European case law on migrants’ social and mobility rights: The need for a comparative approach in assessing ‘human rights overreach’

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Abstract
Social rights (right to social security and social welfare) and mobility rights (right to freedom of movement within the territory) are the only two rights in European human rights law that limit their scope of application to persons lawfully in the territory. Migrants have contested this limitation in two ways: (1) arguing for exceptions to, or for a broad interpretation of, the concept of lawful presence, and (2) arguing that such policies violate other human rights that apply to everyone. This article examines the responses in European case law to these arguments, and shows a striking difference between cases on social rights and cases on mobility rights. While European courts and treaty bodies have significantly expanded the personal scope of social rights and/or the material scope of civil rights into the social realm, they have refrained from doing so as regards mobility rights. This finding is relevant for two reasons. First, it nuances the general idea that civil rights are privileged over social rights. Second, it nuances concerns about human rights ‘proliferation’ or ‘overreach’, which have been voiced as regards the expansion of migrants’ social rights.

Keywords
Persons lawfully within the territory, access to social benefits (‘social rights’), freedom of movement and to choose a residence (‘mobility rights’), migration control, European Court of Human Rights, Court of Justice of the European Union, European Committee of Social Rights

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1. INTRODUCTION

The only two rights in European human rights law that limit their scope of application to persons lawfully (residing) in the territory are, on the one hand, the right to access social security and social welfare (social rights) and, on the other, the right to internal freedom of movement and to choose a place of residence within the territory (mobility rights).¹ These limitations in personal scope can be found in the appendix to the (revised) European Social Charter (ESC), in Article 2(1) (on freedom of movement) of Protocol 4 to the European Convention on Human Rights (ECHR), and in Article 34(2) (on social security benefits and social advantages) and Article 45(2) (on freedom of movement) of the Charter of Fundamental Rights of the European Union.²

European States generally use both the exclusion from social rights and mobility rights as an instrument of migration control. Exclusion from social benefits is used to deter future migrants and stimulate the voluntary return of irregular migrants present on the territory. By making their life difficult, States expect migrants to take ‘responsibility’ and make the rational choice to return.³ As an alternative to such policies of forced destitution,⁴ States do provide shelter to irregular migrants, but under the condition of complying with residence restrictions, such as curfews, reporting obligations, surveillance, and dispersal policies.⁵ By subjecting migrants to such policies of forced containment and isolation, States try to improve return procedures and make sure that migrants cooperate.

Migrants without legal residence have contested their exclusion from social and mobility rights before European courts and treaty bodies, relying on two lines of argument:

1. This article deals with the right to freedom of movement within the territory, so not the right to enter the territory or the protection against deportation.
2. This article is limited to European human rights law. Similar limitations in personal scope can be found in Articles 21, 23, 24 and 26 of the Convention Relating to the Status of Refugees. Hathaway notes: ‘The drafters of the Refugee Convention, however, paid surprisingly little attention to the importance of meeting the basic needs of refugees who arrive to seek protection’, as ‘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’ in James C. Hathaway, The Rights of Refugees under International Law (Cambridge University Press 2021) 589-590.
3. Manon Pluymen, Niet toelaten betekent uitsluiten. Een rechtssociologisch onderzoek naar de rechtvaardiging en praktijk van uitsluiting van vreemdelingen van voorzieningen (Boom Juridische Uitgevers 2008); Sieglinde Rosenberger and Alexandra König, ‘Welcoming the Unwelcome: The Politics of Minimum Reception Standards for Asylum Seekers in Austria’ (2012) 25(4) Journal of Refugee Studies 537; Loma Fox O’Mahony and James A. Sweeney, ‘The Exclusion of (Failed) Asylum Seekers from Housing and Home: Towards an Oppositional Discourse’ (2010) 37(2) Journal of Law and Society 285.
4. Jesuit Refugee Service, ‘Living in Limbo. Forced Migrant Destitution in Europe’ (JRS, 2010) <https://jrseurope.org/en/resource/living-in-limbo-forced-migrant-destitution-in-europe/> accessed 29 September 2021.
5. Ilker Ataç, ‘Deserving Shelter: Conditional Access to Accommodation for Rejected Asylum Seekers in Austria, The Netherlands, and Sweden’ (2019) 17 Journal of Immigrant and Refugee Studies 44; Sieglinde Rosenberger and Sabine Koppes, ‘Claiming Control: Cooperation with Return as a Condition for Social Benefits in Austria and the Netherlands’ (2018) 6 Comparative Migration Studies 26; Martina Tazzioli, ‘Governing Migrant Mobility Through Mobility: Containment and Dispersal at the Internal Frontiers of Europe’ (2020) 38(1) Environment and Planning C: Politics and Space 3; René Kreichauf, ‘From Forced Migration to Forced Arrival: The Campization of Refugee Accommodation in European Cities’ (2018) 6(7) CMS 6, 7.
1. Contesting the restriction/definition of the concept of lawful presence/residence; and
2. Arguing that their exclusion from social rights or mobility rights violates another human right, which does not have a limited personal scope, such as the prohibition of inhuman or degrading treatment, the right to liberty, or the respect for human dignity.  

This article discusses case law of the European Court of Human Rights (ECtHR), the Court of Justice of the EU (CJEU) and the European Committee on Social Rights (ECSR or Committee), in which these lines of argument are at stake. The judgments and decisions of these institutions have been selected for analysis as they contain interpretations of the three main European standard-setting systems on human rights. The aim of the analysis is not to compare the different institutions, as the different systems encompass major structural differences, but to test my below hypothesis in the full breadth of European human rights law. The aim is to compare cases on migrants’ social rights with cases on migrants’ mobility rights. My hypothesis, based on prior research, is that there is a significant difference between the two. I hypothesise that, while both lines of argument have been successful as regards social rights, they were generally unsuccessful as regards mobility rights.

While examples of successful cases are sufficient to show how both lines of argument have been successful in cases about social rights, a systematic search strategy is necessary to test the hypothesis that both lines of argument have generally been unsuccessful in cases about mobility rights. Accordingly, for the discussion of ECtHR case law in the sections below on mobility rights, I carried out an elaborate and systematic search in the HUDOC database and screened more than 150 judgments and decisions of the ECtHR for relevance. This search was carried out in May 2021. The search strategy will be explained at the beginning of the relevant Sections (2.2 and 3.2). For the research into CJEU case law, such an elaborate search was not necessary, given the

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6. This article deals with judgments and decisions about migrants without a residence permit and, therefore, includes cases of irregular migrants and asylum seekers. Even though there are important legal differences between these two categories of migrants, as asylum seekers are usually allowed to remain on the territory during their procedure, they both lack a formal residence permit. In addition, whether the right to remain equals the qualifying condition of ‘lawful presence’ as used in social and mobility rights, is contested. In support of this, see Hathaway (n 2) 198-208; Lieneke Slingenberg, *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality* (Hart Publishing 2014) 109–126.

7. Within the Council of Europe, two separate treaties have been developed in order to give binding legal force to the rights laid down in the Universal Declaration of Human Rights: the European Convention on Human Rights (ECHR) and the European Social Charter (ESC, revised version in 1996). These two standard setting systems are considered to be complementary and interdependent. See ‘European Social Charter and European Convention on Human Rights’ (CoE) <https://www.coe.int/en/web/european-social-charter/-european-social-charter-and-european-convention-on-human-rights> accessed 28 September 2021. With the binding legal status of the EU Charter of Fundamental Rights, a third main standard setting system emerged in Europe, that includes both social rights and civil and political rights.

8. Lieneke Slingenberg, ‘Evaluating ‘Life Steeped in Power’: Non-Domination, the Rule of Law and Spatial Restrictions for Irregular Migrants’ (2020) 12 Hague Journal on the Rule of Law 399; Lieneke Slingenberg, ‘The Right Not to be Dominated. Case Law of the European Court of Human Rights on Migrants’ Destitution’ (2019) 19(2) Human Rights Law Review 291; Lieneke Slingenberg, ‘Recht op onderdak voor illegaal verblijvende kinderen? Analyse van een beslissing van het Europees Comité voor Sociale Rechten’ (2010) 4 Tijdschrift voor Vreemdelingenrecht 337.
relatively small number of judgments and the option of selecting all cases about a specific provision of a piece of legislation within the Curia database.9

This systematic case law analysis indeed shows that in recent decades, European case law has expanded migrants’ social rights, whereas migrants’ mobility rights have remained untouched. This finding is counterintuitive from a doctrinal point of view. Migrants’ access to social rights concerns positive obligations of the State. There are several restraints in international human rights doctrine for establishing such socio-economic ‘obligations to fulfil’. First of all, due to the fact that socio-economic rights are often to be progressively realised, highly resource-dependent and formulated in vague terms; they are assumed not, or only exceptionally, to impose binding legal obligations upon States. A second restraint is the traditionally restricted role of the judge in cases concerning socio-economic policy and a reluctance towards the justiciability of social rights. Protection of migrants’ freedom of movement, conversely, concerns the negative obligations of the State. Such obligations generally do not suffer from the above-mentioned restraints, since they are neither resource-dependent nor subject to progressive realisation, and they use clearer language in formulating the obligations for the State. Accordingly, it is a general assumption that civil and political rights are legally and politically privileged over socio-economic rights in Europe,10 and that this under-development of socio-economic rights particularly affects irregular migrants.11

Framing issues like poverty as a human rights issue has been criticised as a form of ‘rights inflation’, which forces communities to create hierarchies of rights in determining the allocation of resources and which undermines the power of rights-talk12 and democratic legitimacy.13 The ECtHR in particular has been criticised for expanding the scope of the ECHR rights into the social realm, as this modifies the obligations to which the States initially committed themselves.14 In addition, the ECtHR has been accused of ‘judicial overreach’ in the field of immigration, by giving ‘a radically expansive interpretation’ to Articles 3 and 8 ECHR, which ‘incoherently privileges preventing risks to noncitizens over preventing risks to citizens’ and renders it difficult to maintain ‘fair but strict immigration controls’.15

This article demonstrates how a comparative analysis of the scope of human rights protection in the field of migration control nuances both the inferior status of social rights often assumed in human rights doctrine and concerns about ‘rights proliferation’ and ‘judicial overreach’ in the field of immigration and social rights. By providing a systematic analysis of European case law

9. For example, the Curia database allows for a search on the basis of ‘References to case-law or legislation’, where a specific article of a specific directive can be entered in the search form (for example, Directive 2011/95, article 33).
10. Grainne De Búrca, ‘The Future of Social Rights Protection in Europe’, in Grainne de Búrca, Bruno de Witte, and Larissa Ogertschnig (eds), Social Rights in Europe (Oxford University Press 2005); Roderic O’Gorman, ‘The ECHR, the EU and the Weakness of Social Rights Protection at the European Level’ (2011) 12 German Law Journal 1833.
11. Colm O’Cinneide, ‘The Human Rights of Migrants with Irregular Status: Giving Substance to Aspirations of Universalism’, in Sarah Spencer and Anna Triandafyllidou (eds) Migrants with Irregular Status in Europe (Springer 2020).
12. Dominique Clément, ‘Human Rights or Social Justice? The Problem of Rights Inflation’ (2018) 22 International Journal of Human Rights 155.
13. Aryeh Neier, ‘Differentiating Fundamental Rights and Economic Goals’, in Bardo Fassbender and Knut Traisbach (eds), The Limits of Human Rights (Oxford University Press 2019) 175–183.
14. Marc J. Bossuyt, ‘Should the Strasbourg Court Exercise More Self-RestRAINT? On the Extension of the Jurisdiction of the European Court of Human Rights to Social Security Regulations’ (2007) 28 Human Rights Law Journal 321; See also the critical comments by various scholars on the M.S.S. case, mentioned in Section 3.1 below.
15. John Finnis and Simon Murray, Immigration, Strasbourg, and Judicial Overreach (Policy Exchange 2021).
into migrants’ social and mobility rights, it shows how this case law still leaves States ample room for pursuing their purposes of migration control, while migrants can only secure some basic needs if they trade away their freedom.

To this end, Section 2 discusses case law in which the restriction to, or definition of, lawful presence is contested as regards social rights and mobility rights. Section 3 analyses cases in which migrants’ exclusions of social and mobility rights have been constructed as possible violations of other human rights that do not have a limited personal scope. The final section presents conclusions.

2. ARGUMENT 1: CONTESTING RESTRICTION TO OR DEFINITION OF LAWFUL PRESENCE

2.1. SOCIAL RIGHTS

A clear example of cases in which the restriction of social rights to persons lawfully residing on the territory was successfully contested are the collective complaints filed with the ECSR by Defence for Children International (DCI) and the Conference of European Churches (CEC) against the Netherlands. In their complaints, DCI and CEC argued that the Netherlands violated their obligations under the (revised) ESC by not providing shelter to unlawfully present children and adults respectively.

The appendix to the (revised) ESC states ‘[T]he persons covered by Articles 1 to 17 and 20 to 31 include foreigners only insofar as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned […]’.16

Hence, the appendix indicates that a migrant only falls under the scope of the ESC provisions if they are a national of one of the contracting parties and are ‘lawfully resident or working regularly’ within the territory of a Contracting Party. According to the ECSR, however, the restriction of the ESC’s personal scope ‘should not be read in such a way as to deprive migrants in an irregular situation of the protection of their most basic rights enshrined in the ESC, nor to impair their fundamental rights, such as the right to life or to physical integrity or human dignity’.17 Therefore, the Committee held that in certain cases and under certain circumstances, the provisions of the ESC apply to irregular migrants as well. In DCI v the Netherlands, the ECSR concluded that children, whatever their residence status, fall under the personal scope of Article 31(2) ESC (on the prevention and reduction of homelessness).18 In CEC v the Netherlands, the Committee expanded this new interpretation of the scope of Article 31(2) to adults.19

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16. According to Article 38 of the ESC and Article N to the revised ESC, the appendix to the Charter forms an integral part of it.
17. See for example: CEC v the Netherlands Complaint no 90/2013 (ECSR, 1 July 2014), para 66.
18. DCI v the Netherlands Complaint no 47/2008 (ECSR, 20 October 2009). The Committee based part of its reasoning on its decision in the case of FIDH v France Complaint no 14/2003 (ECSR, 8 September 2004) on access to medical assistance for migrants without legal residence. In its 2004 Statement of Interpretation on the personal scope of the ESC, the Committee referred to obligations to grant rights to foreigners not covered by the ESC undertaken by Parties by ratifying other human rights treaties or by adopting domestic rules. It held that ‘[w]hereas these obligations do not in principle fall within the ambit of its supervisory functions, the Committee does not exclude that the implementation of certain provisions of the Charter could in certain specific situations require complete equality of treatment between nationals and foreigners, whether or not they are nationals of member States, Party to the Charter’ (Statement of Interpretation on the personal scope of the Charter, Conclusions XVII-1 (ECSR, 2004)).
19. CEC v the Netherlands Complaint no 90/2013 (ECSR, 1 July 2014).
These two examples show how the exclusion of migrants without legal residence from the ESC was successfully contested. The legal reasoning of the Committee has been criticised by legal scholars, as being not convincing enough to justify an interpretation of the appendix that is contrary to the text. In addition, scholars have expressed concerns that such a far-reaching decision by the ECSR would damage States’ acceptance of the ESC and the complaints procedure, and States’ willingness to ratify other treaties and complaints procedures for socio-economic rights. The Dutch government used this kind of ‘overreach’ reasoning as well. It argued in its response to the decision in CEC that ‘the ECSR’s unwarranted interpretation risks jeopardising the trust that States place in what they have agreed upon in treaty law’ and stressed the ‘serious concerns how this will affect the authority of the Committee in the long run and how this will affect the effectiveness of the ESC itself. As one result, the majority of States not having accepted the collective right of complaint may be discouraged from doing so.’

Another example stems from the field of EU law. The EU Reception Conditions Directive applies to asylum seekers ‘as long as they are allowed to remain on the territory’. In Cimade and GISTI, the CJEU was asked to answer the question of when the obligation to provide reception benefits to asylum seekers ends, when in respect of these people a Dublin claim had been made to another Member State. Under the previously applicable EU Asylum Procedures Directive, asylum seekers were allowed to remain on the territory during the examination of the asylum application by the authorities, but not automatically during any possible appeals. In France, asylum seekers who were the subjects of a Dublin claim did not receive reception benefits, because they did not gain a provisional residence document and were, therefore, no longer ‘allowed to remain on the territory’ within the meaning of the EU Reception Conditions Directive.

The CJEU ruled that asylum seekers for whom another Member State is responsible on the basis of the Dublin Regulation fall under the personal scope of the Reception Conditions Directive until they have actually been transferred to the responsible Member State. Remarkably, the CJEU did not pay attention to the condition of being ‘allowed to remain on the territory’ in this part of the judgment at all. Accordingly, even though under French law there was no right to remain on the territory and under EU law there was no such right during the appeal phase, the CJEU ruled that the EU Reception Conditions Directive was applicable until the actual transfer. Accordingly, the

20. Antoine Buyse, ‘Kinderen in de kou. Gebrek aan onderdaksgarantie minderjarige illegale schendt ESH’ (2010) 35 NTM/NJCM-Bulletin 205; Lieneke Slingenberg, ‘Recht op onderdak voor illegaal verblijvende kinderen? Analyse van een beslissing van het Europees Comité voor Sociale Rechten’ (2010) 4 Tijdschrift voor Vreemdelingenrecht 337.
21. Yvonne Donders and R Brouwer, ‘Case note to Europees Comité voor Sociale Rechten (rolnr. Nr. 47/2008: [Defence for Children International tegen Nederland])’ (2010) 5 European Human Right Cases 659.
22. Appendix to Resolution CM/ResChS(2015)5: Conference of European Churches (CEC) v the Netherlands, Complaint No 90/2013.
23. Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31, Article 3 and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180, Article 3.
24. Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326, Articles 7 and 39(3).
25. Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L 180/31.
26. Case C-179/11 CIMADE and GISTI v Ministre de l’Intérieur, de l’Outre-mer, des Collectivités territoriales et de l’Immigration [2012] ECLI:EU:C:2012:594.
CJEU disregards in its case law an explicit limitation as regards the personal scope of the obligation to provide social benefits. This bears resemblance to the approach of the ECSR, discussed above, but the CJEU does it more implicitly.

2.2. MOBILITY RIGHTS

Migrants without legal residence or an insecure residence status have also contested the limitation or definition of ‘lawful presence’ in cases about residence and mobility restrictions. I could not find cases, however, in which such claims were successful. The only successful case did not consist of an exception or wider interpretation of the lawfulness requirement but was entirely based on the (incorrect) application of domestic law.

There are no judgments (yet) by the CJEU on the interpretation of Article 45 of the EU Charter on Fundamental Rights. The search strategy for relevant ECtHR case law included four different searches in the HUDOC database, which resulted in six relevant cases. Cases that were not found relevant included those in which the personal scope of the right to freedom of movement was not at stake, or old Commission decisions.

Article 2(1) of Protocol 4 to the ECHR contains the right to freedom of movement. It states that ‘[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence’.

In the early case of Piermont v France, the applicant, a German citizen and member of the European Parliament, travelled to New Caledonia at the invitation of locally elected representatives. After she had gone through immigration control at the airport, where the airport and border police stamped her passport, a police officer stopped her and took her into an airport office. There she was served with an order excluding her from the territory of New Caledonia. The applicant argued that she had lawfully entered the territory and that the exclusion order was in fact an expulsion order. The ECtHR ruled, however, that the applicant’s argument that the mere fact of going through immigration control regularises a person’s position in a territory is ‘too formalistic’. At an airport ‘a passenger remains liable to checks for as long as he remains within the perimeter’. According to the ECtHR, the applicant was never lawfully within the territory, and Article 2 of Protocol 4 ECHR did not apply. Hence, the Court limited the meaning of the term ‘lawfully within the territory’ in this case, both in time and in space. A formal stamp by border authorities is not enough to securely establish a lawful presence.

Another relevant case is Omwenyeke v Germany. Omwenyeke was an asylum seeker in Germany who had been issued a provisional residence permit and a geographical restriction to reside and remain in the city of Wolfsburg during the asylum procedure. Since he had left Wolfsburg several times without being granted permission, criminal proceedings were initiated. He argued before the ECtHR that the geographical restriction and the criminal proceedings

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27. Search I: Judgments and decisions, keywords: P4-2-1 lawfully within the territory: 24 results, 5 relevant ones. Search II: Judgments and decisions, text search: Omwenyeke: 1 (relevant) result. Search III: Judgments and decisions, article: P4-2-1, text search: migrant: 3 (irrelevant) results. Search IV: Judgments and decisions, article: P4-2-1, text search: asylum: 7 (irrelevant) results.
28. Piermont v France App nos 15773/89 and 15774/89 (ECtHR, 27 April 1995).
29. ibid, para 49.
30. ibid.
31. Omwenyeke v Germany App no 44294/04 (ECtHR, 20 November 2007).
against him violated his freedom of movement, as protected by Article 2 of Protocol 4 ECHR. He argued that he was lawfully within the territory as he was in possession of a provisional residence permit and was allowed to await the outcome of the asylum procedure.

The ECtHR ruled that the phrase ‘lawfully within the territory’ refers to the domestic law of the State concerned, and that therefore ‘[i]t 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”’.\(^{32}\) In addition, the Court held that migrants can only be regarded as ‘lawfully’ in the territory so long as they comply with the conditions to which their admission and stay are subjected. The Court noted that Omwenyeke’s provisional authorisation to stay in Germany was conditional on his stay in the assigned district. Since he had left that district without permission, he was not ‘lawfully within the territory’ anymore, and Article 2 of Protocol 4 did not apply. Accordingly, the Court did not scrutinise the residence restriction as such, but used it to stress the limited personal scope of the right to freedom of movement.

With reference to this case, the Court repeated in \textit{Balta v France} that it is for domestic law to establish the criteria for lawful presence. This case concerned a Romanian national – i.e. a Union citizen – who lived in France. He invoked the freedom to choose a residence against a decision by the Prefect of Seine-Saint-Denis to serve formal notice on him and other caravan occupiers illegally parked in La Courneuve to leave the area. Since he had not produced any evidence on the lawfulness of his stay in France after the first three months, the Court concluded that he did not fall under the personal scope of the freedom to choose a residence.\(^{33}\)

There are also cases concerning individuals who contested the withdrawal of their lawful residence since this resulted in them being unable to move freely within the territory or leave and return to the territory. In these cases, the Court merely established that according to domestic law, the people concerned did not have a lawful residence (anymore), as a result of which the right to freedom of movement was inapplicable.\(^{34}\) The case of \textit{Tatishvili v Russia} is the only exception.\(^{35}\) In this case, the Court concluded that the applicant was lawfully present in Russia, despite the Russian government’s statement to the contrary. The Court noted that the applicant had a special legal status in Russia, that of a ‘citizen of the former USSR’,\(^{36}\) and was as such entitled to equal treatment with Russian nationals as regards residence registration. This is the only case in which the Court ruled in favour of the applicant as regards contested applicability of the right to freedom of movement. This finding is, however, entirely based on Russian domestic law.

These cases indicate that the Court provides a strict interpretation of the condition of ‘lawfully in the territory’ as laid down in Article 2 of Protocol 4 ECHR, and leaves the definition of lawful presence entirely to domestic law. Even though this approach is contrary to the interpretations by the ECSR and CJEU as regards similar conditions in the field of social rights (see Section 2.1), and another approach would have been legally feasible,\(^{37}\) the ECtHR has not changed its approach.

\(^{32}\) ibid, para 1.
\(^{33}\) \textit{Balta v France} App no 19462/12 (ECtHR, 16 January 2018).
\(^{34}\) Yildirim \textit{c Roumanie} App no 21186/02 (ECtHR, 20 September 2007); \textit{Sissojeva et autres c la Lettonie} App no 60654/00 (ECtHR, 9 November 2000).
\(^{35}\) \textit{Tatishvili v Russia} App no 1509/02 (ECtHR, 22 February 2007).
\(^{36}\) ibid, para 42.
\(^{37}\) See for example the view of the Human Rights Committee in \textit{Celepli v Sweden} Communication No. 456/1991, CCPR/C/51/D/456/1991 (UNHRC, 18 July 1994); Also see Lieneke Slingenberg, \textit{The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality} (n 6) 110-125.
during the last decades. Accordingly, Article 2 of Protocol 4 ECHR is not applicable to migrants whose presence in the territory cannot be qualified as lawful under domestic law, and provides, therefore, no obstacle for States to make access to social rights conditional on meeting strict residence restrictions.

3. ARGUMENT 2: EXCLUSION FROM SOCIAL OR MOBILITY RIGHTS VIOLATES ANOTHER HUMAN RIGHT

3.1. SOCIAL RIGHTS

Another opportunity to argue that migrants’ exclusion from social rights violates human rights law is to state that this exclusion violates rights that do not have a limited personal scope, such as the right to be free from inhuman treatment (laid down in Article 3 ECHR) or respect for human dignity (laid down in Article 1 of the EU Charter on Fundamental Rights). This has proven to be a successful strategy.38

The first case in which the ECtHR held that Article 3 ECHR was violated due to poor socio-economic circumstances was a case of a migrant without legal residence – the case of M.S.S. v Belgium and Greece.39 M.S.S. was an asylum seeker from Afghanistan who travelled through Greece to Belgium, where he lodged an asylum application. On the basis of the EU Dublin Regulation, Belgium sent him back to Greece, as this was the country where he first entered the European Union. In his complaint against Greece, the applicant alleged that his poor living conditions there violated Article 3 ECHR. The Greek government submitted inter alia that the Convention did not guarantee the right to accommodation. To rule otherwise ‘would open the doors to countless similar applications from homeless persons and place an undue positive obligation on the States in terms of welfare policy’.40

The Grand Chamber of the ECtHR held that:

‘the Greek authorities have not had due regard to the applicant’s vulnerability as an asylum-seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs’.41

The Court considered that such living conditions, ‘combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving’, attained the level of severity required to fall within the scope of Article 3 of the Convention.42 Since the applicant found himself in a situation incompatible with Article 3 ECHR by fault of the authorities, the Court concluded that that provision was violated.

38. Another rather successful strategy has been to argue that exclusion from social rights violates the prohibition of non-discrimination, as laid down in Article 14 ECHR. See for example Natalia Caicedo Camacho, ‘Social Rights and Migrants before the European Court of Human Rights’, in David Moya and Georgios Milios (eds), Aliens before the European Court of Human Rights. Ensuring Minimum Standards of Human Rights Protection (Brill 2021) 191.
39. M.S.S. v Belgium and Greece App no 30696/09 (ECtHR, 21 January 2011).
40. Submissions by the Greek government, as summarised by the ECtHR in M.S.S. v Belgium and Greece (n 39), para 243.
41. ibid, para 263.
42. ibid.
After the M.S.S. case, the Court found more violations of Article 3 ECHR for migrants’ poor living conditions, for example the cases of F.H.,43 AL.K.,44 Amadou,45 and Rahimi46 v Greece; Shioshvili and others v Russia;47 Khan,48 and N.H. and others49 v France. Even though there are also numerous cases in which the Court dismissed migrants’ claim that their poor living conditions resulted in a violation of Article 3 ECHR,50 this shows that the Court has widened the material scope of the prohibition of inhuman treatment to include socio-economic circumstances and did that in cases concerning migrants without legal residence.51

The M.S.S. case has been mentioned as an example of (worrisome) ‘rights proliferation’ or ‘human rights overreach’. In his case comment to this judgment, Bossuyt argued that by continuously lowering the threshold for the application of Article 3 ECHR, the Court contributes to a trivialisation of that article which seems incompatible with its absolute character. According to Bossuyt, the Court overstepped its jurisdiction by transforming the ‘civil right by excellence’ into a social right requiring considerable expenditure.52 Zwart mentioned the M.S.S. case as one of the ‘dramatic additions’ to the rights that have been ‘found’ by the ECtHR in the Convention.53 In his view, this kind of rights proliferation raises legitimacy concerns, which ultimately hamper the effectiveness of the Court. Similarly, Malcolm mentioned the case of M.S.S. as an example of how the scope of rights can be extended by lowering the thresholds for applying certain key terms in the Convention. This is one of the methods for ‘engineering the continuous expansion of rights’ and this ‘unclear, indeterminate, subjective and unpredictable system of human rights adjudication’ raises rule of law concerns and undermines democracy, according to Malcolm.54

In EU law the starting point is different, as different EU directives contain obligations for the Member States to provide social benefits to migrants without legal residence. Thus, in cases concerning EU law, migrants have contested their exclusion from social benefits by arguing for a wide interpretation of these obligations, in line with fundamental rights. As shown below, the CJEU has

43. F.H. v Greece App no 78456/11 (ECtHR, 31 July 2014).
44. AL.K. v Greece App no 63542/11 (ECtHR, 11 December 2014).
45. Amadou v Greece App no 37991/11 (ECtHR, 4 February 2016).
46. Rahimi v Greece App no 8687/08 (ECtHR, 5 April 2011).
47. Shioshvili and others v Russia App no 19356/07 (ECtHR, 20 December 2016).
48. Khan v France App no 12267/16 (ECtHR, 28 February 2019).
49. N.H. and others v France App nos 28820/13, 75547/13 and 13114/15 (ECtHR, 2 July 2020).
50. For a recent example see B.G. and others v France App no 63131/13 (ECtHR, 10 September 2020) and for an overview until May 2018 see Lieneke Slingenberg, ‘The Right Not to be Dominated. Case Law of the European Court of Human Rights on Migrants’ Destitution’ (n 8) 291.
51. See also Filippo Ippolito and Carlos Pérez-González, “‘Handle with Care’ in Strasbourg. The Effective Access of Vulnerable Undocumented Migrants to Minimum Socio-economic Rights’, in Başak Çalı, Ledi Bianku, and Iulia Motoc (eds), Migration and the European Convention on Human Rights (Oxford University Press 2021) 138 and Meltem Ineli-Ciğer, ‘Protecting Aliens with Article 3 of the ECHR. An Analysis with a Focus on Refugees and Migrants’, in David Moya and Georgios Milios (eds), Aliens before the European Court of Human Rights. Ensuring Minimum Standards of Human Rights Protection (Leiden: Brill 2021) 67–69.
52. Marc Bossuyt, ‘Belgium Condemned for Inhuman or Degrading Treatment Due to Violations by Greece of EU Asylum Law: MSS v Belgium and Greece’ (2011) European Human Rights Law Review 581, 582.
53. Tom Zwart, ‘More Human Rights Than Court: Why the Legitimacy of the European Court of Human Rights is in Need of Repair and How it Can Be Done’, in Spyridon Flogaitis and others (eds) The European Court of Human Rights and its Discontents (Edward Elgar 2013) 71 at 87/88.
54. Noel Malcolm, Human Rights and Political Wrongs. A New Approach to Human Rights law (Policy Exchange 2017) at 137/138.
generally been willing to provide such an interpretation. In all cases on the interpretation of the EU Reception Conditions Directive and the EU Return Directive dealing with asylum seekers’ and irregular migrants’ access to social welfare, the CJEU has provided interpretations that ensured migrants’ eligibility for benefits.

In the case of Saciri, the CJEU was asked to provide an interpretation of the EU Reception Conditions Directive. This case concerned the Saciri family (father, mother, and their three minor children) who applied for asylum in Belgium. Due to saturation of the reception facilities, the Saciri family was not provided with accommodation but received general social assistance. Having been unable to find housing, the Saciri family turned to the private rental market but, being unable to pay the rent, applied for extra financial aid with the public centre for social welfare. The CJEU was asked whether, in the situation that the State has opted to grant reception conditions in the form of financial allowances, the State is bound to ensure that the amount of those allowances is such as to enable asylum seekers to obtain accommodation. With reference to Article 1 of the EU Charter of Fundamental Rights, the CJEU ruled that financial allowances must be sufficient to ensure a dignified standard of living by enabling asylum seekers to obtain housing, if necessary, on the private rental market. In addition, the CJEU underlined that saturation of the reception networks is not a justification for any derogation from meeting the minimum standards of the Directive.

In Haqbin, the CJEU was asked to rule on the withdrawal of reception conditions in case of violent behaviour. Haqbin, an unaccompanied minor, was involved in a brawl between residents of an asylum seekers’ reception centre and was arrested by the police for, allegedly, being one of the instigators. Based on this, the director of the reception centre decided that Haqbin would be excluded from access to the reception centre for a period of 15 days. The Reception Conditions Directive allows Member States to determine sanctions applicable to serious breaches of the rules of the accommodation centres as well as to seriously violent behaviour. The Advocate General’s proposal for the judgment of the Court was limited to situations of minors. He suggested the Court to rule that withdrawal of all benefits is possible in case of violent behaviour, but only if ‘that decision is accompanied by the prior involvement of the assistance services and/or the judicial authorities responsible for child protection, in such a way as to ensure that that minor will receive ongoing support appropriate for the specific needs which his age, status and situation require’. The Court, however, took a different approach. It ruled, in general, not limited to minors, that sanctions may not consist in the withdrawal of all reception conditions, not even temporarily. According to the CJEU, withdrawal of all benefits would be irreconcilable with the requirement to ensure a dignified standard of living for the applicant, read in accordance with Article 1 of the Charter.

A final example concerns the case of Abdida, in which the CJEU was asked to provide an interpretation of the EU Returns Directive. This Directive does not contain a provision about access to

55. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348.
56. Case C-79/13 Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others [2014] ECLI:EU:C:2014:103.
57. Case C-233/18 Zubair Haqbin v Federaal Agentschap voor de opvang van asielzoekers [2019] ECLI:EU:C:2019:956.
58. Directive 2013/33/EU (n 23) Article 20(4).
59. Case C 233/18 Zubair Haqbin v Federaal Agentschap voor de opvang van asielzoekers (n 57), Opinion of Advocate General Campos Sánchez-Bordona, para 88.
60. C-562/13 Centre public d’action sociale d’Ottignies-Louvain-La-Neuve v Moussa Abdida [2014] ECLI:EU:C:2014:2453.
shelter or other basic needs, but it does contain an obligation for the Member States to ensure, as far as possible, emergency health care and essential treatment of illness during the period for voluntary departure and where removal has been postponed. In *Abdida*, the applicant’s request to reside on medical grounds was rejected and, consequently, his social assistance was withdrawn. The applicant lodged an appeal against the rejection of his application for leave to reside and against the withdrawal of his social assistance. The CJEU was asked whether the EU Returns Directive compelled Member States to provide for the basic needs of a seriously ill person pending a ruling on appeal against the rejection of an application for leave to reside. The CJEU acknowledged that Recital 12 of the EU Returns Directive holds that the basic needs of third-country nationals who are staying illegally but who cannot yet be removed should be defined according to national legislation. However, it concluded that the obligation to provide emergency health care and essential treatment of illness would be rendered meaningless if there were not also a concomitant requirement to make provision for the basic needs of the third-country national concerned. The CJEU confirmed and extended this interpretation in the more recent case of *LM*. In this case, the CJEU ruled that the obligation to provide, as far as possible, for the basic needs of a third-country national who is awaiting the outcome of an appeal against a return decision, also applies to the parent of an adult child who is seriously ill and dependent on this parent.

These cases show how the CJEU, based on human dignity or effectiveness reasoning, has provided broad interpretations of Member States’ obligations to provide social benefits to asylum seekers and other migrants without legal residence, even if the text of the relevant instruments seemed to point otherwise. These cases could, therefore, raise similar concerns as those voiced against the *M.S.S.* judgment of the ECtHR. The next section will show, however, how such concerns can be nuanced if the wide possibilities for States to use the provision of social benefits as an instrument of migration control, that are left untouched by human rights and EU law, are taken into account.

### 3.2. Mobility Rights

In regards to restrictions on their freedom of movement and freedom to choose a place of residence, migrants have also argued that such restrictions violated other human rights that do not have a limited personal scope. In order to test the hypothesis that such arguments have been unsuccessful in ECtHR case law, a systematic search in the HUDOC database was carried out. To this end, eight searches were conducted, which resulted in 14 relevant cases. Irrelevant cases included cases about expulsion or detention conditions and cases in which there was no possibility whatsoever, neither in theory nor in practice, to leave the premises; in other words, cases in which the door

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61. C-402/19 LM v Centre public d’action sociale de Seraing [2020] ECLI:EU:C:2020:759.
62. Search I: Judgments, Article: NOT P4-2, Text search: ‘freedom of movement’ AND asylum: 79 results, sorted by relevance scrutinized the first 40, 4 relevant. Search II: Judgments, Article: NOT P4-2, Text search: ‘freedom of movement’ AND migrant: 42 results, 3 relevant. Search III: Judgments, Article: NOT P4-2, text search: ‘restriction of liberty’ and asylum: 13 results, 3 relevant (1 new). Search IV: Judgments and decisions, Article 5, text search ‘semi-ouvert’: 11 results, 5 relevant (4 new). Search V: Judgments and decisions, Article 5, text search ‘semi-open’: 10 results, 1 relevant. Search VI: Judgments and decisions, Text search: ‘transit zone’: 25 results, 7 relevant (3 new). Search VII: Judgments and decisions, text search: ‘zone de transit’: 34 results, 7 relevant (2 new). Search VIII: Judgments and decisions, text search: Ilias and Ahmed: 51 results, 4 relevant.
was locked, such as in the case of Nolan and K. v Russia\textsuperscript{63} and Khlai\textit{fi}a and others v Italy.\textsuperscript{64} In the 14 relevant cases found, the applicants argued that the restrictions on liberty were so severe, that they actually constituted deprivations of liberty, and should be assessed under Article 5 ECHR. On this issue, two lines of case law can be identified: cases about ‘semi-open’ reception centres and cases about confinement in transit centres at the border.

Concerning transit centres, which migrants could only exit by leaving the country altogether, the Court used to rule that if this possibility of leaving the centre is a mere theoretical possibility, it constituted a deprivation of liberty in the sense of Article 5 ECHR. For example, in the 1996 case of 	extit{Amuur}, the Court held that holding asylum seekers in the transit zone of Paris-Orly Airport was equivalent in practice, in view of the restrictions suffered, to a deprivation of liberty. While the French authorities argued in this case that although the transit zone was ‘closed on the French side’, it remained ‘open to the outside’, the Court argued that 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.\textsuperscript{65} With reference to 	extit{Amuur}, the Court concluded also in 	extit{Riad and Idiab v Belgium},\textsuperscript{66} as well as in other cases,\textsuperscript{67} that migrants’ confinement in a transit zone, even if there was the possibility of leaving voluntarily, amounted to a \textit{de facto} deprivation of liberty. I only found two exceptions: (1) 	extit{Mahdid and Haddar v Austria}, in which the applicants’ asylum request was denied within three days, the applicants were in possession of passports and tourist visas for Slovenia, and were not kept under any special surveillance;\textsuperscript{68} and (2) 	extit{Gahramanov v Azerbaijan}, in which the applicant was only held for a few hours in a room at the airport, while the authorities carried out a further check, and was free to leave the airport after his situation was clarified.\textsuperscript{69}

In November 2019, however, the Grand Chamber of the ECtHR created a broader exception to the classification of confinement in a transit zone as deprivation of liberty. In the cases of 	extit{Z.A. and others v Russia} and 	extit{Ilias and Ahmed v Hungary}, the Court formulated a new list of factors that should be taken into consideration in determining the distinction between a restriction on liberty of movement and deprivation of liberty in the context of confinement of foreigners:

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’.\textsuperscript{70}

\textsuperscript{63} Nolan and K. v Russia App no 2512/04 (ECtHR, 12 February 2009).
\textsuperscript{64} Khlai\textit{fi}a and others v Italy App no 16483/12 (ECtHR, 15 December 2016).
\textsuperscript{65} Amuur v France App no 19776/92 (ECtHR, 25 June 1996).
\textsuperscript{66} Riad and Idiab v Belgium App nos 29787/03 and 29810/03 (ECtHR, 24 January 2008).
\textsuperscript{67} See Shamsa v Poland App nos 45355/99 and 45357/99 (ECtHR, 27 November 2003); Al-Agha v Romania App no 40933/02 (ECtHR, 12 January 2010); Abou Amer v Romania App no 14521/03 (ECtHR, 24 May 2011).
\textsuperscript{68} Mahdid and Haddar v Austria App no 74762/01 (ECtHR, 8 December 2005).
\textsuperscript{69} Gahramanov v Azerbaijan App no 26291/06 (ECtHR, 15 October 2013).
\textsuperscript{70} Z.A. and others v Russia App no 61411/15 (ECtHR, 21 November 2019) para 138, Ilias and Ahmed v Hungary App no 47287/15 (ECtHR, 21 November 2019), para 217.
In addition, the Court argued that for asylum seekers who are seeking admission to a State to apply for asylum, it is relevant that they had no prior link to the State and requested admission to the territory of their own initiative. The Court held that ‘[w]hile this fact in itself does not exclude the possibility of the applicants finding themselves in a situation of de facto deprivation of liberty after having entered, the Court considers that it is a relevant consideration, to be looked at in the light of all other circumstances of the case’. This is a new starting point in the Court’s case law, which had not been used in Amuur and Riad and Idiab.

In Z.A. and others the applicants complained about their confinement in the transit zone of Sheremetyevo Airport. The Court concluded that the applicants had been deprived of their liberty within the meaning of Article 5 ECHR. Decisive for reaching this conclusion was that the applicants were held in an airport transit zone. Leaving this zone would have required ‘planning, contacting aviation companies, purchasing tickets and possibly applying for a visa depending on the destination’ and the Russian government had failed to substantiate how the applicants, despite these practical obstacles, could leave the transit zone. In addition, the Court noted that the processing and judicial examination of the applicants’ case was ‘anything but speedy’, ranging from five months and one day until one year, nine months and 28 days.

Another above-mentioned case relevant in this regard, Ilias and Ahmed, concerned the confinement of asylum seekers in the Röszke transit zone on the land border between Hungary and Serbia. Despite the Court’s finding that ‘the size of the area and the manner in which it was controlled were such that the applicants’ freedom of movement was restricted to a very significant degree, in a manner similar to that characteristic of certain types of light-regime detention facilities’, the Court concluded that the applicants had not been deprived of their liberty. Contrary to Z.A. and others, the Court concluded that the applicants’ situation was not influenced by any inaction of the Hungarian authorities, as the Hungarian authorities ‘were working in conditions of a mass influx of asylum-seekers and migrants at the border’ and, nevertheless, dealt with the applicants’ asylum claims and their judicial appeals within three weeks and two days. In addition, the Court held that, since the applicants in this case were placed in a land border transit zone and, consequently, did not need to board an airplane to return to the country from which they came, they had a genuine possibility of leaving the transit zone by walking to Serbia. The fact that they did not have a legal right to enter Serbia and they would have forfeited the examination of their asylum claims in Hungary if they left prior to the final decision on their asylum requests, did not render this possibility merely theoretical.

A case in which the Court ruled again about the confinement of asylum seekers in the Röszke transit centre, but came to an opposite conclusion, is R.R. and others v Hungary. Here, the Court held Article 5 ECHR to be applicable (and violated). The Court did not, however, depart from its findings in Ilias and Ahmed. Instead, using the same factors as those listed in Z.A and others and Ilias and Ahmed, the Court took into account a number of different factual circumstances of the applicants in R.R. Contrary to the case of Ilias and Ahmed, in this case, no maximum duration of the applicants’ stay in the transit zone applied (because a crisis situation caused by mass

71. Z.A. and others (n 70), paras 140–141; Ilias and Ahmed (n 70), para 221.
72. ibid, para 154.
73. ibid, para 148.
74. Ilias and Ahmed v Hungary (n 70), para 232.
75. ibid, para 228.
76. R.R. and others v Hungary App no 36037/17 (ECtHR, 2 March 2021).
immigration was declared) and there were considerable delays in the domestic examination of the applicants’ asylum claims. In addition, the applicants in this case spent a month and a half in the isolation section of the transit zone (because of a hepatitis B. infection), under very restrictive conditions. Given these circumstances, the Court ruled that the applicants’ stay in the transit zone amounted to a *de facto* deprivation of liberty.

As regards semi-open reception centres, the Court does not easily conclude that a deprivation of liberty is at stake. In a number of cases, applicants complained about the mobility restrictions in the Vial reception centre, located on the Greek island of Chios. In these cases, the applicants were issued with decisions forcing them not to leave the island and to stay in the reception centre. This centre was transformed from a closed to a semi-open centre, which meant that the applicants could leave during the day but had to return during the night. The applicants complained about the arbitrary character of their detention and the poor detention conditions, but the Court concluded, without any deliberation, that from the date of the transfer into a semi-open centre, there was no deprivation of liberty.77 The Court did not pay any attention to the fact that the applicants could not leave the island and had to stay in the centre during the night. Also in the case of *Alissa v Romaine*, the applicants (beneficiaries of international protection) were placed in a centre from which they could not leave between 10 pm and 6 am.78 With reference to *J.R.*, the Court merely held that this placement was a simple restriction of freedom and no deprivation of liberty within the meaning of Article 5 ECHR.

*Nur Ahmed and others v Ukraine* is an exception.79 In this case, six Somali applicants argued that their placement in a ‘temporary accommodation centre’ constituted a deprivation of their liberty and violated Article 5 ECHR. The applicants had unlawfully entered Ukraine from Russia and subsequently been arrested and placed in a temporary accommodation centre for illegally present migrants. They were allowed to leave this centre, but only with the management’s written permission. The Court, with reference to the factors listed in *Z.A. and others* and *Ilias and Ahmed*, concluded that their placement in the temporary accommodation centre amounted to a deprivation of liberty. Crucial for this conclusion was that the applicants had not entered the centres on their own initiative, nor had they ever consented to their placement there. Moreover, the management’s authority to give permission to leave the centre was entirely discretionary, domestic law used the criminal law term ‘arrest’ for the placement in a temporary accommodation centre, and the applicants would have required permission to leave the centre had they wanted to return to Russia.

Accordingly, claims that placement in a semi-open reception centre actually amounts to *de facto* detention have generally not been successful. The only exception was the above case where permission was necessary to leave the centre, and the authority to give such permission was entirely discretionary. In addition, the Court has limited the possibility of arguing that confinement in a transit zone qualifies as deprivation of liberty, by emphasising that asylum seekers at the border do not have a prior link to the State and by disregarding important legal obstacles for asylum seekers to actually leave such zones. Consequently, in light of the strict interpretation of the condition of

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77. *J.R. and others v Greece* App no 22696/16 (ECtHR, 25 January 2018); *O.S.A. and others v Greece* App no 39065/16 (ECtHR, 21 March 2019); *Kaak and others v Greece* App no 34215/16 (ECtHR, 3 October 2019).
78. *Alissa v Romaine* App no 48780/17 (ECtHR, 17 December 2019).
79. *Nur Ahmed and others v Ukraine* App nos 42779/12, 56367/12, 68309/12, 68335/12, 68344/12 and 68358/12 (ECtHR, 18 June 2020).
'lawful presence’ in Article 2 of Protocol 4 ECHR (see Section 2.2), the Convention hardly provides any legal protection against residence restrictions, curfews and reporting obligations applied to migrants. This means that, contrary to policies of forced destitution, States still have a lot of room under the ECHR to apply policies of isolation and forced containment and, in this way, use irregular migrants’ social rights as an instrument of migration control.

The same is true under EU law. In EU law, Member States are provided with a number of ways to limit migrants’ freedom of movement and freedom to choose a residence. The EU Returns Directive allows Member States to impose obligations to ‘regular reporting to the authorities’ and ‘to stay at a certain place’ during the period for voluntary return, which the Member States are obliged to grant to illegally residing migrants when they issue a return decision.\(^\text{80}\) The purpose of imposing such an obligation is to avoid the risk of absconding. This obligation may also be imposed during the time that the removal of the migrant concerned has been postponed.\(^\text{81}\) Also, the EU Reception Conditions Directive contains various options for the Member States to restrict asylum seekers’ liberty. Member States can limit asylum seekers’ freedom of movement to an assigned area and they can limit asylum seekers’ freedom to choose a residence by assigning a specific place. In order to effectively decide on asylum seekers’ residence, Member States may make provision of the material reception conditions subject to an actual residence in a specific place\(^\text{82}\) and they may limit or withdraw the reception conditions in case of abandonment of the assigned place.\(^\text{83}\) Migrants have contested such mobility restrictions by arguing for a restricted interpretation of Member States’ possibilities, in light of fundamental rights.

There are only two cases in which the CJEU had to provide an interpretation of a provision dealing with a restriction on migrants’ freedom of movement. The first one is the case of *Alo and Osso*.\(^\text{84}\) This case concerned beneficiaries of international protection whose residence permits included a residence restriction. Article 33 of Directive 2011/95\(^\text{85}\) stipulates that the right of beneficiaries of international protection to freedom of movement must be exercised under the same conditions and restrictions as those provided for other third-country nationals who are legally resident. As this is an equal treatment provision of the ‘closed model’, which does not leave room for derogations or justifications,\(^\text{86}\) this provision entails that beneficiaries of international protection cannot be subjected to restrictions on their freedom to choose their place of residence if such restrictions are not imposed on other legally resident third-country residents. However, according to the CJEU, Member States can impose such restrictions on beneficiaries of international protection only (and not on other legally resident third-country nationals) if they are not in an objectively comparable situation with other legally resident third-country nationals as regards the objective pursued by those restrictions. The Court argued that this could be the

\[^{80}\text{Directive 2008/115/EC (n 55) Article 7(3).}\]
\[^{81}\text{Directive 2008/115/EC (n 55) Article 9(3).}\]
\[^{82}\text{Directive 2013/33/EU (n 23) Article 7(3).}\]
\[^{83}\text{Directive 2013/33/EU (n 23) Article 20(1).}\]
\[^{84}\text{Joined Cases C-443/14 and C-444/14 Kreis Warendorf v Ibrahim Alo and Amira Osso v and Region Hannover [2016] ECLI:EU:C:2016:127.}\]
\[^{85}\text{Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337.}\]
\[^{86}\text{Lieneke Slingenberg, *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality* (n 6) 89–90.}\]
case if residence restrictions were imposed on beneficiaries of international protection who received social security benefits for the purpose of facilitating their integration. Hence, in that situation, beneficiaries of international protection may be treated differently as compared to other third-country nationals who are legal residents.

The second CJEU judgment on mobility restrictions imposed on migrants concerns the confinement of migrants in the Hungarian Röszke transit zone, just as in the ECtHR cases of Ilias and Ahmed and R.R. and others (see above). The CJEU did not, however, follow the ECtHR in adopting a more restrictive approach to answering the question when the holding of migrants in a transit zone amounts to deprivation of liberty. In Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, the CJEU ruled that asylum seekers in the transit zone did not have an effective possibility of leaving the zone for Serbia, as their entry in Serbia would be considered illegal by Serbia and as they would risk losing all chance of obtaining refugee status in Hungary. According to the CJEU, since there was no effective way of leaving the transit zone, the obligation to remain permanently in such a zone amounted to a deprivation of liberty. Therefore, this approach has more in common with the early approach of the ECtHR, in cases like Amuur and Riad and Idiab.

In other cases, the CJEU ‘reminded’ the Member States about their options to limit the freedom of movement of migrants. For example in Sagor, the Court allowed a Member State to impose a home detention order on illegally staying third-country nationals, by way of penalisation, as long as such a home detention order did not impede the removal procedure. In Jawo, the Court noted that ‘pursuant to Article 7(2) to (4) of the Reception Directive, the Member States may […] limit the possibility of asylum seekers choosing their accommodation and require them to obtain prior administrative authorisation to leave that accommodation’. In Haqbin, after ruling that Member States may not withdraw reception benefits as a sanction (see Section 3.1), the Court mentioned examples of sanctions that Member States may impose, such as being held in a separate part of the accommodation centre or being transferred to another accommodation centre or other housing. These sanctions involve limitations in migrants’ freedom of movement or freedom to choose a residence. In Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, the CJEU held that a Member State cannot detain asylum seekers at the border for more than four weeks, but added that ‘after such a period of four weeks, paragraph 3 of this article nevertheless authorizes Member State to limit their freedom of movement to an area near its borders or its transit areas, in accordance with Article 7 of Directive 2013/33’.

In addition, the CJEU allowed Member States to use a significant degree of coercion in order to secure compliance with residence restrictions, as non-compliance can be used to justify detention measures. The EU Returns Directive allows for detention if there is a ‘risk of absconding’. In Jawo, the CJEU commented on the meaning of the term ‘absconding’ in the Dublin Regulation by saying that, ‘in order to ensure the effective functioning of the Dublin system and the achievement of its objectives,’ the authorities do not have to prove that the migrant concerned deliberately

87. Joined Cases C-924/19 PPU and C-925/19 PPU FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság [2020] ECLI:EU:C:2020:367, paras 229-231; See also Case C-808/18 European Commission v Hungary [2020] ECLI:EU:C:2020:1029.
88. Case C-430/11 Criminal proceedings against Md Sagor [2012] ECLI:EU:C:2012:777.
89. Case C-163/17 Abubacarr Jawo v Bundesrepublik Deutschland [2019] ECLI:EU:C:2019:218, para 63.
90. FMS and Others (n 87), para 247.
91. Directive 2008/115/EC (n 55) Article 15(1)(a).
evades the reach of those authorities, as this would cause the authorities considerable difficulties. Therefore, according to the Court, it may be assumed that an applicant has absconded if he has left the accommodation allocated to him without informing the competent national authorities of his absence. The Court explicitly acknowledged that this interpretation is not in line with the ordinary meaning of the term ‘absconds’.

Accordingly, the cases discussed in this section do not show a willingness of the CJEU to provide a restrictive interpretation of Member States’ options to limit migrants’ mobility. With the exception of the ruling on the Röszke transit zone, where the CJEU did not follow the ECtHR in adopting an even more restrictive approach, the CJEU underlined or even expanded Member States’ broad possibilities in this regard.

4. CONCLUSION

This article deals with the only two rights in European human rights law that are explicitly limited to persons ‘lawfully within the territory’: access to social benefits (‘social rights’) and freedom of movement and of choosing a residence (‘mobility rights’). It analysed the response by European treaty bodies and courts to two main arguments against the exclusion of migrants without legal residence from social and mobility rights:

1. Arguments against the limitation or definition of ‘lawful presence’; and
2. Arguments concerning how the exclusion violated other human rights without such a limited personal scope.

The systematic case law analysis presented in this article shows how the ECSR, the ECtHR, and the CJEU have all provided protection against migrants’ exclusion from social rights, by ignoring or making exceptions to the limited personal scope of social rights and by providing a broad interpretation of the prohibition of inhuman treatment and of Member States’ obligations under EU law in light of the principle of human dignity. The same does not apply, however, with regard to migrants’ exclusion from mobility rights. With some minor and limited exceptions, both the ECtHR and the CJEU did not make exceptions or provide new interpretations of the limited personal scope of the right to freedom of movement, nor did they provide broad interpretations of the right to liberty or limit Member States’ powers under EU law in the light of fundamental rights. As regards residence restrictions imposed on migrants in transit zones the ECtHR has recently provided an even more limited interpretation of the scope of the right to liberty compared to its earlier cases.

The contrast is apparent in the case law of the ECtHR. In the first case ever in which it concluded that Article 3 ECHR was violated because of poor living conditions, it used the specific vulnerability of asylum seekers as a justifying factor for broadening the material scope of Article 3 ECHR. Contrastingly, in case law about the confinement of migrants, the Court used asylum seekers’ special status as persons requesting admission to the territory ‘of their own initiative’ as a factor limiting the material scope of Article 5 ECHR. The contrast is also visible in the case law of the CJEU, where, on the one hand, it used effectiveness reasoning to find an obligation to provide for basic needs in the EU Return Directive, while, on the other hand, it allowed for an exception

92. Abubacarr Jawo v Bundesrepublik Deutschland (n 89), para 62.
93. ibid, para 56.
to be made on a strict equal treatment provision in order to enable residence restrictions for beneficiaries of international protection.

These examples also show that the contrast between cases on social rights and cases on mobility rights cannot be explained by the application of general doctrines by the ECtHR, nor by the relevant legislative EU framework. The ECtHR has used vulnerability as a relevant factor to increase protection against destitution, but did not rely on that concept in cases about containment in transit centres. Nor can the importance of the right explain the different approach, as the ECtHR labels both Article 3 and 5 ECHR of fundamental value in democratic societies. The CJEU identified obligations for the State to provide for basic needs where the relevant legislation did not explicitly contain such obligations and did identify possibilities for the State to impose residence restrictions where the relevant legislation did not explicitly provide room for that.

But if established legal doctrines and the applicable legislative framework do not provide for a convincing explanation for the contrast identified in this article, how can the diverging approach then be explained? Did the case law follow State practice in this regard (or was it the other way around)? Can the theoretical concept of freedom as non-domination, which has been identified as an explanatory concept in the Article 3 ECHR destitution case law, serve as an explanation? Or does another theoretical concept (for example, hierarchy of needs and rights or deservingness) provide the explanation? Further research is necessary to answer these questions.

Instead of offering a conclusive explanation, this article shows the importance of analysing developments in the interpretation of social rights and mobility rights together, before drawing conclusions about possible human rights overreach. If one were to focus only on the case law on migrants’ access to social rights, it could appear that there has been a significant increase in human rights protection for migrants without legal residence during the last decades. This could be celebrated from a migrant’s point of view or criticised as a form of human rights ‘overreach’. If one adopts, instead, a combined approach, as this article has done, a different picture emerges: European human rights law only provides protection against one policy choice (forced destitution), but not against a highly related one (containment). This finding is contrary to the widely held view that in current human rights practices, social rights have an inferior status as compared to civil and political rights. In addition, it nuances concerns about rights proliferation or overreach, as this finding shows that European human rights law and EU law still leave ample room for States to use migrants’ social rights as an instrument of migration control. Perhaps, concerns about

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94. In its ‘general principles’, the ECtHR usually repeats that Article 3 ECHR enshrines ‘one of the most fundamental values of democratic societies’ (see for example M.S.S. v Belgium and Greece (n 39) para 218 with further references) and that Article 5 ECHR is ‘of the highest importance “in a democratic society”’ (see for example Medvedyev and Others v France App no 3394/03 (ECtHR, 29 March 2010), para 76 with further references). The absolute character of Article 3 ECHR cannot explain the difference either, as Article 5 ECHR only has a few exhaustively-listed exceptions, which need to be interpreted narrowly (Medvedyev and Others v France, para 78 with further references) and, moreover, the issue at stake in the cases discussed in this article is qualification under Article 3 or 5 ECHR, not justification.

95. Lieneke Slingenberg, ‘The Right Not to be Dominated. Case Law of the European Court of Human Rights on Migrants’ Destitution’ (n 8) 291.

96. See for example Fernando Suárez Müller, ‘The Hierarchy of Human Rights and the Transcendental System of Right’ (2019) 20 Human Rights Review 47–66; Alberto Quintavalla and Klaus Heine, ‘Priorities and Human Rights’ (2019) 23 The International Journal of Human Rights 679–697.

97. See for example Lieneke Slingenberg, ‘Deservingness in Judicial Discourse. An Analysis of the Legal Reasoning Adopted in Dutch Case Law on Irregular Migrant Families’ Access to Shelter’ (2021) 20 Social Policy and Society 521–530.
human rights ‘underreach’ are more appropriate since current European human rights law does not protect irregular migrants against being forced to trade away their freedom in order to secure subsistence.98

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98. Compare Elizabeth Ashford, ‘A Moral Inconsistency Argument for a Basic Human Right to Subsistence’, in Rowan Cruft and others (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 515–534.