most convincing options:
    a. All other migrants, except those coming from special partner States (e.g. EU citizens). This interpretation follows from a reading in conjunction with the phrase 'the most favourable treatment accorded to nationals of a foreign country in the same circumstances', which appears in Article 17 RC, on the right to employment (Article 31(1) VCLT, the 'contex' of a provision).[1398]
    b. Migrants with similar features to asylum-seekers, in terms of the length of their stay (i.e. migrants with a residence permit with a comparable validity period), the reason for their stay (i.e. migrants present in the country for humanitarian grounds) and/or the receipt of social assistance (i.e. migrants who, like asylum-seekers, also receive social assistance). This interpretation follows from a judgment of the German Federal Administrative Court (Article 31(3)(b) VCLT, 'subsequent practice).[1399] Even though both options are legally persuasive, I would favour the latter interpretation, because it achieves an adequate balance between compliance with the non-discrimination safeguard (by excluding refugee-specific restrictions) and a margin of manoeuvre for States who, for instance, might want to impose residence restrictions *only* on migrants who receive social assistance (including asylum-seekers).

(c) The nature and extent of the restrictions placed on asylum-seekers must be the same as those imposed on the other group of migrants.[1400] A textual reading of Article 26 (Article 31(1) VCLT) seems to support this view: asylum-seekers may only be subjected to 'any regulations applicable' to another group of non-nationals. If the limitations on the movement of that other group of migrants were very different from the restrictions placed on asylum-seekers, it could hardly be said that the 'regulations' imposed on other migrants are also 'applicable' to asylum-seekers.

(d) States may not subject the exercise of the right to free movement of asylum-seekers to conditions that they are unable to fulfil due to the uprooting and dislocation associated with refugeehood.[1401] This safeguard derives from a reading of the term 'in the same circumstances' in Article 26 RC in the light of Article 6 RC (Article 31(1) VCLT, the 'context' of a provision). Suppose, for example, that a State obliges all migrants who receive social assistance (including asylum-seekers under the RC) to live in an assigned

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[1396] For instance, the Netherlands reserved the right to designate a place of principal residence for certain refugees or groups of refugees 'in the public interest'. Greece, for its part, declared that it reserved the right to derogate from the provisions of Article 26 in cases which would justify exceptional procedure for reasons of national security or public order. Beyani (2000, p. 115) notes that 'this reservation is inappropriate because it relates to derogation rather than ordinary restriction, and it should have been more appropriately made by reference to Article 9 of the Convention [concerning special measures in exceptional circumstances]'.

[1397] See also above, Maple 2016, p. 29.

[1398] See above, Hathaway 2021, p.222; Slingenberg 2014, p. 106; Grahl-Madsen 1963, p. 16; Battjes 2006, p. 476.

[1399] See above, Diehl 2021, p. 114.

[1400] See above, Maple 2016, p. 29.

[1401] See above, Slingenberg 2014, p. 249.

residence. An exception is provided for those migrants who wish to enrol in university. Suppose that an asylum-seeker wishes to take advantage of this exception, but the closest university to his assigned home is located in a distant municipality, which means that he would have to change his place of residence in order to study there. Article 26 RC would prevent the university from rejecting his enrolment on the sole ground that he cannot present a high school certificate, which he lost while fleeing his country of origin: such a requirement would subject the exercise of the right to choose one's residence to a condition that he is unable to fulfil.[1402]

4.8.2 Safeguards for asylum-seekers under the Spanish and German Constitution

Safeguards under the Spanish Constitution (CE):

(a) Limitations to this right may be regulated only by an organic law, the passing of which requires an absolute majority of the members of Congress (Articles 53 and 81 CE).
(b) The restriction will only be legitimate if it pursues a 'constitutionally relevant good [or] interest'.[1403] Detterance of irregular migration is not a constitutionally relevant interest.[1404]
(c) The proportionality principle must be respected, even though the standards of the principle are not as strict as when asylum-seekers are detained.[1405]
(d) Asylum-seekers have a right to challenge the lawfulness and proportionality of a restrictive measure before domestic courts 'by means of a preferential and summary procedure', as well as to submit an individual appeal for protection to the Constitutional Court (Article 53(2) CE).

Safeguards under the German Constitution:

(a) Limitations to this right must be regulated in an act of general application—though not necessarily an act of Parliament.[1406]
(b) The authorities must respect the principle of proportionality when imposing a restrictive measure.[1407]
(c) Asylum-seekers have a right to have recourse to the courts and to the Federal Constitutional Court in order to challenge the lawfulness and proportionality of a restriction on movement (Article 19(4) GG and Article 93(I)(4a) GG).

Even if not as strong as the guarantees for individuals in general, the identification of the safeguards specifically applicable to the right to free movement of asylum-seekers that has been carried out in this chapter may provide an avenue for challenging the various restrictive measures to which asylum-seekers are subjected across Europe, in particular the

[1402] Article 22 RC (public education) would also prohibit such a policy, given that this provision also employs the term 'in the same circumstances' when referring to the treatment of refugees 'with respect to education other than elementary education'. The university would therefore have to find other ways to ascertain whether the asylum-seeker possessed the necessary knowledge to enter the university. Another example of a practice that Article 26 RC (in light of Article 6 RC) would prohibit is a requirement to pay high fees in order to be allowed to reside in certain metropolitan areas (Pelzer and Pilch 2016, p. 97).
[1403] Judgment of the Constitutional Court 292/2000, 4 January.
[1404] Judgment of the Supreme Court 2662/2020, 29 July, Point of Law n. 2.
[1405] Judgment of the Constitutional Court 169/2001, 14 August 2001, Point of Law n. 2.
[1406] Judgment of the Federal Constitutional Court 6, 32 (16 January 1957), paras. 15-23.
[1407] Judgment of the Federal Constitutional Court 7, 377 (11 June 1958).

Residenzpflicht and the obligation to stay in Ceuta, Melilla and the Canary Islands, but also the spatial restrictions and residence requirements in other countries such as Greece, Switzerland, Austria, Italy and Denmark.[1408]

[1408] See Section 1.1 in the introduction of this study.

Conclusions

In the first decade of the 21st century, Ben and Sunny sought asylum in two countries which, on the face of it, are socially and culturally dissimilar: Spain and Germany. Yet both suffered from the same policy, whereby their 'possibility to maintain interpersonal relationships and a minimum of participation in social, cultural and political life'[1409] was reduced to 12.3 and 204 square kilometres (the surface areas of Melilla and Wolfsburg, respectively).

I once had the opportunity to attend a summer course in German language and culture at the Freie Universität Berlin, where a professor told us that 'if you take one national from each European country and put them on a bus travelling through China, they will realise that they have more in common than they thought'. Indeed, there is a prevailing idea that comparing the 'old continent' with non-European countries brings to the surface the similarities between European nations. However, these similarities do not always take the shape of 'political freedom, economic prosperity and social cohesion', as suggested by Josep Borrell.[1410] There is also a dark side to them, which is particularly salient in the area of migration and asylum, where even distant European countries converge in their 'intent to devise rules which exclude some people from being able to access liberal European polities'.[1411]

While there are numerous excellent works that provide an overall picture of how human rights law serves as a (albeit incomplete) shield for refugees and other migrants to use against these exclusionary rules,[1412] the present study has focused on a particular European asylum reception policy—restrictions on the movement of asylum-seekers—and a particular human right—the right to freedom of movement. It is, to my knowledge, the first PhD thesis to exclusively address the freedom of movement of asylum-seekers in international and European law, thus filling a gap in the literature on the rights of refugees.[1413] Moreover, the analysis of the legal status of asylum-seekers under the various treaties (Chapter 2) and the detailed examination of the difference between a restriction on movement and a deprivation of liberty (Chapter 3) contribute to the understanding of underexplored topics and may inform research in other areas of refugee and human rights law.

This study has scrutinised this freedom from four different angles: its historical origins, its personal scope, its material scope (i.e. the difference between restrictions and detention) and its safeguards (i.e. the conditions for lawful interference). In the conclusion of each chapter, I have answered the specific research questions relating to it. It is now time to summarise

[1409] Pelzer and Pichl 2016, p. 100.
[1410] In 2022, the EU High Representative for Foreign Affairs Josep Borrell compared Europe to a 'garden' of freedom and democracy and the rest of the world to a 'jungle' (EEAS Press Team 2022).
[1411] Dembour 2015, p. 258.
[1412] To quote only some: Dembour 2015, Bast, Von Harbou and Wessels 2022, Spalding 2022, Faggiani 2023.
[1413] As noted in the introduction, some authors have dealt exclusively with the right to free movement of asylum-seekers and recognised refugees in academic articles (Zieck 2018, McDonough 2016, Slingenberg 2022b, Pelzer and Pilch 2016), research papers (Maple 2016, Künzli *et al.* 2017) and guidelines (Hathaway *et al.* 2018). Most authors who have examined this topic have done so in chapters of books concerning the human right to free movement (Beyani 2000) or the rights of refugees (most of the authors quoted in this study).

the most relevant findings and link them to the four key objectives presented in the introduction of this study.

1. First key objective: historical origins

Investigate the historical origins of the human right to free movement, the shaping of its scope of protection and the way in which the drafters of the various instruments viewed the position of refugees and other migrants in relation to this right.

I. This right was not a priority for the drafters of human rights instruments. Some questioned its nature as a human right, and neither of the original drafts included it in their lists of rights and freedoms. In the refugee-specific instrument, this right acquired even less significance than in the general instruments since, unlike in the UDHR, the ICCPR and Protocol 4 to the ECHR, the drafters of the Refugee Convention did not discuss why they wished to grant this freedom to refugees. Instead, they only debated the purpose of the restrictions. Notably, France, often regarded as the birthplace of human rights, suggested that this right should be excluded from the Refugee Convention, while supporting its inclusion in general human rights instruments.

II. After some deliberation, the drafters of the general human rights instruments decided to incorporate freedom of movement into human rights law, mainly in order to protect 'the spirit of freedom', the human need to relate and communicate with others and the private life of individuals, as well as to prevent residential segregation. However, for the drafters, these areas of life were only worthy of protection if the person was a national or a lawfully present non-national: irregular migrants were left completely outside the reach of this right. While most drafters remained silent on the reasons for this exclusion, its original proponent, Mrs. Roosevelt, expressed her fear that granting this freedom to everyone would be interpreted as an attempt to grant migrants the right to move between States. The fear of a pull factor thus outweighed the drafter's interest in protecting the 'human need' to relate and communicate with others and to develop a private life. Similarly, the fathers of the German Constitution were silent on why they excluded non-Germans from the personal scope of this freedom, and those of the Spanish Constitution were anxious that this freedom would attract more migrants to Spanish territory. Freedom of movement *within* the country was thus born with the 'stigma' of being linked to the right of States to control the movement of persons *between* countries.

III. In the discussions regarding the permissible restrictions on the movement of persons 'lawfully within the country' under the ICCPR and Protocol 4 ECHR, the movement of non-nationals emerged as one of the main points of concern. Several drafters feared that migrants of the same nationality living in close proximity to each other would give rise to security problems,[1414] while others thought that migrants freely residing where they wished would harm the economy. Similar concerns related to sovereignty and control were expressed by the drafters of the Refugee Convention, who viewed Articles 31(2) and 26 primarily as

[1414] This argument is still used today in the public debate to justify restrictions on movement. Pelzer and Pichl (2016, p. 101) note that German politicians defend the need to maintain the *Residenzpflicht* as a way to avoid 'ghetto problems'.

provisions guiding the management of refugee arrivals through restrictions on movement, rather than as an instrument to promote the self-realisation of the refugee.

2. Second key objective: personal scope

Explore to what extent asylum-seekers fall under the personal scope of the right to free movement.

IV. Legal doctrine and UNHCR documents reveal five different perspectives concerning the question of whether asylum-seekers are 'lawfully in [the] territory' within the meaning of Article 26 of the Refugee Convention.[1415] This finding is important in itself, as it shows that the issue is not conclusively resolved. My interpretation in the light of the VCLT is that: (1) the term 'lawfully in [the] territory' should be given an autonomous meaning; (2) asylum-seekers who have entered or stayed irregularly in the host State are not 'lawfully in'; (3) unlawfully present asylum-seekers who have been awaiting the outcome of the refugee determination procedure for more than three years are 'regularised'; and (4) asylum-seekers who present themselves at the border without complying with entry requirements are 'lawfully in' if the border authorities exempt them from these requirements. Approaches also differ in legal doctrine with regard to the personal scope of Article 31(2) RC. While some authors argue that 'criminalisable asylum-seekers' (i.e. those who do not meet the criteria of Article 31(1) RC to escape being criminalised) can benefit from this provision, others hold the opposite view. I align with the former group. Overall, there is a common ground in Refugee Convention doctrine: at the very least, 'non-criminalisable' asylum-seekers are entitled to the protection of their freedom of movement under Article 31(2) RC.

V. The HRC and the ECtHR confer great leeway to States in the determination of whether asylum-seekers are 'lawfully within the country' in the sense of Article 12 ICCPR and Article 2(1) of Protocol 4 ECHR. They refuse to give this term an autonomous meaning under the treaty they interpret—independent from domestic law—, which contrasts with the ECtHR's well-established jurisprudence on 'autonomous concepts' in the Convention. Article 2(1) of Protocol 4 is not the only example where the Court has departed from the 'autonomous concepts' line of case law in cases concerning migrants, as other authors have also identified this departure in relation to other terms of the Convention, such as 'criminal charge' in Article 6 ECHR.[1416] On a different note, the ECtHR is stricter than the HRC in its interpretation of the legal status of asylum-seekers, as it appears to require that domestic law grant the asylum-seeker a 'formal authorisation to enter' (at the border) or a 'formal authorisation to stay' (e.g. a work or a student permit). In contrast to the Committee, a mere provision in domestic law granting the asylum-seeker a right to remain on the territory is not sufficient for the Court to conclude that such a 'formal authorisation' has been obtained.

VI. In the *travaux* of the Refugee Convention and in the case law of the HRC and the ECtHR, a tendency has been identified which I have termed the 'principle of conditional lawfulness'.

[1415] These five perspectives are: (1) the exclusion of all asylum-seekers from the personal scope of the article; (2) the inclusion of some asylum-seekers; (3) the inclusion of all asylum-seekers whose applications have been admitted to the asylum procedure—which has generally been the position supported by UNHCR; (4) the inclusion of all asylum-seekers, even before the admissibility phase; and (5) the inclusion of all migrants who fulfil the refugee definition, regardless of whether they have applied for asylum

[1416] Spalding 2022, p. 85.

According to this principle, States are entitled to require asylum-seekers to waive their right to free movement in exchange for lawful entry. Although this principle is at odds with the idea that human rights are inalienable, it has nevertheless been incorporated into positive international and European law. It has been submitted that, ideally, this principle should be rejected by legal actors. Alternatively, however, I have proposed to distinguish between those restrictions on movement imposed 'as a condition of entry' (Type A) and those imposed 'as a restriction on the human right to free movement' (Type B). This would be a form of 'damage control', since only some measures—i.e. those with a *direct link* between the permission to enter or stay and the restriction—would qualify as a Restriction Type A. In addition, the State would be required to clearly inform the asylum-seeker that his lawful status will be made dependant on his compliance with the restriction on movement. This would make it more difficult for States to effectively empty freedom of movement of asylum-seekers of any meaning by making their lawful status conditional on compliance with movement restrictions.

VII. Some European constitutions, such as those of Spain and Germany, take an even stricter approach to the personal scope of the right to free movement than international and European human rights law, as they reserve this freedom for nationals. However, national courts have been crucial in bringing the movement of asylum-seekers under the radar of fundamental rights protection. Of the two selected case studies, the Spanish Supreme Court has been the most 'activist', since in 2020/2021 it adopted a systematic interpretation of Article 19 of the Spanish Constitution in order to expand the personal scope of the right. For its part, the *Bundesverfassungsgericht* has refused to include non-nationals under the scope of Article 11 of the German Constitution (which specifically protects freedom of movement), but has derived a right to free movement for migrants from another constitutional provision, Article 2(1), which protects the freedom to develop one's personality. On a different note, it has been shown that the obsession with controlling the internal movement of asylum-seekers can lead to a serious erosion of the Rule of Law: between 2010 and 2019, the Spanish authorities ignored twenty-six rulings of domestic courts which declared that asylum-seekers fell under the personal scope of the right to free movement under the Law on the Rights and Freedoms of Aliens and that their confinement in Ceuta and Melilla had no legal basis.

3. Third key objective: material scope

Examine the criteria to distinguish between restrictions on movement and detention, so as to determine the material scope of the right to free movement. Additionally, compare the criteria applied in cases involving the confinement of asylum-seekers and other migrants with those employed in 'domestic cases' of confinement.

VIII. In the 2019 judgments *Ilias and Ahemed v. Hungary* and *Z.A. and Others v. Russia*, the Grand Chamber of the ECtHR laid down the criteria to be followed in 'migration-related cases' (i.e. those involving the confinement of asylum-seekers and other migrants in transit zones and reception centres) to distinguish between a restriction on the right to freedom of movement (Article 2(1) of Protocol 4 ECHR) and a deprivation of liberty affecting the right to liberty (Article 5 ECHR). The Court identified four general principles which, looking at the details of the judgments, can be divided into sixteen sub-criteria. The meaning of some

of these criteria (e.g. 'speedy review by the national courts') raised a number of questions concerning their interpretation which, where possible, I have tried to answer.

IX. While the Grand Chamber affirmed that the principles set out in *Ilias* and *Z.A.* were merely a summary of previous migration-related judgments on the Article 5 admissibility test, this is only partially true. Most of the criteria that appeared in previous judgments changed their meaning or importance in the assessment made in *Ilias/Z.A.*, and four principles appeared for the first time in the Grand Chamber judgments. Moreover, two of them ('classification in domestic legislation' and 'purpose of the measure') had previously been rejected as relevant factor because they undermined the autonomous Convention meaning of the concept of 'deprivation of liberty' under Article 5. There is thus a parallel between the Court's deference to domestic law in interpreting the concept 'lawfully within' under Article 2(1) of Protocol 4—as shown in Chapter 2—and the Court's deference to domestic law in the interpretation of the term 'deprivation of liberty' under Article 5.

X. If one compares the principles of *Ilias/Z.A.* with the criteria used by the Court in the Article 5 admissibility test in 'domestic cases', it becomes clear that there are two different standards of assessment. While some of the pre-*Ilias* migration-related cases already pointed to a greater leeway to States in the confinement of asylum-seekers than in that of nationals, in *Ilias* and *Z.A.* the Grand Chamber consolidated a more State-deferential line of jurisprudence, making it particularly difficult for confined asylum-seeker to claim that the measure amounts to detention. This is problematic for two reasons. On the one hand, asylum-seekers always fall under the personal scope of Article 5 (as it applies to 'everyone'), whereas if a confinement measure is classified as a 'restriction on movement', the right to freedom of movement will not necessarily apply if the State does not consider the asylum-seeker to be 'lawfully within the country' (Article 2(1) of Protocol 4). On the other hand, the safeguards offered by the right to liberty are greater than those afforded by the right to free movement, the most relevant difference being the availability of *habeas corpus* where a deprivation of liberty is found. Moreover, Protocol 4 cannot be used to challenge confinement in Greek reception centres such as the EU-funded Closed Controlled Access Centres, since Greece is not a State party to this Protocol.

XI. Since *Ilias* and *Z.A.*, the chambers of the Court have taken some steps towards a more favourable interpretation of the Article 5 applicability test for asylum-seekers and other migrants, but overall the Grand Chamber judgments have had a negative impact on the Article 5 applicability test in migration-related cases. This impact might be felt beyond the ECHR in the near future, given that the ECtHR is the international body with the most developed jurisprudence on the distinction between a restriction on movement and detention.

4. Fourth key objective: safeguards

Analyse the safeguards of the right to free movement in the law specifically applicable to asylum-seekers, and compare them with those in the law applicable to nationals or to all individuals

XII. The identification of the safeguards for the freedom of movement of asylum-seekers is important in the light of the severe spatial and residence restrictions to which they are subjected in several European countries. Regarding the Refugee Convention, there are various interpretations of the guarantees offered by this refugee-specific treaty, which I have exposed and classified. Taking the VCLT as a measuring stick, I have also submitted my own interpretation, arguing that, under Article 31(2) RC: (a) the authorities have to ground the decision to restrict movement on evidence that the individual asylum-seeker is a threat to the public good protected by the measure (*rational connection* between measure and purpose);[1417] and (b) they must search for less intrusive means that would achieve the purpose before imposing the restriction (*necessity test*).[1418] On the other hand, under Article 26: (a) refugee-specific restrictions are prohibited; (b) the nature and extent of the restrictions must be the same as those imposed on another group of migrants—either all other non-nationals except those coming from special partner States, or a group of migrants with similar features to asylum-seekers; and (c) States may not subject the exercise of freedom of movement to conditions that they are unable to fulfil.[1419]

XIII. Under Spanish and German constitutional law, limitations on free movement must respect the principle of proportionality (although in Spain, the standards of the principle are not as strict as in asylum detention) and asylum-seekers have a right to challenge the measure before the national courts. In Spain, moreover, these limitations may be regulated only by a law adopted in Parliament.

XIV. The safeguards afforded by the decisions of the HRC to the right to free movement of individuals in general are not very strong, but still provide more protection than the Refugee Convention as interpreted by the majority of legal doctrine. In particular, restrictions under Article 12(3) ICCPR must have a basis in a general norm (such as a governmental Decree or a law enacted by Parliament), the authorities may only invoke the restriction grounds set out in Article 12(3) (*numerus clausus* safeguard), and a restriction on the right to choose a job also impinges on the right to free movement (indirect restriction). The ECtHR case law reinforces the protection of the freedom of movement of all individuals, further widening the gap between general human rights law and the Refugee Convention: the general norm allowing the restriction must be accessible and foreseeable, States have to carry out the three steps of the proportionality test (a strict rational connection requirement, a necessity test[1420] and a balancing act), and must put in place robust procedural guarantees, such as the possibility to challenge the lawfulness of the measure before a court.[1421]

[1417] The majority of the Refugee Convention doctrine also agrees with the existence of this safeguard under Article 31(2) RC. However, the consensus seems to be that States do not need to provide very strong evidence to show that the individual poses a threat to the public good protected by the measure (unlike in cases of detention, where this test is stricter).

[1418] It should be noted, however, that only half of the authors examined recognise the existence of this safeguard in Article 31(2) RC in the case of restrictions on movement.

[1419] The majority of authors also support the existence of safeguards (a) and (c), while safeguard (b) is advocated by Maple (2016).

[1420] However, it appears that the necessity test is not required when the purpose of the restriction is the protection of economic well-being.

[1421] Moreover, the authorities must periodically re-examine the justification and proportionality of the measure, the person must be informed of the reasons for the restrictions, and a restriction on movement without a time-limit is more likely to amount to a violation of Article 2(1) of Protocol 4.

XV. This differentiated protection is also visible in domestic legal systems, as shown by the case studies of Spain and Germany. At the constitutional level, the Spanish Constitutional Court has explicitly affirmed that 'the protection of Article 19 for foreigners does not have to be on the same terms as for Spaniards'—an assertion which strangely resembles that made by the HRC in relation to Article 12 ICCPR.[1422] Similarly, German legal doctrine has argued that the principle of proportionality may be applied less rigorously in the case of restrictions on the movement of asylum-seekers (under Article 2(1) GG) than in the case of nationals (under Article 11 GG).[1423] While the Federal Constitutional Court has not made such an explicit statement, the comparison of how this court treats the principle of proportionality in two different judgments leads me to conclude that it gives substantially less protection to the freedom of movement of asylum-seekers than to nationals. At the legislative level, the laws specifically applicable to asylum-seekers in both countries also grant State authorities greater leeway to restrict movement than the laws applicable to individuals in general (the Spanish Criminal Code and the *Länder*-Police Acts). Moreover, in the case of Spain, the law imposing these restrictions is a governmental Decree, which may give a sense of 'plausible legality'[1424] to the restrictions in Ceuta and Melilla, which, in fact, would only comply with the Constitution if they were imposed by an organic law adopted in Parliament.

Concluding thoughts

This study has shown that human rights law is fragmented, not only because there are *multi-sourced equivalent norms* that give a different scope and content to freedom of movement within the country, but also because there is a *two-tier human rights system* whereby the norms that apply to nationals or all individuals grant stronger protection to freedom of movement than those specifically relating to asylum-seekers. I do not necessarily see the existence of equivalent norms with different protection standards as a problem, since the plurality of actors charged with the interpretation of these norms avoids the concentration of decision-making power in a particular court or body and reflects the richness of perspectives through which human rights law can be construed in a heterogeneous world.[1425] *Migration exceptionalism*, however, is 'the antithesis to the function and purpose of human rights'.[1426] To paraphrase Bosniak, while asylum-seekers are not having their humanity formally withdrawn, their personhood is being 'diminished in its effect, evaded, effaced, diluted, displaced'.[1427]

[1422] Judgment of the Constitutional Court 94/1993, 22 March, Point of Law n. 3 and HRC General Comment No. 27, para. 4
[1423] Rixen 2021, p. 133. Other differences include much wider grounds for justifying restrictions under Article 2(1) than under Article 11 GG, to the point that German legal doctrine has claimed that the rights protected under Article 2(1) 'run dry' (doctrine quoted by the Judgment of the Federal Constitutional Court 6, 32).
[1424] Sanders 2018.
[1425] In this regard, it is worth quoting the book by Mateos Durán (2023), where he develops a model through which constitutional judges can accommodate the different interpretations when the same fundamental/human right contains contradictory restrictions in different national and international legal instruments. In addition, judicial dialogue between courts, such as that which takes place in Europe between constitutional courts, the CJEU and the ECtHR (González Herrera 2021), is also a means through which the different courts can find common ground while retaining their ability to differ in their interpretation of the content of a right.
[1426] Spalding 2022, p. 152.
[1427] Bosniak 2011, p. 207.

In a series of lectures broadcast by the BBC, Jonathan Sumption, a former senior judge of the Supreme Court of the United Kingdom, criticised what he sees as a trend of courts in recent decades to overstep their role as law enforcers and become law makers, especially regarding politically sensitive issues such as migration. In the question and answer session, Sarah Nathan, co-founder of the NGO Refugees At Home, posed the following question: 'The hostile environment to refugees is government policy. Often the court is the only defence for [them]. Should the courts act?'.[1428]

I can understand Lord Sumption's concern about respecting the separation of powers, given that the democratic legitimacy of Parliament and Government is not the same as that of courts. However, I also think that human rights represent—or at least strive to represent—a universal consensus on the minimum entitlements that human beings should have in order to reduce suffering.[1429] In this area, courts should take the lead, because their role as counterweights and watchdogs of majority decisions makes them best placed to protect vulnerable persons, who are in the end the ones most in need of human rights protection. Moreover, the need to justify every public decision—including the justification for limiting human rights—is inherent to democratic societies and, in this respect, the control exercised by the judiciary over the executive and legislative powers through elaborate and reflective reasoning is essential to ensure that these decisions are well justified. I therefore agree with Sarah Nathan that yes, courts should act to protect asylum-seekers from the hostile environment created around them, especially given the lower standards of protection granted to their freedom of movement by treaty-makers (e.g. in the Refugee Convention vs. in the ICCPR/ECHR), constituent assemblies (e.g. in the Spanish and German constitutions) and Parliaments (e.g. in Spanish and German ordinary laws).

However, in general terms, judicial and quasi-judicial bodies have not bridged the gap between the different protection standards for asylum-seekers and for nationals or individuals in general, in the true spirit of *universalism* which permeates human rights law. With the exception of the Spanish Supreme Court, courts and quasi-judicial bodies have reinforced and sometimes widened this gap in several ways, including: (1) the non-autonomous interpretation of the term 'lawfully within the territory' by the HRC and the ECtHR and their acceptance of the 'principle of conditional lawfulness'; (2) the ECtHR's creation of obstacles for asylum-seekers to argue that a confinement measure must comply with the guarantees of the right to liberty; (3) the assertion by the HRC and the Spanish Constitutional Court that the same provision offers different safeguards to nationals than to migrants; and (4) the lower guarantees given by the Federal Constitutional Court to the provision in the German Constitution governing freedom of movement of migrants than to the provision protecting freedom of movement of nationals.

[1428] BBC Radio, The Reith Lectures 2019: Law and the Decline of Politics, Joanathan Sumption, Lecture 2: In Praise of Politics, minute 33:15. This lecture was discussed at the Max Planck Institute for Comparative Public Law and International Law during on the 15th of August 2023 in one of the Tuesday Meetings organised under the direction of Prof. Dr. Armin von Bogdandy.

[1429] Moreover, respect for human rights is an essential component of the Rule of Law, following the case law of the Court of Justice of the EU and the ECtHR (Pérez Bernárdez 2016b, p. 52). For the different conceptions on the meaning of human rights, see Dembour 2006.

This differentiated protection is particularly striking in view of the fact that freedom of movement is a negative civil right that requires no action on the part of the State to secure its fulfilment and does not relate to the inclusion of the individual in the *demos* of a political society. Indeed—without going into the merit of these arguments—migration exceptionalism in social rights is often justified on the grounds that these rights place a burden on 'resource-hungry public services' and that the State is therefore entitled to curtail them in the case of 'short-term and illegal immigrants, who, as a rule, do not contribute to the funding [of these services]'.[1430] The two-tier human rights system is also mostly seen as legitimate in the case of voting rights, given that, in virtually every State of the world, 'the right to vote is accorded with reference to two criteria: nationality and durable residence or presence in the state'.[1431] However, why a negative civil right like freedom of movement is granted less protection to migrants (and, in particular, to asylum-seekers) than to nationals is difficult to understand.[1432] The only possible explanation seems to be that, in human rights law, membership of a nation (or at least immigration status) is placed above personhood as a precondition for the equal and full and equal enjoyment of *all* fundamental rights.[1433]

I would not however like to end this study with a defeatist tone. Freedom of movement of asylum-seekers within the host State is not completely outside the remit of human rights law, and there are some options to use this right as an instrument to challenge restrictive European policies, as the analysis in the different chapters has shown. Moreover, critique can bring about change and has in the past shifted the approach of courts towards greater protection of human rights.[1434] In 2011, Dembour and Kelly coordinated a book with the provocative title *Are human rights for migrants?*.[1435] My answer is: yes, they are. And if they are not, it is our duty as academics working in the field to point this out in order to raise awareness and prompt legal actors to do something about it. This is, in essence, what this study has tried to do. I hope it has not been in vain.

[1430] *Ponomaryov v. Bulgaria*, no. 53335/05, 21 June 2011. The case law of the ECtHR on the social rights of migrants is analysed in Caicedo Camacho 2021.
[1431] Schmalz 2020, p. 96
[1432] The same can be said for the right to liberty, regarding which the ECtHR affords less safeguards to migrants than to nationals or individuals in general (Costello 2015, p. 147; Cornelisse 2010, pp. 300-312; Spalding 2023, pp. 60-67).
[1433] *Mutatis mutandi*, Wilsher 2011, p. xvi.
[1434] See Spalding (2023, p. 149), referring to the changes in the ECtHR's case law on the expulsion of migrants with severe health problems.
[1435] Dembour and Kelly 2011.

Conclusiones

En la primera década del siglo XXI, Ben y Sunny solicitaron asilo en dos países que, a primera vista, son social y culturalmente distintos: España y Alemania. Sin embargo, ambos migrantes se vieron sometidos a la misma medida de control, mediante la cual su "posibilidad de mantener relaciones interpersonales y un mínimo de participación en la vida social, cultural y política"[1436] se redujo a 12,3 y 204 kilómetros cuadrados (las superficies de Melilla y Wolfsburgo, respectivamente).

Una vez tuve la oportunidad de asistir a un curso de verano de lengua y cultura alemanas en la *Freie Universität* de Berlín, donde una profesora nos dijo que "si cogen a un ciudadano de cada país europeo y lo suben a un autobús que recorra China, se darán cuenta de que tienen más en común de lo que pensaban". En efecto, prevalece la idea según la cual comparar el "viejo continente" con países no europeos permite vislumbrar las similitudes entre las naciones de Europa. Sin embargo, estas similitudes no siempre adoptan la forma de "libertad política, prosperidad económica y cohesión social", como sugiere Josep Borrell[1437]. También tienen un lado oscuro, especialmente evidente en el ámbito de la migración y el asilo, donde incluso países europeos distantes convergen en su "intención de elaborar normas que excluyan a algunas personas del acceso a las políticas europeas liberales"[1438].

Aunque ya existen excelentes trabajos que ofrecen una visión general de cómo la legislación sobre derechos humanos sirve de escudo (aunque incompleto) a los refugiados y otros migrantes para protegerse de estas normas excluyentes,[1439] el presente estudio se ha centrado en una política europea concreta—las restricciones a la libre circulación de los solicitantes de asilo—y en un derecho humano concreto: el derecho a la libertad de circulación. Se trata de la primera tesis doctoral que aborda exclusivamente la libertad de circulación de los solicitantes de asilo desde la perspectiva del Derecho Internacional y Europeo, llenando así una laguna en la bibliografía sobre los derechos de los refugiados.[1440] Además, el análisis del estatuto jurídico de los solicitantes de asilo en virtud de los distintos tratados (Capítulo 2) y el examen detallado de la diferencia entre una restricción de la libertad de circulación y una privación de libertad (Capítulo 3) contribuyen a la comprensión de temas poco explorados y pueden servir de base para la investigación en otros ámbitos del Derecho de Refugiados y del Derecho Internacional de los Derechos Humanos.

Este estudio ha examinado esta libertad desde cuatro ángulos diferentes: sus orígenes históricos, su ámbito de aplicación personal, su ámbito de aplicación material (es decir, la

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[1436] Pelzer y Pichl 2016, p. 100.

[1437] En 2022, el Alto Representante de la UE para Asuntos Exteriores, Josep Borrell, comparó a Europa con un "jardín" de libertad y democracia y al resto del mundo con una "jungle" (EEAS Press Team 2022).

[1438] Dembour 2015, p. 258.

[1439] Por citar sólo algunos: Dembour 2015, Bast, Von Harbou y Wessels 2022, Spalding 2022, Faggiani 2023.

[1440] Como se señala en la introducción, algunos autores se han ocupado exclusivamente del derecho a la libre circulación de los solicitantes de asilo y los refugiados en artículos académicos (Zieck 2018, McDonough 2016, Slingenberg 2022b, Pelzer y Pilch 2016), trabajos de investigación (Maple 2016, Künzli *et al.* 2017) y guías (Hathaway *et al.* 2018). La mayoría de los autores que han examinado este tema lo han hecho en capítulos de libros relativos al derecho humano a la libre circulación (Beyani 2000) o a los derechos de los refugiados (la mayoría de los autores citados en este estudio).

diferencia entre restricciones y detención) y sus garantías (es decir, las condiciones que deben darse para que el Estado pueda interferir de forma lícita en el derecho). En la conclusión de cada capítulo, he respondido a las preguntas de investigación específicas. Ha llegado el momento de resumir las conclusiones más relevantes y vincularlas a los cuatro objetivos generales presentados en la introducción de este estudio.

1. Primer objetivo: orígenes históricos

Investigar los orígenes históricos del derecho humano a la libre circulación, la configuración de su ámbito de protección y el modo en que los redactores de los distintos instrumentos jurídicos entendían la posición de los refugiados y otros migrantes en relación con este derecho.

I. Este derecho no era una prioridad para los redactores de los instrumentos de derechos humanos. Algunos incluso cuestionaron su naturaleza como derecho humano, y ninguno de los borradores originales lo incluía en sus listas de derechos y libertades. En el instrumento específico para los refugiados, este derecho adquirió aún menos importancia que en los instrumentos generales ya que, a diferencia de lo que ocurrió en la DUDH, el PIDCP y el Protocolo 4 del CEDH, los redactores de la Convención de Refugiados no debatieron por qué deseaban garantizar esta libertad. En su lugar, sólo debatieron la finalidad de las restricciones. Es de señalar que Francia, a menudo considerada la cuna de los derechos humanos, propuso que este derecho se excluyera de la Convención, mientras que apoyó su inclusión en los instrumentos generales de derechos humanos.

II. Después de algunas deliberaciones, los redactores de los instrumentos generales de derechos humanos decidieron incorporar la libertad de circulación al Derecho Internacional de los Derechos Humanos, principalmente para proteger "el espíritu de la libertad", la "necesidad humana" de relacionarse y comunicarse con los demás y la vida privada de las personas, así como para evitar la segregación. Sin embargo, para los redactores, estos ámbitos de la vida sólo eran dignos de protección si la persona era un nacional o un migrante en situación regular: los migrantes irregulares quedaban fuera del alcance de este derecho. La defensora de esta exclusión, la Sra. Roosevelt, expresó su temor a que garantizar esta libertad a todos los seres humanos se interpretara como un intento de conceder a los migrantes el derecho a circular *entre* Estados. El temor a un "efecto llamada" tenía por tanto más peso que el interés de los redactores por proteger la "necesidad humana" de relacionarse y comunicarse con los demás y de desarrollar una vida privada. Del mismo modo, los padres de la Constitución alemana no explicaron por qué excluían a los extranjeros del ámbito personal de esta libertad, y los de la Constitución española temían que esta libertad atrajera a más migrantes al territorio español. La libertad de circulación *dentro* del país nació así con el "estigma" de estar vinculada al derecho de los Estados a controlar la migración de las personas *entre* países.

III. En los debates sobre las limitaciones justificadas a la circulación de migrantes "legalmente en el territorio de un Estado" en virtud del PIDCP y el Protocolo 4 del CEDH, la idea de que los migrantes regulares pudieran circular libremente se convirtió en motivo de preocupación. Varios redactores temían que los migrantes de una misma nacionalidad que

residieran en un mismo barrio causaran problemas de seguridad[1441], mientras que otros pensaban que la libertad de los migrantes para decidir dónde querían vivir perjudicaría la economía. Los redactores de la Convención de Refugiados también expresaron preocupaciones similares, relacionadas con la soberanía y el control. Además, consideraban el apartado 2 del artículo 31 y el artículo 26 principalmente como disposiciones que servían para orientar la gestión de las llegadas de refugiados mediante restricciones a la circulación, más que como un instrumento para promover el libre albedrío del refugiado.

2. Segundo objetivo: ámbito personal

Explorar en qué medida los solicitantes de asilo entran en el ámbito de aplicación personal del derecho a la libre circulación.

IV. De la doctrina y los documentos del ACNUR se pueden extraer cinco teorías diferentes sobre la cuestión de si los solicitantes de asilo se encuentran "legalmente en el territorio" en el sentido del artículo 26 de la Convención de Refugiados[1442]. Esta conclusión es importante en sí misma, ya que demuestra que la cuestión no está resuelta de manera concluyente. Mi interpretación a la luz del CVDT es que: (1) debe darse un significado autónomo—es decir, independiente del derecho nacional—al término "legalmente en el territorio"; (2) los solicitantes de asilo que han entrado o permanecido irregularmente en el Estado de acogida no se encuentran "legalmente en el territorio"; (3) los solicitantes ilegalmente presentes que llevan más de tres años esperando el resultado del procedimiento de asilo se "regularizan" automáticamente; y (4) los solicitantes que se presentan en la frontera sin cumplir los requisitos de entrada se encuentran "legalmente en el territorio" si las autoridades fronterizas les eximen de dichos requisitos. También existe debate doctrinal respecto al ámbito de aplicación personal del artículo 31.2 de la Convención. Mientras que algunos autores argumentan que los "solicitantes de asilo penalizables" (es decir, aquellos que no cumplen los criterios del artículo 31.1 de la Convención para que el derecho penal los exima de pena por su entrada irregular) pueden beneficiarse de esta disposición, otros sostienen justo lo contrario. Yo coincido con el primer grupo doctrinal. En general, existe un mínimo común denominador en la doctrina relativa a la Convención de Refugiados: como mínimo, los solicitantes de asilo "no penalizables" tienen derecho a la protección de su libertad de circulación en virtud del artículo 31.2.

V. El Comité de Derechos Humanos de la ONU y el TEDH conceden una gran discrecionalidad a los Estados para que decidan si los solicitantes de asilo se encuentran o no "legalmente en el territorio" en el sentido del artículo 12 del PIDCP y del artículo 2.1 del Protocolo 4 del CEDH. Así, el Comité y el Tribunal no dan a este término un significado

[1441] Este argumento se sigue utilizando hoy en día en el debate público para justificar las restricciones a la circulación. Pelzer y Pichl (2016, p. 101) señalan que los políticos alemanes defienden la necesidad de mantener *el Residenzpflicht* como forma de evitar el "problema de los guetos".

[1442] Estas cinco teorías son: (1) la exclusión de todos los solicitantes de asilo del ámbito de aplicación personal del artículo; (2) la inclusión de algunos solicitantes de asilo; (3) la inclusión de todos los solicitantes de asilo cuyas solicitudes hayan sido admitidas a trámite—que ha sido, en general, la postura defendida por ACNUR—; (4) la inclusión de todos los solicitantes de asilo, incluso antes de la fase de admisibilidad; y (5) la inclusión de todos los migrantes que cumplan la definición de refugiado, independientemente de que hayan o no solicitado asilo

autónomo en virtud del tratado que interpretan—independiente del derecho interno—, lo cual contrasta con la jurisprudencia consolidada del TEDH sobre "conceptos autónomos" en el Convenio. El artículo 2.1 del Protocolo 4 no es el único ejemplo en el que el Tribunal se ha apartado de su jurisprudencia sobre "conceptos autónomos" en casos relativos a migrantes, ya que otros autores también han identificado esta desviación en relación con otros términos del Convenio, tales como "acusación penal" en el artículo 6 del CEDH[1443]. En otro orden de cosas, el TEDH es más estricto que el Comité de la ONU en su interpretación del estatus migratorio de los solicitantes de asilo, ya que parece exigir que la legislación nacional conceda al solicitante una "autorización formal de entrada" (en la frontera) o una "autorización formal de estancia" (por ejemplo, un permiso de trabajo o de estudiante). A diferencia del Comité, una mera disposición de derecho interno que otorgue al solicitante el derecho a permanecer en el territorio no es suficiente para que el Tribunal concluya que el solicitante se encuentra "legalmente en el territorio".

VI. En los trabajos preparatorios de la Convención de Refugiados y en la jurisprudencia del Comité de la ONU y del TEDH he identificado una tendencia que he denominado "principio de legalidad condicional". Según este principio, los Estados pueden exigir a los solicitantes de asilo que renuncien a su derecho a la libre circulación a cambio de una entrada legal. Aunque este principio es contrario a la idea de que los derechos humanos son inalienables, se ha incorporado al derecho positivo internacional y europeo. He afirmado que, idealmente, este principio debería ser rechazado por los distintos actores jurídicos. Como alternativa, sin embargo, he propuesto distinguir entre aquellas restricciones a la circulación impuestas "como condición de entrada" (Tipo A) y aquellas impuestas "como restricción al derecho humano a la libre circulación" (Tipo B). Se trataría de una forma de "control de daños" (*damage control*), ya que sólo algunas medidas—es decir, las que tienen un *vínculo directo* entre el permiso de entrada o estancia y la restricción a la libre circulación—podrían considerarse restricciones de tipo A. Además, debería exigirse al Estado que informara claramente al solicitante de asilo de que su estatus migratorio regular dependerá del cumplimiento de la restricción a la libre circulación. De este modo, los Estados tendrían más dificultades para vaciar de contenido la libertad de circulación de los solicitantes de asilo al condicionar su estatuto migratorio al cumplimiento de restricciones.

VII. Algunas constituciones europeas, como las de España y Alemania, son aún más estrictas en relación al ámbito personal del derecho a la libre circulación que la legislación internacional y europea, ya que otorgan esta libertad únicamente a los nacionales. Sin embargo, los tribunales españoles y alemanes han tenido un papel crucial a la hora de situar la movilidad de los solicitantes de asilo bajo el radar de los derechos fundamentales. De los dos casos de estudio seleccionados, el Tribunal Supremo español ha sido el más "activista", ya que en 2020/2021 utilizó una interpretación sistemática del artículo 19 de la Constitución española para ampliar el alcance personal del derecho. Por su parte, aunque el *Bundesverfassungsgericht* se ha negado a incluir a los migrantes en el ámbito de aplicación del artículo 11 de la Constitución alemana (que protege específicamente la libertad de circulación), ha derivado un derecho a la libre circulación para los migrantes de otro artículo de la Constitución, el 2.1, que protege la el libre desarrollo de la personalidad. En otro orden

[1443] Spalding 2022, p. 85.

de cosas, se ha observado que la obsesión por controlar la movilidad de los solicitantes de asilo puede conducir a una grave erosión del Estado de Derecho: entre 2010 y 2019, las autoridades españolas ignoraron veintiséis sentencias de tribunales nacionales que concluían que los solicitantes de asilo entran en el ámbito personal del derecho a la libre circulación previsto en la Ley 4/2000, sobre Derechos y Libertades de los Extranjeros, y que la prohibición de salir de Ceuta y Melilla carecía de base legal.

3. Tercer objetivo: ámbito material

Examinar los criterios para distinguir entre una restricción a la libertad de circulación y una detención, a fin de determinar el alcance material del derecho a la libre circulación. Además, comparar los criterios aplicados en casos de confinamiento de solicitantes de asilo y otros migrantes con los empleados en "casos nacionales".

VIII. En las sentencias de 2019 *Ilias y Ahmed c. Hungría* y *Z.A. y otros c. Rusia*, la Gran Sala del TEDH estableció los criterios que deben seguirse en los "casos relacionados con la migración" (es decir, los relativos al confinamiento de solicitantes de asilo y otros migrantes en zonas de tránsito y centros de acogida) para distinguir entre una restricción a la libertad de circulación (artículo 2.1 del Protocolo 4 del CEDH) y una privación de libertad que afecte al derecho a la libertad física (artículo 5 del CEDH). El Tribunal identificó cuatro principios generales que, examinando los detalles de las sentencias, pueden dividirse en dieciséis criterios. El significado de algunos de estos criterios (por ejemplo, "control rápido por los órganos jurisdiccionales nacionales") planteaba una serie de cuestiones relativas a su interpretación que, en la medida de lo posible, he intentado responder.

IX. Aunque la Gran Sala afirmó que los principios establecidos en *Ilias* y Z.*A.* no eran más que un resumen de la jurisprudencia anterior relativa a la admisibilidad del artículo 5 en "casos relacionados con la migración", esto no es del todo cierto. La mayoría de los criterios que aparecían en sentencias anteriores cambiaron su significado o importancia en *Ilias/Z.A.* y, además, la Gran Sala creó cuatro nuevos principios. Dos de ellos ("clasificación en la legislación nacional" y "finalidad de la medida") habían sido previamente rechazados de manera expresa por el Tribunal como factores relevantes, debido a que debilitaban el sentido autónomo del concepto "privación de libertad" del artículo 5. Por tanto, existe un paralelismo entre la deferencia del Tribunal hacia el derecho nacional en su interpretación del concepto "legalmente en el territorio" del artículo 2.1 del Protocolo 4—como se muestra en el capítulo 2—y la deferencia del Tribunal hacia el derecho interno en su interpretación del término "privación de libertad" del artículo 5.

X. Si se comparan los principios de *Ilias/Z.A.* con los criterios utilizados por el Tribunal en el examen de admisibilidad del artículo 5 en "casos nacionales", se pone en evidencia que existen dos criterios de evaluación diferentes. Mientras que algunas de las sentencias anteriores a *Ilias* relacionados con la migración ya apuntaban a una mayor discrecionalidad para los Estados en caso de confinamiento de solicitantes de asilo que en el de nacionales, en *Ilias* y *Z.A.* la Gran Sala consolidó una línea jurisprudencial más favorable al Estado, haciendo especialmente difícil para los solicitantes de asilo alegar que una medida de confinamiento equivale a una detención. Esto es problemático por dos razones. Por un lado, los solicitantes de asilo siempre entran en el ámbito de aplicación personal del artículo 5 (ya

que se aplica a "toda persona"), mientras que si una medida de confinamiento se clasifica como "restricción a la libertad de circulación", el derecho a la libertad de circulación no se aplicará necesariamente si el Estado no considera que el solicitante de asilo se encuentra "legalmente en el territorio" (artículo 2.1 del Protocolo 4). Por otra parte, las garantías que ofrece el derecho a la libertad física son mayores que las que ofrece el derecho a la libre circulación, siendo la diferencia más relevante la protección del *habeas corpus*. Además, el Protocolo 4 no puede utilizarse para impugnar el confinamiento en centros de acogida griegos como los Centros Cerrados de Acceso Controlado financiados por la UE, ya que Grecia no es Estado parte de este Protocolo.

XI. Desde *Ilias* y *Z.A.*, las distintas salas del Tribunal han dado algunos pasos hacia una interpretación más favorable para los solicitantes de asilo del examen de admisibilidad del artículo 5, pero en general estas dos sentencias de la Gran Sala han tenido un impacto negativo para ellos. Este impacto podría sentirse más allá del TEDH en un futuro próximo, dado que el TEDH es el organismo internacional con la jurisprudencia más desarrollada sobre la distinción entre restricciones a la libertad de circulación y detenciones.

4. Cuarto objetivo: garantías

Analizar las garantías del derecho a la libre circulación en la legislación específicamente aplicable a los solicitantes de asilo, y compararlas con las de la legislación aplicable a los nacionales o a todas las personas.

XII. En vista de las restricciones espaciales y de residencia tan severas a las que se ven sometidos los solicitantes de asilo en distintos países europeos, identificar las garantías que ofrece el derecho a la libre de circulación resulta especialmente importante. En relación a la Convención de Refugiados, existen diversas interpretaciones sobre cuáles son esas garantías, que he explicado y clasificado en el capítulo 4. Utilizando el CVDT, también he ofrecido mi propia interpretación, argumentando que, en virtud del artículo 31.2 de la Convención, las autoridades: (a) tienen que fundamentar la decisión de restringir la libre circulación con pruebas de que el solicitante de asilo constituye una amenaza individual para el bien público que la medida pretende proteger (*conexión racional* entre la medida y su finalidad)[1444]; y (b) deben buscar medios menos intrusivos que permitan alcanzar la finalidad antes de imponer la restricción (*necesidad*)[1445]. Por otra parte, en virtud del artículo 26: (a) quedan prohibidas las restricciones dirigidas únicamente a los refugiados; (b) la naturaleza y el alcance de las restricciones dirigidas a los refugiados deben ser iguales que aquellas impuestas a otros grupos de migrantes, ya sean todos los demás migrantes de terceros Estados (no pertenecientes a la Unión Europea), o grupos de migrantes con características similares a los solicitantes de asilo; y (c) los Estados no pueden someter el ejercicio de la libertad de

[1444] La mayoría de la doctrina de la Convención de Refugiados también está de acuerdo con la existencia de esta garantía derivada del artículo 31.2. Sin embargo, el consenso parece ser que los Estados no necesitan aportar pruebas muy sólidas para demostrar que el individuo representa una amenaza para el bien público protegido por la medida (a diferencia de los casos de detención, en los que esta prueba es más estricta).
[1445] Hay que señalar, sin embargo, que sólo la mitad de los autores examinados reconocen la existencia de esta garantía en el artículo 31.2 en casos de restricciones a la libre circulación .

circulación a condiciones que los solicitantes de asilo, por su condición de refugiados, no puedan cumplir[1446].

XIII. Según el derecho constitucional español y alemán, las limitaciones a la libre circulación deben respetar el principio de proporcionalidad (aunque en España las exigencias de este principio no son tan estrictas como en casos de detención) y los solicitantes de asilo tienen derecho a impugnar la medida ante los tribunales nacionales. En España, además, estas limitaciones sólo pueden regularse mediante ley orgánica.

XIV. Las garantías que ofrecen las decisiones del Comité de Derechos Humanos de la ONU al derecho a la libre circulación de todas las personas no son muy sólidas, pero proporcionan una mayor protección que la Convención de Refugiados. En particular, las restricciones contempladas en el artículo 12.3 del PIDCP deben tener su base jurídica en una norma general (tales como un decreto gubernamental o una ley), las autoridades sólo pueden invocar una lista *numerus clausus* de motivos para justificar la restricción, y una restricción del derecho a elegir un trabajo también afecta al derecho a la libre circulación (restricción indirecta). La jurisprudencia del TEDH refuerza la protección de la libertad de circulación de todas las personas, ampliando aún más la brecha entre la normativa general de derechos humanos y la Convención de Refugiados: la norma general que autorice la imposición de la restricción debe ser accesible y previsible, los Estados tienen que implementar los tres elementos del test de proporcionalidad (un requisito estricto de conexión racional entre la medida y su finalidad, necesidad[1447] y proporcionalidad *stricto sensu*), y deben poner en marcha garantías procesales sólidas, tales como la posibilidad de impugnar la legalidad de la medida ante un tribunal[1448].

XV. Esta protección diferenciada también se observa en los ordenamientos jurídicos nacionales, como demuestran los casos de España y Alemania. En el plano constitucional, el Tribunal Constitucional español ha afirmado explícitamente que "la protección del artículo 19 para los extranjeros no tiene por qué ser en los mismos términos que para los españoles", afirmación que se asemeja extrañamente a la realizada por el Comité de Derechos Humanos en relación con el artículo 12 del PIDCP[1449]. Del mismo modo, la doctrina alemana ha sostenido que el principio de proporcionalidad puede aplicarse con menos rigor en el caso de las restricciones a la libre circulación impuestas a los solicitantes de asilo (en virtud del artículo 2.1 de la Constitución alemana) que a los nacionales (en virtud del artículo 11 de dicha norma)[1450]. Aunque el Tribunal Constitucional Federal no ha hecho una declaración tan explícita, la comparación detallada de dos de sus sentencias me lleva a concluir que este

[1446] La mayoría de los autores también sostiene la existencia de las garantías (a) y (c), mientras que Maple (2016) defiende la garantía (b).

[1447] Sin embargo, parece que el test de necesidad no es necesario cuando la finalidad de la restricción es la protección del bienestar económico.

[1448] Además, las autoridades deben reexaminar periódicamente la justificación y proporcionalidad de la medida, la persona debe ser informada de los motivos de la restricción, y una restricción de la libertad de circulación sin límite de tiempo tiene más probabilidades de llegar a vulnerar el artículo 2.1 del Protocolo 4 al CEDH.

[1449] Sentencia del Tribunal Constitucional 94/1993, 22 de marzo, Punto de Derecho nº 3 y Observación General nº 27 del CDH, párrafo. 4.

[1450] Rixen 2021, p. 133. Además, el artículo 2.1 permite al Estado alegar motivos mucho más amplios para justificar las restricciones que el artículo 11, hasta el punto de que la doctrina alemana ha afirmado que los derechos protegidos en virtud del artículo 2.1 "se vacían" (doctrina citada por la sentencia del Tribunal Constitucional Federal 6, 32).

tribunal también otorga una protección sustancialmente menor a la libertad de circulación de los solicitantes de asilo que a la de los nacionales. En el plano legislativo, las leyes específicamente aplicables a los solicitantes de asilo en ambos países también conceden a las autoridades estatales una mayor discrecionalidad para restringir la libertad de circulación que las leyes aplicables a todos los individuos (el Código Penal español y las leyes de fuerzas y cuerpos de seguridad de los *Länder*). Además, en el caso de España, la ley que impone estas restricciones es un Decreto gubernamental, lo que puede dar una sensación de "falsa legalidad (*plausible legality*)"[1451] al confinamiento de solicitantes de asilo en Ceuta y Melilla, cuando, en realidad, sólo se ajustarían a la Constitución si se impusieran por ley orgánica.

Reflexiones finales

Este estudio ha demostrado que el Derecho Internacional de los Derechos Humanos está fragmentado, no sólo porque existen *normas equivalentes* en distintas fuentes normativas que dan un alcance y contenido diferentes a la libertad de circulación, sino también porque se da un *sistema de derechos humanos de dos niveles*, según el cual las normas que se aplican a los nacionales o a todas las personas ofrecen una protección más sólida a la libertad de circulación que las normas específicamente aplicables a los solicitantes de asilo. No considero necesariamente un problema la existencia de normas equivalentes con diferentes niveles de protección, ya que la pluralidad de actores encargados de la interpretación de estas normas evita la concentración del poder de decisión en un solo tribunal u organismo y refleja la riqueza de perspectivas a través de las cuales pueden interpretarse los derechos humanos en un mundo heterogéneo[1452]. Sin embargo, *el excepcionalismo migratorio* es "la antítesis de la función y el propósito de los derechos humanos"[1453]. Parafraseando a Bosniak, aunque a los solicitantes de asilo no se les está retirando formalmente su humanidad, su condición de personas está siendo "disminuida en sus efectos, evadida, borrada, diluida, desplazada"[1454].

En una serie de conferencias retransmitidas por la BBC, Jonathan Sumption, ex magistrado del Tribunal Supremo del Reino Unido, criticó lo que él considera una tendencia de los tribunales en las últimas décadas a extralimitarse en su función de hacer cumplir la ley y convertirse en legisladores, especialmente en lo relativo a cuestiones políticamente delicadas como la migración. En la sesión de preguntas y respuestas, Sarah Nathan, cofundadora de la ONG Refugees At Home, planteó la siguiente cuestión: "El entorno hostil hacia los refugiados lo genera precisamente la política gubernamental. A menudo los tribunales son su única defensa. ¿Deben actuar los tribunales?"[1455].

[1451] Sanders 2018.

[1452] En este sentido, cabe citar el libro de Mateos Durán (2023), que desarrolla un modelo a través del cual los jueces constitucionales pueden combinar las diferentes interpretaciones cuando un mismo derecho fundamentalcontiene restricciones contradictorias en diferentes instrumentos jurídicos nacionales e internacionales. Además, el diálogo judicial entre tribunales, como el que tiene lugar en Europa entre los tribunales constitucionales, el TJUE y el TEDH (González Herrera 2021), es también un medio a través del cual los distintos tribunales pueden encontrar un terreno común, conservando su capacidad de discrepar en su interpretación sobre el contenido de un derecho.

[1453] Spalding 2022, p. 152.

[1454] Bosniak 2011, p. 207.

[1455] BBC Radio, The Reith Lectures 2019: Law and the Decline of Politics, Joanathan Sumption, Lecture 2: In Praise of Politics, minuto 33:15. Esta conferencia fue debatida en el Instituto Max Planck de Derecho Público

Entiendo la preocupación de Lord Sumption sobre la necesidad de respetar la separación de poderes, dado que la legitimidad democrática del Parlamento y del Gobierno no es la misma que la de los tribunales. Sin embargo, también creo que los derechos humanos representan—o al menos tratan de representar—un consenso universal sobre los derechos mínimos que deben tener los seres humanos para reducir el sufrimiento[1456]. En este ámbito, los tribunales deberían tomar la iniciativa, ya que su papel como contrapesos y vigilantes de las decisiones mayoritarias los sitúa en la mejor posición para proteger a las personas vulnerables, que son, en definitiva, las que más necesitan la protección de los derechos humanos. Además, la necesidad de justificar toda decisión pública—incluida la justificación de limitar los derechos humanos—es inherente a las sociedades democráticas y, en este sentido, el control que ejerce el poder judicial sobre los poderes ejecutivo y legislativo mediante un razonamiento elaborado y reflexivo es esencial para garantizar que estas decisiones estén bien justificadas. Por lo tanto, estoy de acuerdo con Sarah Nathan en que sí, los tribunales deberían actuar para proteger a los solicitantes de asilo del entorno hostil creado a su alrededor, especialmente teniendo en cuenta los estándares más bajos de protección concedidos a su libertad de movimiento por los creadores de tratados (por ejemplo, en la Convención de Refugiados frente al PIDCP/EDH), los poderes constituyentes (por ejemplo, en las constituciones española y alemana) y los Parlamentos (por ejemplo, en las leyes españolas y alemanas).

Sin embargo, en términos generales, los órganos judiciales y cuasi-judiciales no han reducido la brecha existente entre las normas de protección para los solicitantes de asilo y aquellas para los nacionales, dejando así de lado el espíritu de *universalismo* que impregna el Derecho Internacional de los Derechos Humanos. Con la excepción del Tribunal Supremo español, los tribunales y los órganos cuasi-judiciales han reforzado y, en ocasiones, empeorado esta brecha de varias formas, entre las que se incluyen: (1) la interpretación no autónoma del término "legalmente en el territorio" por parte del Comité de Derechos Humanos y el TEDH y su aceptación del "principio de legalidad condicional"; (2) la creación por parte del TEDH de obstáculos para que los solicitantes de asilo argumenten que una medida de confinamiento equivale a una privación de libertad; (3) la afirmación del Comité de Derechos Humanos y del Tribunal Constitucional español de que un mismo artículo ofrece más garantías a los nacionales que a los migrantes; y (4) las garantías más débiles otorgadas por el Tribunal Constitucional Federal a la disposición de la Constitución alemana que regula la libertad de circulación de los migrantes que al artículo que protege la libre circulación de los nacionales.

Esta protección diferenciada es especialmente llamativa si se tiene en cuenta que la libertad de circulación es un derecho civil que no requiere ninguna acción por parte del Estado para garantizar su cumplimiento y no está relacionado con la inclusión del individuo en el *demos* de una sociedad política. De hecho—sin entrar a valorar la solidez de estos argumentos—el excepcionalismo migratorio en los derechos sociales se justifica a menudo alegando que estos derechos suponen una carga para los servicios públicos y que, por tanto, el Estado tiene derecho a restringirlos en el caso de los "migrantes de corta duración e ilegales, que, por regla

Comparado y Derecho Internacional el 15 de agosto de 2023 en un seminario organizado por el Prof. Dr. Armin von Bogdandy.

[1456] Además, el respeto a los derechos humanos es un componente esencial del Estado de Derecho, siguiendo la jurisprudencia del Tribunal de Justicia de la UE y del TEDH (Pérez Bernárdez 2016b, p. 52). Para las diferentes concepciones sobre el significado de los derechos humanos, véase Dembour 2006.

general, no contribuyen a la financiación [de estos servicios]"[1457]. El sistema de derechos humanos de dos niveles también se suele considerar legítimo en el caso del derecho de voto, dado que, en prácticamente todos los Estados del mundo, "el derecho al voto se concede con referencia a dos criterios: la nacionalidad y la residencia o presencia duradera en el Estado"[1458]. Sin embargo, es difícil entender por qué un derecho civil negativo como la libertad de circulación otorga menos protección a los migrantes (y, en particular, a los solicitantes de asilo) que a los nacionales[1459]. La única explicación posible parece ser que, en la legislación sobre derechos humanos, la pertenencia a una nación (o, al menos, el estatus migratorio) se presenta como condición previa para el disfrute igualitario y pleno de *todos los* derechos fundamentales[1460].

Sin embargo, no quisiera terminar este estudio con un tono derrotista. La libertad de circulación de los solicitantes de asilo dentro del Estado de acogida no queda completamente fuera del ámbito de aplicación del Derecho Internacional de los Derechos Humanos, y existen algunas opciones para utilizar este derecho como instrumento para cuestionar las políticas europeas restrictivas, como ha demostrado el análisis de los distintos capítulos. Además, la crítica puede generar cambios y en el pasado ha modificado el enfoque de los tribunales hacia una mayor protección de los derechos[1461]. En 2011, Dembour y Kelly coordinaron un libro con un título provocativo: *Are human rights for migrants*?[1462] Mi respuesta es: sí, lo son. Y si no lo son, es nuestro deber como académicos señalarlo para concienciar e incitar a los actores jurídicos a hacer algo al respecto. Esto es, en esencia, lo que este estudio ha intentado hacer. Espero que no haya sido en vano.

[1457] *Ponomaryov c. Bulgaria*, no. 53335/05, 21 de junio de 2011. La jurisprudencia del TEDH sobre los derechos sociales de los migrantes se analiza en Caicedo Camacho 2021.
[1458] Schmalz 2020, p. 96
[1459] Lo mismo puede decirse del derecho a la libertad física, respecto del cual el TEDH ofrece menos garantías a los migrantes que a los nacionales o a las personas en general (Costello 2015, p. 147; Cornelisse 2010, pp. 300-312; Spalding 2023, pp. 60-67).
[1460] *Mutatis mutandi*, Wilsher 2011, p. xvi.
[1461] Véase Spalding (2023, p. 149), en referencia a los cambios en la jurisprudencia del TEDH sobre la expulsión de migrantes con graves problemas de salud.
[1462] Dembour y Kelly 2011.

References

1. International and European Law and Policy – Doctrine

Abrisketa Uriarte, J. (2017), 'La dimensión externa del derecho de la Unión Europea en materia de refugio y asilo: un examen desde la perspectiva del non-refoulement', *Revista de Derecho Comunitario Europeo*, 56: 119-158.

Abrisketa Uriarte, J. (2022), 'The European Pact on Migration and Asylum: Border Containment and Frontline States', *European Journal of Migration and Law*, 24: 463-488.

Agi, M. (1998), *René Cassin, Prix Nobel de la Paix (1887-1976)*, Paris: Perrin.

Allen, N. (2009), 'Restricting Movement or Depriving Liberty?', *Journal of Mental Health Law*, 18: 19-32.

Alonso-Rocafort, V. (2009), 'La libertad de movimiento en Hannah Arendt', *Revista de Estudios Políticos*, 145: 33-64.

Amann, C. (1994), *Die Rechte des Flüchtlings*, Baden-Baden: Nomos.

Amann, O. (2019), *Domestic Courts and the Interpretation of International Law. Methods and Reasoning Based on the Swiss Example,* Leiden: Brill/Nijhoff.

Arenas Hidalgo, N. (2005), 'La libertad de circulación en el territorio de los Estados (la libertad deambulatoria definida en el articulo 2 P4)', in García Roca, J. and Santolaya Machetti, P., *La Europa de los Derechos. El Convenio Europeo de Derechos Humanos*, Madrid: Centro de Estudios Políticos y Constitucionales.

Arendt, H. (1962), *The Origins of Totalitarianism*, Cleveland: The World Publishing Company.

Ashford, E. (2015), 'A Moral Inconsistency Argument for a Basic Human Right to Subsistence', in Rowan Cruft and others (eds.), *Philosophical Foundations of Human Rights*, Oxford: Oxford University Press.

Ashraf, T., Korkut, U. and Gyollai, D. (2019), 'The Expansion of State Authority over the Neighbouring States through Informal Migration Controls: the Case of Hungary's Control over Serbia', *Spanish Yearbook of International Law*, 23: 306-316.

Barak, A. (2012), *Proportionality: Constitutional Rights and their Limitations,* Cambridge: Cambridge University Press.

Bast, J., Von Harbou, F. and Wessels, J. (2022) *Human Rights Challenges to European Migration Policy*, Basen-Baden: Nomos/Hart.

Battjes, H. (2006), *European Asylum Law and International Law*, Leiden: Brill.

Beyani, C. (2000), *Human Rights Standards and the Free Movement of People Within States*, Oxford: Oxford University Press.

Bosniak, L. (2011), 'Human Rights within One State: dilemmas of personhood in liberal constitutional thought', in Dembour, M. and Kelly, T. (eds.), *Are Human Rights for Migrants?*, Oxon: Routledge.

Bossuyt, M. J. (1987), *Guide to the 'travaux préparatoires' of the International Covenant on Civil and Political Rights,* Dordrecht: Martinus Nijhoff.

Bratanova van Harten, E. (2022), 'Complementary Pathways for Refugees in Times of COVID? Failing Attempts to Bridge the Gap between Us and Legal Other', *European Union Studies Association Conference Paper*, Miami.

Broude, T. and Shany, Y. (2011), *Multi-Sourced Equivalent Norms in International Law*, Oxford: Hart Publishing.

Brown Scott, J. (2000), *The Spanish Origin of International Law. Francisco de Vitoria and his Law of Nations*, New Jersey: The Lawbook Exchange.

Buergenthal, T. (2001), 'The U.N. Human Rights Committee', *Max Planck Yearbook of United Nations Law*, 5: 341-398.

Caicedo Camacho, N. (2021), 'Social Rights and Migrants before the European Court of Human Rights', in Moya, D. and Milios, G. (eds.), *Aliens before the European Court of Human Rights. Ensuring Minimum Standards of Human Rights Protection*, Leiden: Brill/Nijhoff.

Carens, J. H. (1987), 'The Case for Open Borders', *The Review of Politics*, 49(2): 251-273.

Carozza, P. (2003), 'From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights', *Human Rights Quarterly*, 25: 281-313.

Cassarino, J. P. and Marin, L. (2022), 'The Pact on Migration and Asylum: Turning the European Territory into a Non-territory?', *European Journal of Migration and Law*, 24: 1-26.

Catholic Relief Services (1956), 'The Refugee Problem in Trieste', *Social Compass*, 3: 271-273.

Chetail, V. (2012), 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law', in Rubio-Marin, R. (ed.), *Human Rights and Immigration. Collected Courses of the Academy of European Law*, Oxford: Oxford University Press.

Chimni, B. S. (1998), 'The Geopolitics of Refugee Studies: A View from the South', *Journal of Refugee Studies*, 11(4): 350-374.

Citroni, G. (2015), 'The Human Rights Committee and its Role in Interpreting the International Covenant on Civil and Political Rights vis-à-vis States Parties', *EJIL-Talk!* [blog].

Clark, T. (2004), 'Rights Based Refugee, the Potential of the 1951 Convention and the Need for Authoritative Interpretation', *International Journal of Refugee Law*, 16(4): 584-608.

Clark, T. and Crépeau, F. (1999), 'Mainstreaming Refugee Rights. The 1951 Refugee Convention and International Human Rights Law', *Netherlands Quarterly of Human Rights,* 17(4): 389-410.

Cornelisse, G. (2010), *Immigration Detention and Human Rights*, Leiden: Brill/Nijhoff.

Cornelisse, G. (2016), 'Territory, Procedures and Rights: Border Procedures in European Asylum Law', *Refugee Survey Quarterly*, 35(1): 74-90.

Cornelisse, G. (2019), 'Protecting human dignity across and within borders: The legal regulation of international migration in Europe', in Logi Gunnarsson, Ulrike Mürbe and Norman Weiß (eds.), *The Human Right to a Dignified Existence in an International Context*, Postsdam: Nomos/Hart Publishing.

Cornelisse, G. (2020), 'Borders, Procedures and Rights at Röszke: Reflections on Case C-924/19 (PPU)', *European Database of Asylum Law* [blog].

Cornelisse, G. and Reneman, M. (2021), 'Border procedures in the Commission's New Pact on Migration and Asylum: A case of politics outplaying rationality?', *European Law Journal* 2021: 1-18.

Costello, C. (2012), 'Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law', *Indiana Journal of Global Legal Studies*, 19(1): 257-303.

Costello, C. (2015), 'Immigration Detention: The Grounds Beneath our Feet', *Current Legal Problems*, 68: 143-177.

Costello, C. (2017), *Article 31 of the 1951 Convention Relating to the Status of Refugees*, Geneva: UNHCR.

Costello, C. and Kaytaz, E. (2013), *Building Empirical Research into Alternatives to Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva*, Geneva: UNHCR.

Davy, U. (2011), 'Article 32', in Zimmermann, A., Dörschner, J. and Machts, F. (eds.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A commentary*, Oxford: Oxford University Press.

De Bruycker, P., Bloomfield, A., Tsourdi, E. L., Pétin, J. (2015), *Alternatives to Immigration and Asylum Detention in the EU. Time for Implementation*, Brussels: Odysseus Network.

De Weck, F. (2017), *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture*, Leiden: Brill/Nijhoff.

Dembour, M. B. (2006), *Who Believes in Human Rights?: Reflections on the European Convention*, Cambridge: Cambridge University Press.

Dembour, M. B. and Kelly, T. (eds.) (2011), *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States*, Oxon: Routledge.

Dembour, M. B. (2015), *When Humans Become Migrants. Study of the European Court of Human Rights with and Inter-American Counterpoint*, Oxford: Oxford University Press.

Dez, J. F. (2022), 'Print Rights with a Thousand Masks: Migrant Vulnerability, Resistance, and Human Rights Law', *Refuge: Canada's Journal on Refugees / Refuge: revue canadienne sur les réfugiés*, 38(2): 1-17.

Diehl, A. (2021), 'GFK Art. 31', in Decker, A., Bader, J., and Kothe, P., *Migrations- und Integrationsrecht*, Nördlingen: C.H. Beck.

Edwards, A. (2011a), 'Article 17', in Zimmermann, A., Dörschner, J. and Machts, F. (eds.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A commentary*, Oxford: Oxford University Press.

Edwards, A. (2011b), 'Article 18', in Zimmermann, A., Dörschner, J. and Machts, F. (eds.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A commentary*, Oxford: Oxford University Press.

Edwards, A. (2011c), *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-seekers, Stateless Persons and Other Migrants*, Geneva: UNHCR.

Escobar Hernández, C. (2019), 'Sobre la problemática determinación de los efectos jurídicos internos de los dictámenes adoptados por Comités de derechos humanos. Algunas reflexiones a la luz de la STS 1263/2018, de 17 de julio', *Revista Española de Derecho Internacional*, 71(1): 241-250.

Faggiani, V., *La protección internacional de los migrantes en la UE. Estándares de tutela, límites y perspectivas de reforma del derecho de asilo*, Pamplona: Aranzadi.

Field, O. and Edwards, A. (2006), *Alternatives to Detention of Asylum Seekers and Refugees*, Geneva: UNHCR.

Filges, T. *et al.* (2015), 'The Impact of Detention on the Health of Asylum Seekers: A Systematic Review', *Campbell Systematic Reviews*, 11(1): 1-104.

García Andrade, P. (2019), 'The EU Accession to the Geneva Convention Relating to the Status of Refugees: Legal Feasibility and Added Value', *Spanish Yearbook of International Law*, 23: 193-211.

Gatta, F. L. (2020), 'Systematic Push Back of Well-Behaving Asylum Seekers at the Polish Border: M.K. and Others v. Poland', *Strasbourg Observers* [blog].

Girma Teshome, R. (2022), 'Derogations to Human Rights During a Global Pandemic: Unpacking Normative and Practical Challenges', *American University International Law Review*, 37(2): 307-354.

González Herrera, D. (2021), *El diálogo judicial en el espacio jurídico europeo*, Valencia: Tirant lo Blanch.

Goodwin-Gil, G. S. (1986), 'International Law and the Detention of Refugees and Asylum Seekers', *International Migration Review*, 20(2): 193-219.

Goodwin-Gil, G. S. (2001), *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection*, Geneva: UNHCR.

Goodwin-Gil, G. S. and McAdam, J. (2021), *The Refugee in International Law*, Oxford: Oxford University Press.

Grahl-Madsen, A. (1963), *Commentary on the Refugee Convention 1951 Articles 2-11, 13-37*, Geneva: UNHCR.

Grahl-Madsen**,** A. (1972), *The Status of Refugees in International Law. Vol. II. Asylum, Entry and Sojourn*, Leiden: A.W. Sijthoff.

Hall, M. and Wright, R. (2004), 'Systematic Content Analysis of Judicial Opinions', *California Law Review*, 96: 63-122.

Hannum, H. (1996), 'The Status of the Universal Declaration of Human Rights in National and International Law', *Georgia Journal of International and Comparative Law*, 25(1): 287-397.

Harmsen, R. (2007), 'The European Court of Human Rights as a Constitutional Court: Definitional Debates and the Dynamics of Reform', in Morison, J., McEvoy, K. and Anthony, G. (eds.), *Judges, Transition, and Human Rights*, Oxford: Oxford University Press.

Harrington, J. (2015), 'The Human Rights Committee, Treaty Interpretation, and the Last Word', *EJIL-Talk!* [blog].

Harris, D. J., O'Boyle, M., Bates, E.P. and Buckley, C. (2018), *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights*, Oxford: Oxford University Press.

Hathaway, J. C. (2003), 'What's in a Label?', *European Journal of Migration and Law*, 5: 1-21.

Hathaway, J. C. (2021), *The Rights of Refugees under International Law*, Cambridge: Cambridge University Press.

Hathaway, J. C. *et al.* (2018), 'The Michigan Guidelines on Refugee Freedom of Movement', *Michigan Journal of International Law*, 39(1): 5-17.

Hathaway, J.C. and Foster, M. (2014), *The Law of Refugee Status*, Cambridge: Cambridge University Press.

Humphrey, J. P. (1984), *Human Rights & the United Nations: A Great Adventure,* New York: Dobbs Ferry.

Ismaïli, N. (2019), *Who cares for the child? Regulating custody and access in family and migration law in the Netherlands, the European Union and the Council of Europe*, PhD Thesis, Research and graduation internal, Vrije Universiteit Amsterdam.

Jiménez Piernas, C. (1993), 'Reflexiones sobre el método del Derecho Internacional Público', in Pérez González, M. (coord.), *Hacia un nuevo orden internacional y europeo: estudios en homenaje al profesor don Manuel Díez de Velasco*, Madrid: Tecnos.

Joseph, S. and Castan, M. (2013), *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford: Oxford University Press.

Kälin, W. (2012), 'Examination of state reports', in Keller, H. and Ulfstein, G. (eds.), *UN Human Rights Treaty Bodies. Law and Legitimacy*, Cambridge: Cambridge University Press.

Kelsen, H. (1960), *What is Justice? Justice, Law, and Politics in the Mirror of Science. Collected Essays by Hans Kelsen*, Berkeley/Los Angeles: University of California Press.

Klammer, S. (2022a), 'Art. 26 – Freizügigkeit', in Hruschka, C. (ed.), *Genfer Flüchtlingskonvention*, Baden-Baden: Nomos.

Klammer, S. (2022b), 'Art. 31 Abs. 2 – Bewegunseinschränkungen', in Hruschka, C. (ed.), *Genfer Flüchtlingskonvention*, Baden-Baden: Nomos.

Künnermann, R. (1995), 'A Coherent Approach to Human Rights', *Human Rights Quarterly*, 17(2):

Künzli *et al.* (2017), *Freiheitsentzug und Freiheitsbeschränkung bei ausländischen Staatsangehörigen - Dargestellt am Beispiel der Unterbringung von Asylsuchenden in der Schweiz*, Bern: Schweizerisches Kompetenzzentrum für Menschenrechte.

Larsen, B. R. (2011), 'Becoming Part of Welfare Scandinavia: Integration through the Spatial Dispersal of Newly Arrived Refugees in Denmark', *Journal of Ethic and Migration Studies*, 37: 333-350.

Letsas, G. (2007), *A Theory of Interpretation of the European Convention on Human Rights*, Oxford: Oxford University Press.

Maassen, H.-G. (1997), *Die Rechtsstellung des Asylbewerbers im Völkerrecht*, Frankfurt am Main: Peter Lang.

Majcher, I. (2018), 'The EU Hotspot Approach: Blurred Lines between Restriction on and Deprivation of Liberty (Part II)', *Border Criminologies* [blog].

Manero Salvador, A. (2023), 'El valor jurídico de las decisiones de los órganos basados en los tratados en materia de derechos humanos de Naciones Unidas y sus efectos en el ordenamiento español', *Anuario Español de Derecho Internacional*, 39: 265-287.

Maple, N. (2016), *Rights at Risk: A thematic investigation into how states restrict the freedom of movement of refugees on the African Continent*, Geneva: UNHCR.

Marx, R. (2011), 'Article 26', in Zimmermann, A., Dörschner, J. and Machts, F. (eds.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A commentary*, Oxford: Oxford University Press.

Mateos Durán, A. (2023), *Das Verhältnis zwischen nationalen und inkorporierten internationalen Grundrechten*, Baden Baden: Nomos.

McAdam, J. (2006), *Complementary Protection in International Refugee Law*, Oxford: Oxford University Press.

McDonough, P. (2009), 'Revisiting Germany's *Residenzpflicht* in Light of Modern E.U. Asylum Law', *Michigan Journal of Intenational Law*, 30(2): 515-546.

Mead, D. (2012), 'The Right to Protest Contained By Strasbourg: An Analysis of Austin v. UK and The Constitutional Pluralist Issues it Throws Up', *Strasbourg Observers* [blog].

Menon, V. P. (1956), *The Story of the Integration of the Indian States*, New York: Macmillan.

Meron, T. (1991), *Human Rights and Humanitarian Norms as Customary Law*, Oxford: Oxford University Press.

Mora Hernández, C. B. (2013), 'Los derechos humanos en Francisco de Vitoria', *En-claves del pensamiento*, 7(14): 35-62.

Moreno-Lax, V. (2017), *Accessing Asylum in Europe. Extraterritorial Border Controls and Refugee Rights under EU Law*, Oxford: Oxford University Press.

Morsink, J. (1999), *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*, Pennsylvania: University of Pennsylvania Press.

Moynihan, M. (2020), 'Confinement? Asylum Seekers and Rural Dispersion in Ireland's Direct Provision System', *Border Criminologies* [blog].

Nagy, B. (2020), 'A –phyrrhic– victory concerning detention in transit zones and procedural rights: *FMS & FMZ* and the legislation adopted by Hungary in its wake', *EU Immigration and Asylum Law and Policy* [blog].

Nicolosi, S. F. (2015), 'Re-Conceptualizing the Right to Seek and Obtain Asylum in International Law', *International Human Rights Law Review*, 4 : 303-332.

Noll, G. (2011), 'Article 31', in Zimmermann, A., Dörschner, J. and Machts, F. (eds.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A commentary*, Oxford: Oxford University Press.

Oviedo Moreno, C. (2020), *Police Identity Checks and Migration Control: Tackling the Impunity of 'Racial Profiling' in Spain*, Amsterdam: Vrije Universiteit Amsterdam.

Paúl, A. (2017), *Los trabajos preparatorios de la Declaración Americana de los Derechos y Deberes del Hombre y el origen remoto de la Corte Interamericana*, Ciudad de México: Universidad Nacional Autónoma de México.

Pérez Bernárdez, C. (2016a), 'The Constistency of the European Union's Human Rights Policy and the United Nations', in Eeckhout, P. and López-Escudero, M. (eds.), *The European Union's External Action in Times of Crisis*, Oxford/Portland: Hart Publishing.

Pérez Bernárdez, C. (2016b), 'La Unión Europea frente a la erosión del Estado de Derecho: las respuestas jurídico-políticas al caso polaco', *Revista General de Derecho Europeo*, 40: 48-94.

Pérez González, M. (1989), 'Observaciones sobre la metodología jurídico-internacional: método y evolución social y *law making* en Derecho internacional público', in *Liber Amicorum. Homenaje al profesor Tapia Salinas*, Madrid: Instituto Iberoamericano de Derecho Aeronáutico y del Espacio y de la Aviación Comercial.

Pourgourides, C., 'The mental health implications of detention of asylum seekers', in Hughes, J. and Liebaut, F. (eds.), *Detention of Asylum Seekers in Europe: Analysis and Perspectives*, Leiden: Martus Nijhoff.

Rainey, B., Wicks, E. and Ovey, C. (2014) *Jacobs, White & Ovey: The European Convention on Human Rights*, Oxford: Oxford University Press.

Reneman, M. (2014), *EU Asylum Procedures and the Right to an Effective* Remedy, Oxford: Hart Publishing.

Robinson, N. (1953), *Convention Relating to the Status of Refugees. Its History, Contents and Interpretation*, New York: Institute of Jewish Affairs.

Roldán Barbero, F. J. (1990), 'El valor jurídico de las Resoluciones de la Asamblea General de la ONU en la sentencia Nicaragua c. Estados Unidos de 27 de junio de 19860, *Revista Española de Derecho Internacional*, 42(1): 81-100.

Rubenstein, D. S. and Gulasekaram, P. (2017), 'Immigration Exceptionalism', *Northwestern University Law Review*, 111: 583-654.

Ruiz Ramos, J. (2020), 'The Right to Liberty of Asylum-Seekers and the European Court of Human Rights in the Aftermath of the 2015 Refugee Crisis', *Revista Electrónica de Estudios Internacionales*, 39: 1-46.

Schabas, W. A. (2013), *The Universal Declaration of Human Rights. The Travaux Préparatoires*, Cambridge: Cambridge University Press.

Schabas, W. A. (2014), '*Travaux Préparatoires* of Human Rights Instruments', in Alen, A. *et al.* (eds.), *Liberae Cogitationes. Liber amicorum Marc Bossuyt*, Cambridge/Antwerp/Portland: Intersentia.

Schabas, W. A. (2019), *U.N. International Covenant on Civil and Political Rights. Nowak's CCPR Commentary*, Kehl: N.P. Engel.

Schabas, W. A. (2021), *The Customary International Law of Human Rights*, Oxford: Oxford University Press.

Schmalz, D. (2020), *Refugees, Democracy and the Law. Political rights at the Margins of the State*, Oxon: Routledge.

Shelton, D. L. (2013), 'The Promise of Regional Human Rights System', in Shelton, D. L. and Carozza, P. G. (eds.), *Regional Protection of Human Rights*, Oxford: Oxford University Press.

Slingenberg, L. (2014), *The Reception of Asylum Seekers under International Law: Between Sovereignty and Equality*, Oxford: Hart Publishing.

Slingenberg, L. (2022a), 'Reception conditions for asylum seekers: inherent duality', in Tsourdi, E. and De Bruycker, D., *Research Handbook on EU Migration and Asylum Law*, Cheltenham: Edward Elgar.

Slingenberg, L. (2022b), 'European case law on migrants' social and mobility rights: The need for a comparative approach in assessing human rights overreach', *Netherlands Quarterly of Human Rights* 1(20): 1-20.

Slingenberg, L. (forthcoming), 'Coerced into Subsistence. The New EU Reception and Identification Centers in Greece', *Social & Legal Studies*.

Slingenberg, L. and Bonneau, L. (2017), '(In)formal Migrant Settlements and Right to Respect for a Home', *European Journal of Migration and Law*, 19(4): 335-369.

Smet, S. (2012), 'Poll on the Best and Worst ECtHR Judgments of 2012: the Winners', *Strasbourg Observers* [blog].

Spalding, A. (2022), *The Treatment of Immigrants in the European Court of Human Rights. Moving Beyond Criminalisation*, London: Hart.

Spaventa, E. (2021), 'Article 45', in Peers, S. *et al.* (eds.), *The EU Charter of Fundamental Rights: A Commentary*, London: Hart/Beck.

Spijkerboer, T. (2018), 'Reconceptualising the Externalisation of Migration Control', *European Journal of Migration and Law*, 20(4): 452-469.

Stahmann, R. (2016), 'AsylVfG § 56 Räumliche Beschränkung', in Hofmann, R. M., *Ausländerrecht*, Baden-Baden: Nomos.

Stoyanova, V. (2019), 'The Grand Chamber Judgment in Ilias and Ahmed v Hungary: Immigration Detention and how the Ground beneath our Feet Continues to Erode', *Strasbourg Observers* [blog].

Stoyanova, V. (2023), *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries*, Oxford: Oxford University Press.

Taylor, P. (2020), *A Commentary on the International Covenant on Civil and Political Rights*, Cambridge: Cambridge University Press.

Tazzioli, M. and Garelli, G. (2020), 'Containment beyond detention: The hotspot system and disrupted migration movements across Europe', *Environment and Planning D: Society and Space*, 38(6): 1009-1027.

Tökés, R. K. (1998), *Hungary's Negotiated Revolution: Economic Reform, Social Change and Political Succession*, Cambridge: Cambridge University Press.

Tsourdi, L. (2016), 'Asylum Detention in EU Law: Falling between Two Stools?', *Refugee Survey Quarterly*, 35: 7-28.

Tsourdi, L. (2022), 'Asylum Reception Conditions Directive 2013/33/EU', in Thym, D. and Hailbronner, K., *EU Immigration and Asylum Law. Article-by-Article Commentary*, München: Beck/Hart/Nomos.

Udombana, N. (2008), 'Mission Accomplished? An Impact Assessment of the UDHR in Africa', *Journal of Public Law & Policy*, 30: 335-386.

Ulfstein, G. (2012), 'Individual complaints', in Keller, H. and Ulfstein, G. (eds.), *UN Human Rights Treaty Bodies. Law and Legitimacy*, Cambridge: Cambridge University Press.

UNHCR Expert Roundtable (2001), *Summary Conclusions: Article 31 of the 1951 Convention*, Geneva: UNHCR.

Van Dijk, P., van Hoof, F., van Rijn, A. and Zwaak, L. (eds.), *Theory and Practice of the European Convention on Human Rights*, Cambridge: Intersentia.

Vedsted-Hansen, J. (2016), 'Asylum Procedures Directive 2013/32/EU', in Hailbronner, K. and Thym, D., *EU Immigration and Asylum Law. A Commentary*, München: Beck/Hart/Nomos.

Wastell, R. (2012), 'Kettling: Can a public interest motive justify a deprivation of liberty or not?', *UK Human Rights Blog.*

Weiler, J. (2022), 'On My Way Out – Advice to Young Scholars VII: Taking Exams Seriously (Part 1), *EJIL: Talk!* [blog].

Weis, P. (1990), *The Refugee Convention, 1951. The travaux preparatoires analysed with a commentary by Dr. Paul Weis*, Geneva: UNHCR.

Weissbrodt, D. (2008), *The Human Rights of Non-citizens*, Oxford: Oxford University Press.

Wilsher, D. (2011), *Immigration Detention: Law, History, Politics,* Cambridge: Cambridge University Press.

Zamboni, M. (2022), 'Law, politics, and the constitutional courts' activism. Setting the starting point', in Belov, M. (ed.), *Courts and judicial activism under crisis conditions*, Oxon: Routledge.

Ziebritzki, C. (2018), 'Implementation of the EU-Turkey Statement: EU Hotspots and restriction of asylum seekers' freedom of movement', *EU Immigration and Asylum Law and Policy* [blog].

Zieck, M. (2018), 'Refugees and the Right to Freedom of Movement: From Flight to Return', *Michigan Journal of International Law*, 39(1): 19-116.

Zoeteweij, M. H. (2016), 'Restrictions on the Freedom of Movement for Beneficiaries of International Protection (Joined Cases C-443/14 and C-444/14, Alo and Osso v Region Hannover), *European Law Blog.*

2. International and European Law and Policy – Institutional sources

AIDA (2017), *The detention of asylum seekers in Europe. Constructed on shaky ground?*, Brussels: European Council on Refugees and Exiles.

AIDA (2023a), *Country report: Italy*, Brussels: European Council on Refugees and Exiles. .

Council of Europe 1976, *Collected Edition of the 'Travaux Préparatoires' of Protocol No. 4 to the Convention, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto*, Strasbourg: Council of Europe.

Council of Europe/European Court of Human Rights (2022), *Guide on Article 2 of Protocol No. 4 to the European Convention on Human Rights: Freedom of Movement*, Strasbourg: Council of Europe.

CPS and Pro Asyl (2022), *Systematic Human Rights Violations at Croatian Borders*, Zagreb: Centre for Peace Studies.

CPT (2020), *Report to the Croatian Government on the visit to Croatia carried out by the CPT from 10 to 14 August 2020*, Strasbourg: Committee for the Prevention of Torture.

ECRE (2002), *Setting Limits. Research paper on the effects of limits on the freedom of movement of asylum seekers within the borders of European Union Member States*, Brussels: European Council on Refugees and Exiles.

ECRE (2018), *Boundaries of liberty. Asylum and de facto detention in Europe*, Brussels: European Council on Refugees and Exiles.

ECRE (2020), *Information Sheet 28 May 2020: COVID-19 Measures related to Asylum and Migration across Europe*, Brussels: European Council on Refugees and Exiles.

EEAS Press Team (2022), 'European Diplomatic Academy: Opening remarks by High Representative Josep Borrel at the inauguration of the pilot programme', 13 October 2022.

ERBB (2021), *'Still detained and forgotten'. Update on Detention Policies, Practices and Conditions on Kos 2022/2023*, Athens: Equal Rights Beyond Borders.

HHC (2019), *Findings of the Grand Chamber Judgment of the European Court of Human Rights in the Ilias and Ahmed v. Hungary Case in light of the current legal framework,* Budapest: Hungarian Helsinki Committee.

HFHR (2022), *Submission to the UN Special Rapporteur on the human rights of migrants of 24 February 2022*, Warsaw: Helsinki Foundation for Human Rights.

IAComHR (2002), *Report on Terrorism and Human Rights (OEA/Ser.L/V/II.116)*, Washington: Inter-American Commission on Human Rights.

Independent Chief Inspector of Borders and Immigration, *An inspection of contingency asylum accommodation: HMIP report on Penally Camp and Napier Barracks (November 2020–March 2021)*, London: His Majesty's Inspectorate of Prisons.

Our World in Data (2023), 'Oxford COVID-19 Government Response Tracker'.

Refugee Info (2017), 'Hungary's container camps for asylum-seekers', 15 July 2017.

The Guardian (2021), 'Danish ex-minister given jail sentence for separating couples seeking asylum', 13 December 2021.

UNHCR (1988), *'Lawfully Staying' – A Note on Interpretation*, Geneva: UNHCR.

UNHCR (1999), *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, Geneva: UNHCR.

UNHCR (2001), *Reception of asylum-seekers, including standards of treatment, in the context of individual asylum systems*, Geneva: UNHCR.

UNHCR (2003), *UNHCR annotated comments on Council Directive 2003/9/EC*, Brussels: UNHCR.

UNHCR (2007a), *Saadi v. United Kingdom. Written submissions on behalf of the United Nations High Commissioner for Refugees*, London: UNHCR.

UNHCR (2007b), *UNHCR-Stellungnahme zu Maßnahmen zur Beschränkung der Wohnsitzfreiheit von Flüchtlingen und subsidiär geschützten Personen*, Berlin: UNHCR.

UNHCR (2009), *UNHCR policy on refugee protection and solution in urban areas*, Geneva: UNHCR.

UNHCR (2011a), *Statement on the reception conditions of asylum-seekers under the Dublin procedure*, Brussels: UNHCR.

UNHCR (2011b), *Comments to the European Commission's amended recast proposal for a Reception Conditions Directive (COM(2011) 320 final)*, Brussels: UNHCR.

UNHCR (2012), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, Geneva: UNHCR.

UNHCR (2013), *Kituo Cha Sheria and Others v. The Attorney General. Bried of 1st Amicus Curiae*, Nairobi: UNHCR.

UNHCR (2014a), *Handbook on Protection of Stateless Persons*, Geneva: UNHCR.

UNHCR (2014b), *UNHCR Policy on Alternatives to Camps*, Geneva: UNHCR.

UNHCR (2014c), *Beyond Detention. A Global Strategy to support governments to end the detention of asylum-seekers and refugees 2014-2019*, Geneva: UNHCR.

UNHCR (2015a), *Response to the Constitutional Court of Ecuador query regarding International Treaty No. 0030-13-TI*, Geneva: UNHCR.

UNHCR (2015b), *Annotated Comments to the Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, Brussels: UNHCR.

UNHCR (2015c), *Options for governments on open reception and alternatives to detention*, Geneva: UNHCR.

UNHCR (2016), *Observations on the proposed amendments to the Danish Aliens legislation*, Geneva: UNHCR.

WHO (2022), *World report on the health of refugees and migrants*, Geneva: World Health Organisation.

3. Case study – Spain

Abrisketa Uriarte, J. (2017), 'La dimensión externa del derecho de la Unión Europea en materia de refugio y asilo: un examen desde la perspectiva del non-refoulement', *Revista de Derecho Comunitario Europeo*, 56: 119-158.

Acosta Sánchez, M. (2022), 'Ceuta y Melilla en el Espacio Schengen: situación actual y opciones de futuro', *Peace & Security – Paix et Sécurité Internationales*, 10: 1-18.

AIDA (2023b), *Country report: Spain*, Brussels: European Council on Refugees and Exiles.

Barbero, I. (2021), 'Los centros de atención temporal de extranjeros como nuevo modelo de control migratorio: Situación actual, (des)regulación jurídica y mecanismos de control de derechos y garantías', *Derechos y Libertades*, 45: 267-302.

Boehmer, C. R. and Peña, S. (2012), 'The determinants of open and closed borders', *Journal of Borderlands Studies*, 27(3): 273-285.

Boček, T. (2018), *Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, to Spain, 18-24 March*, Strasbourg: Council of Europe Information Documents SG/Inf(2018)25.

Bondanini, F. (2017), 'Migration on the borders of Europe: The case of Melilla', in Pelican, M. and Steinberger, S. (eds.), *Melilla: Perspectives on a border town*, Cologne: Cologne Working Papers in Cultural and Social Anthropology No. 6.

CEAR (2018), *Refugees and migrants in Spain: the invisible walls beyond the southern border*, Madrid: Comisión Española de Ayuda al Refugiado.

Churruca Muguruza, C., Massoud Ahmadi, A., Morris, C., Schoonbeek, N. and Álvarez Zuluaga, P. (2020), *Melilla in limbo: Restrictions on the freedom of movement of migrants and asylum seekers*, Bilbao: Instituto de Derechos Humanos de Deusto.

ECRE (2021), *Reception, detention and restriction of movement at EU external boders*, Brussels: Heinrich Böll Stiftung European Union.

Ferrer-Garrado, X. and Albetmas, A. (2016), 'EU-Limboscapes: Ceuta and the proliferation of migrant detention spaces across the European Union', *European Urban and Regional Studies*, 23(3): 527-530.

García Vitoria, I. (2018), Una década sin Reglamento de asilo en España: Obstáculos e interpretaciones divergentes, *Anuario CIDOB de la Inmigración*: 116-128.

Leal Medina, J. (2008), *Un estudio de las actuales medidas de seguridad y los interrogantes que plantean en la moderna dogmática del derecho penal*, Madrid: Aranzadi.

Marco Francia, M. P. (2021), *La medida de seguridad de libertad vigilada para sujetos imputables. Su implementación práctica a través de 30 casos*, Madrid: Reus.

Nistal Burón, J. (2020), 'La libertad vigilada post-penitenciaria. De la teoría de su imposición a la práctica de su incumplimiento', *La Ley Penal* 142: 1-8.

Otero González, P. (2015), *La libertad vigilada aplicada a ¿imputables?: presente y futuro*, Madrid: Dykinson.

Piñar Mañas, J. L. (1980), 'El derecho a la libertad de residencia y circulación de los extranjeros en territorio nacional (en torno a dos sentencias de la sala cuarta del tribunal supremo)', *Revista de Administración Pública*, 93: 199-212.

Ruiz Robledo, A. (2018), *Constitutional Law in Spain*, Alphen aan den Rijn: Kluwer Law International.

Sanders, R., *Plausible Legality. Legal Culture and Political Imperative in the Global War on Terror*, Oxford: Oxford University Press.

Sanz Morán, A. J. (2010), 'Reflexiones en torno a la idea de libertad vigilada', in Arangüena Faneto, C. (dir.), *Espacio europeo de libertad, seguridad y justicia: últimos avances en cooperación judicial penal*, Valladolid: Lex Nova.

Spanish Ombudsman (2016), *A study of asylum in Spain. International protection and reception system resources*, Madrid: Defensor del Pueblo.

Spanish Ombudsman (2019), *Informe anual 2019. Mecanismo Nacional de Prevención*, Madrid: Defensor del Pueblo.

Spanish Ombudsman (2021), *Migration on the Canary Islands*, Madrid: Defensor del Pueblo.

Tajadura Tejada, J. (2004), 'Los derechos y libertades de los extranjeros en el ordenamiento constitucional español', *Anuario de Facultade de Dereito da Universidade da Coruña*, 8: 875-908.

4. Case study – Germany

Ahonen, P. (2003), *After the expulsion: West Germany and Eastern Europe 1945-1990*, Oxford: Oxford University Press.

Alberts, H. W. (1997), 'Freizügigkeit als polizeiliches Problem', *Neue Zeitschrift für Verwaltungsrecht*: 45-48.

Bergmann, J. (2020), 'Art. 56 AsylG', in Bergmann, J. and Dienelt, K. (eds.), *Ausländerrecht*, Nördlingen: C.H. Beck.

Cornils, M. (2009), 'Allgemeine Handlungsfreiheit', in Isensee, J. and Kirchhof, P., *Handbuch des Staatsrecht Vol. VII: Freiheitsrechte*, Nördlingen: C.H. Beck.

Cremer, W. (2001), 'Aufenthaltsverbote und offenee Drogenszene: Gesetzesvorrang, Parlamentsvorbehalt und grundgesetzliche Kompetenzordnung', *Neue Zeitschrift für Verwaltungsrecht*: 1218-1223.

Dienelt, K. (2020), 'Art. 12 AufenthG', in Bergmann, J. and Dienelt, K. (eds.), *Ausländerrecht*, Nördlingen: C.H. Beck.

Durner, W. (2013), 'Art. 11', in Maunz, T. and Dürig, G., *Grundgesetz-Kommentar*, vol. 2, Nördlingen: C. H. Beck.

Gusy, C. (1987), 'Kann Ausländern bzw. Asylbewerbern eine politische Betätigung im Bundesgebiet untersagt warden?', in Otto Benecke Stiftung, *Politische Betätigung von Ausländern in der Bundesrepublik Deutschland*, Baden-Baden: Nomos.

Kugelmann, D. (2006), *Polizei- und Ordnungsrecht*, Heidelberg: Springer.

Kunig, P. and Graf von Kielmansegg, S. (2021), 'Art. 11', in Von Münch, I. and Kunig, P., *Grundgesetz Kommentar*, vol. 1, VII edition, Nördlingen: C. H. Beck.

Kunig, P. and Kämmerer, J. A. (2021), 'Art. 2', in Von Münch, I. and Kunig, P., *Grundgesetz Kommentar*, vol. 1, Nördlingen: C. H. Beck.

Leibholz, G. and Von Mangoldt, H. (eds.) (1951), 'Entstehungsgeschichte der Artikel des Grundgesetzes'*, Jahrbuch des Öffentlichen Rechts*, vol. 1, Tübingen: J.C.B. Mohr (Paulsiebeck).

Pagenkopf, M. (2021), 'Art. 11', in Sachs, M. (ed.), *Grundgesetz Kommentar*, Nördlingen: C.H. Beck.

Pelzer, M. and Pilch, M. (2016), 'Wohnsitzauflage und Residenzpflicht: Aktuelle Einschränkungen der Freizügigkeit von Flüchtlingen', *Zeitschrift für Ausländerrecht und Ausländerpolitik*, 36(3): 96-101.

Rixen, S. (2021), 'Art. 2', in Sachs, M. (ed.), *Grundgesetz Kommentar*, Nördlingen: C.H. Beck.

Röder, S. (2021), 'Recht des Aufenthalts während des Asylverfahrens', in Decker, A., Bader, J., and Kothe, P., *Migrations- und Integrationsrecht*, Nördlingen: C.H. Beck.

Schenke, W-R. (2021), *Polizei- und Ordnungsrecht*, Zwickau: C.F. Müller.

Siegel, T. (2013), 'Hooligans im Verwaltungsrecht', *Neue Juristische Wochenschrift*: 1035-1038.

Stahmann, R. (2011), 'Residenzpflicht und räumliche Beschränkungen der Bewegungsfreiheit', in Barwig, K., Beichel-Benedetti, S. and Brinkmann, G., *Gleichheit*, Baden-Baden: Nomos.

Ziewok, J. (1997), *Über Freizügigkeit und Aufenthalt*, Tübingen: Mohr Siebeck.