Faculty of Human and Social Sciences

Bachelor in International Relations

Bachelors' Thesis

The invisible fences of Ceuta and Melilla:

An analysis of the right of freedom of movement for asylum-seekers and its (un)legitimate restrictions

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1. Introduction: The Right to Freedom of Movement

When thinking about refugees and restriction to freedom of movement, most people, among which I would include myself before having delved into this topic, are likely to think of refugee camps or perhaps detention centers, the latter of which would better fit as an instance of deprivation of liberty. Furthermore, when reflecting on the many struggles millions of individuals face in their struggle to reach a safe country in which they can try to obtain asylum, one may picture actual visible fences. In the case of Spain, someone might think of the fence separating the border between Morocco and the Autonomous Cities of Ceuta and Melilla. This fence has been a topic of great debate, as it is where the infamous pushbacks, automatic "hot returns" of immigrants crossing the border, take place. In occasions police have had to resort to violence to conduct them, which has led some NGOs to claim that they constitute a violation of the prohibition of torture enshrined in Article 3 of the European Convention of Human Rights. The European Court of Justice, however, has ruled that they do nor constitute a breach of the Convention as the individuals "placed themselves in an unlawful situation"[1].

Besides these actual physical fences, there are, however, other "invisible" fences which constitute different forms of limiting people's movement. While not amounting to being deprived of one's liberty or being visible, these invisible fences can still suppose a violation of refugees and asylum seekers' right to freedom of movement. Throughout this dissertation, I will provide an analysis of the restrictions to the right to freedom of movement, in particular as they relate to asylum-seekers.

The judgement which partially motivated this analysis was one rendered by the Spanish Supreme Court on the 14th of April 2021, which represented an important step in recognizing the freedom of movement of asylum-seekers. The Spanish Supreme Court ruled that the prohibition to enter Spanish mainland for asylum-seekers who applied for asylum in the Autonomous Cities of Ceuta and Melilla, was unlawful. The Court determined that such restriction to asylum-seekers' movement violated the

[1] *N.D. AND N.T. v. SPAIN*, *Nos. 8675/15 and 8697/15* ECtHR, par. 148

principles of equality and discrimination enshrined in Article 14 of the Spanish Constitution of 1978, as it was only being imposed on individuals applying for asylum in those cities, and not in those applying in other parts of the country (Supreme Court Judgement 1552/2021).[2]

As nation-states were born, man became citizen and acquired a certain set of rights along the way, some of which were considered of such importance that they were declared "human rights", inherent to all. Among such rights is the right to freedom of movement, which is protected under Article 13 of the Universal Declaration of Human Rights, and Article 12 of the International Covenant on Civil and Political Rights (hereinafter, ICCPR). The Human Rights Committee, which is the treaty body in charge of monitoring states' compliance with the latter treaty, considered freedom of movement as indispensable for the free development of a person (UN Human Rights Committee, 1999, p. 1). The right to freedom of movement is also recognized in Article 2 of Protocol Number 4 of the European Convention on Human Rights (hereinafter, ECHR).

From the time borders began to be set, there have been conflicts between nations which have caused people to flee their countries, seeking asylum in others and becoming refugees. The 1951 Convention Relating to the Status of Refugees (hereinafter, Geneva Convention), in its article 1, defines a refugee as "someone outside his or her country of origin because of a 'well-founded fear of persecution' because of race, religion, nationality, membership of a social group, or political opinion".[3]

The Geneva Convention contains a list of rights, including, but not limited to, the right to non-discrimination (article 3), the right to work (article 17), freedom of religion (article 4), the right to housing (article 21), and the right to freedom of movement (article 26). The right to freedom of movement in Article 26 of the Geneva Convention is granted to refugees "lawfully within a territory". Because of the

[2] Sentencia del Tribunal Supremo 1552/2021, (Sala de lo Contencioso-Administrativo, Sección 5ª), de 14 de abril de 2021 (recurso 2478/2020)

[3] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137

uncertainty of what "lawfully" means, there has been some debate as to the entitlement that asylum-seekers have to this right. One aspect that is not clear is when is somebody considered to be "lawfully within a territory", and whether the presence of asylum-seekers in the host country can be considered "lawful". While this sentence, or versions of it can also be found in other provisions such as articles 12 ("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") and 13 ("An alien lawfully in the territory of a State Party …") of the ICCPR, and General Comment No. 15 on The Position of Aliens Under the Covenant ("once an alien is lawfully within a territory…") by the UN Human Rights Committee (from hereafter, HRC), its meaning has not been firmly stablished.

Some countries choose a restrictive understanding of *lawfully within a territory* as referring only to people who have been granted asylum, and therefore excluding asylum-seekers (Palacios-Arapiles & Madziva, 2017, p. 67). Meanwhile, in the case of the European Union, Article 9 of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 *on common procedures for granting and withdrawing international protection* (hereinafter, Asylum Procedures Directive) establishes the right of those applying for asylum to remain in the state while their application is being process, thus making them "legally" within said country.

Among other motives, restrictions to freedom of movement, in particular restrictions to location of residence, are considered as a tool to distribute the responsibility of providing asylum to refugees among different regions of a country. By restricting asylum-seekers to areas in which the cost of housing and maintenance is lower, governments may also seek to reduce the cost of receiving refugees to a minimum (Hilbig & Riaz, 2020, p. 6). However, restrictions to movement can also hinder the asylum-seekers' ability to access essential services, such as healthcare or legal services, as well as preventing them from being reunited with their families. Another debate that surrounds the matter of restrictions on freedom of movement is where the limit stands between them, and restrictions on liberty or detention. One criteria that has been used is whether the measure forces the individual to rely on

others, or still allows for self-reliance (Persaud, 2006, p. 20). Others consider the distinction to be one of degree or intensity, and not of kind.

Beyond determining when exactly is a person legally within a country, and thus entitled to the right to freedom of movement, there is also the matter of the legitimate restrictions which may be imposed on that right. For instance, Article 2 of Protocol Number 4 of the ECHR allows for those restrictions, as follows,

> 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.

As for what is meant by *necessary*, it is not clear, but the minimum requirement is for it to be in accordance with international human rights law (Kengerlinsky, 2007, p. 6). Regarding the restriction on the basis of national security and public health, they constitute complicated issues as they "are both included in many human rights instruments as 'exceptions' to the human rights therein sanctioned, yet they can arguably be considered as human rights themselves" (Feinberg, Niada-Avshalom, & Toebes, 2015, p. 383). In an article on the relationship between human rights and public health, author Bridgit Toebes warned about how measures related to public health could "potentially infringe on the civil and political rights of individuals, including their rights to privacy and freedom of movement" (Toebes, 2015, p. 488), and defended an integrated approach to human rights.

For its part, Article 12.3 of the ICCPR when referring to the possible restrictions which could be imposed on freedom of movement, says the following:

> 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.

Furthermore, General Comment Number 27 of the HRC establishes that, in addition to being provided by law, these restrictions must be clear, precise, and foreseeable. For its part, the 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)* (from hereinafter, Reception Conditions Directive) also foresees that asylum-seekers may be required to stay within a restricted area. However, it also stablishes on its Article 7 that any restrictions to freedom of movement must not restrict the "unalienable sphere of private life" and "shall allow sufficient scope for guaranteeing access to all benefits under this directive". This Directive also provides a definition for detention (also referred to as detainment) as the "confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement". This is important in relation to freedom of movement as it allows us to examine whether among some instances of restriction to freedom of movement perhaps there were some which ought to be referred to as detention.

While the focus of this dissertation is on the restrictions to movement to asylum-seekers in the Spanish Autonomous Cities of Ceuta and Melilla, I will first provide an overview of the restrictions to freedom of movement for asylum-seekers in Germany and the European Union Hotspot Approach implemented in Greece and Italy. The motive for this is that I believe that the case of Ceuta and Melilla is not to be seen in isolation, but rather as part of a pattern of continuous restrictions to asylum-seekers' right to freedom of movement in the European Union Member States. I will then continue with an examination of the state of the art and theoretical framework as exposed by a variety of authors and international organizations. This will be followed by an explanation of the objective of the thesis, as well as the methodology used to carry it out. This will lead into an analysis and discussion of the chosen topic, divided into four sections as they relate to: the legal framework of the right to freedom of movement; its jurisprudence; a more detailed exploration of the case of Ceuta and Melilla; and the consequences that occur when freedom of movement is restricted. I will then end the thesis with a conclusion, which will include a final assessment and personal reflection on the subject.

2. Aim and Motives

A number of European Union Member States have adopted measures restricting the movement of those applying for asylum, confining them to a certain area, as in the case of Ceuta and Melilla in Spain. Although that particular case, which we will later explore in more detail, was later declared to be illegal by the Spanish courts, it is not the only one. Bulgaria, Austria and Germany, among others, have also imposed restrictions on freedom of movement, not allowing asylum-seekers to freely move outside a particular administrative zone or district (European Council on Refugees and Exiles, 2022).

Besides "geographical" restrictions to movements, there is also the case of the Hotspot Approach, which was originally conceived as a way for the European Union to work with Italy and Greece to register asylum-seekers upon their arrival before either granting them asylum, returning them to their country of origin, or relocating them (Majcher, 2018). However, asylum-seekers found their stay in these Hotspots lasting longer and longer; and because of the fact that this was not their original purpose, there was no formal decision made to keep asylum-seekers there, which meant no possibility of an appeal (Majcher, 2018). According to a paper written by the European Council on Refugees and Exiles, an alliance of over a hundred European non-governmental organizations whose mission is to protect and advance the rights of refugees:

> Persons placed in Hotspots are classified as asylum applicants or economic migrants depending on a summary assessment, mainly carried out by either using questionnaires filled in by migrants at disembarkation, or orally asking questions relating to the reason why they have come to Italy. Persons are often classified solely on the basis of their nationality. (European Council on Refugees and Exiles, 2021, p. 33)

Against this background, the purpose of this dissertation is to analyze the restrictions to asylum-seeker's freedom of movement, further examining whether these are legitimate, as well as explore their consequences. As with many legal matters, I argue that many of the problems related to the violation of the right to freedom of movement are caused not by a lack of legal protections, but by the

ambiguity of the words in the already existing ones. Even the term "asylum-seeker" itself is not clearly determined, as it is:

> a somewhat ambiguous one in the sense that it includes some people who will ultimately be recognized as refugees, some whose claim will be rejected, and others who will be given some kind of residence permit, even if they are not formally granted refugee status (Judge, 2004, p. 160).

While unlike the case of refugees, we cannot find a definition for asylum-seeker in the Geneva Convention, one is found in European Union law. According to 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)*, an asylum-seeker is "a third country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken".

Referring once again to the Geneva Convention, as it regards to freedom of movement, it is important to pay attention in particular to Article 31(2), which states as follows:

> 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.

As in Article 12 of Protocol Number 4 of the ECHR, the Convention indicates that the restrictions ought to be necessary, though there is no clear definition as to what this word entails, beyond assuring there is no less onerous way of ensuring whichever aim is being persecuted and that the measure is reasonable (Ziebritzki, 2018). When it comes to asylum policies in general, Article 9 of the Treaty on the Functioning of the European Union (TFEU) does establish that the European Union, and in consequence its member states, must "take into account requirements linked to the promotion of a

high level of employment, the guarantee of adequate social protection, the fight against social exclusion […] and protection of human health".

With the aim of analyzing the lawfulness of restrictions on freedom of movement, it is also important to ascertain what purpose they serve for the states. In regard to Article 31(2) of the Geneva Convention, for example, it allows states receiving possible refugees to restrict their movement for enough time as to carry out a brief investigation into their cases, before permitting them to move freely within their territories (Hathaway, 2005, p. 420). The issue arises when this time extends beyond what can be considered reasonable and not only violates the freedom of movement, but begins interfering with other rights, such as the right to family life.

Consequently, it remains important to focus on the restrictions on the right of freedom of movement of asylum-seekers because of the dire consequences they can have on their lives, and because of the lack of clarity surrounding them. While the Judgement delivered by the Spanish Supreme Court on 14th April 2021 was a great step forward, it was a long time coming. Nevertheless, the arguments it provided can be considered quite innovative, and hopefully set a precedent within the scope of the European Union in regard to the freedom of movement of asylum-seekers. Given also how interesting it has been for me to inquire further into the subject, I consider it important to examine their legality and ensure they comply with all requirements of necessity and reasonability (European Council on Refugees and Exiles, 2021). This is particularly the case in regard to the situation taking place in Ceuta and Melilla, as it is a state of affairs in which human rights could be being violated in my own country.

However, in order to try to provide a full and thorough understanding of the matter at hand, I will additionally carry out an analysis of other possible violations of freedom of movement in European countries. In particular, these will include on the one hand the case of Germany, and on the other hand the Hotspot Approach carried out in Greece and Italy. As I previously indicated, the reason why I provide an analysis of other cases is due to the fact that, in my opinion, the case of Ceuta and Melilla needs to be looked at as part of a continuum of similar measures being applied throughout the European Union, rather than as an incidental occurrence.

3. Restrictions to the right to freedom of movement in the European Union

a. Geographical restrictions in Germany

Over the course of two years, beginning in 2015 till 2017, over a million people arrived in Germany asking for international protection, following the decision by the then German Chancellor, Angela Merkel, to discount the requirements established in the Schengen System for Syrian refugees because of what she deemed to be a "humanitarian emergency" (Hinger, 2016, p. 82). Once inside, however, asylum-seekers were faced with restrictions being imposed on their right to freedom of movement.

Asylum in Germany is regulated mainly by two laws, the Asylum Procedure Act, and the Residence Act, with the competent authority in the matter being the Federal Office for Migration and Refugees (known as BAMF due to its German acronym), which in turn responds to the Interior Ministry. The BAMF is in charge of initiating the asylum procedure and making the majority of the decisions on applications, as well as overseeing the system of dispersal of refugees throughout the Länder (Federal States) (Spanish Commission for Refugees (CEAR), 2019, p. 8). This procedure is done based on the elements of population and gross domestic product (GDP) as well as following a quota system. However, the task of further distributing and housing the refugees or asylum-seekers in the interior of the Länder is generally delegated to the municipalities, which end up overseeing the process once the asylum-seekers have gone through the initial registration (Hinger, 2016, p. 80).

Asylum-seekers in Germany have to deal with both legal and practical geographical restrictions of movement. Section 55(1) of the Asylum Act establishes that "foreigners seeking asylum shall be permitted to remain in the federal territory while the asylum procedure is pending", however according to Section 56(1) of the same law, that permission "shall be limited to the district of the foreigner's authority where the reception center responsible for receiving the foreigner is located". Restrictions can vary greatly depending on the Federal State, though, from being limited to a single district to encompassing a whole state.

Although the law stablishes that the restriction must last a maximum of three months, there are exceptions in case of individuals who must remain in the initial reception centers, if convicted of a criminal offence, or before deportation. It is worth mentioning that, on such occasions when it is a matter of an individual having been convicted, the restriction would be legitimate under international law, as both the ICCPR and the ECHR allow for restrictions to freedom of movement in the interest of public order. Furthermore, the determination of the district to which an asylum-seeker is allocated cannot be legally challenged, and applications by individuals to be applied to a particular district are only accepted in rarely exceptional cases (European Council on Refugees and Exiles, 2020).

All individuals seeking asylum, when they first arrive to Germany, must reside in the Initial Reception Centers. While residence in these used to last up to three months, the law was changed in 2015 to extend this period to six months, and then again in 2019 at which time it was changed to a total of eighteenth months. The rules regulating these centers can differ, but generally individuals are allowed to leave them for a maximum period of 48 consecutive hours, and if this time is exceeded, they can be at risk of losing economic benefits. Additionally, these restrictions create problems regarding the access to certain services, as asylum-seekers can only obtain free tickets to use public transport in order to attend official appointments regarding their asylum process, which means if they wished to meet family members, they would have to cover the cost themselves (Mouzourakis, Pollet, & Ott, 2019, p. 16). This can become an issue given the geographical location of some of the centers, many kilometers away from the cities.

Even after their time at the Initial Reception Centers have ended, asylum-seekers do not have a choice as to the district where they are relocated, which as indicated is chosen on the basis of population, GDP, and available accommodation. However, in this case some exceptions can be made for humanitarian reasons or in situations regarding families. While their refugee status is being determined, it is still compulsory for applicants to remain in their assigned accommodation, although they are allowed to leave if they are required to appear in court. Additionally, they can ask for special permission to leave “for counselling visits and other compelling reasons”,

though the terms regulating when authorities can give said permission are not clear (Bank, 2000, p. 268).

b. The European Union Hotspot Approach: Greece and Italy

Established by the European Commission on its *European Migration Agenda* on May of 2015, the idea of the "Hotspot" Approach consisted of three agencies (Frontex, Europol, and the European Asylum Support Office) working cooperatively in frontline member states, mainly Greece and Italy, to register and identify incoming arriving immigrants, before they are either granted asylum, relocated, or returned to their country of origin. However, there has been great criticism and debate in regard to these Hotspots, which have been said to "blur the line between detention and restriction of freedom of movement" (European Council on Refugees and Exiles, 2021). The issues are partly caused by the fact that Hotspots are, as their name indicates, an approach and not a newly developed legislation, but instead simply a "reshaping of legal existing instruments" (Casolari, 2015, p. 7) which can make them harder to understand.

While the original concept of Hotspots referred to detention centers, in the case of Greece, they were later substituted by a geographical restriction. After having been released from the initial detention at the Reception and Identification Centers (RICs), asylum-seekers are compelled to remain in whichever island they were registered in. It is worth noting that the RICs are categorized as supposing a restriction on liberty; however, individuals are prohibited from leaving the facilities, which means they better fit under the category of de facto detention (Majcher, 2018). Furthermore, this detention is enforced automatically, meaning without any case-by-case examination and without any option of a legal remedy to appeal it.

Additionally, a fast-track border procedure was stablished, which determines whether Turkey can be considered a "safe country", in which case individuals can be returned. This was established on the basis of Article 7 of the Reception Conditions Directive, according to which "Member States may decide on the residence of the

applicant for reasons of public interest, public order or, when necessary for the swift processing and effective monitoring of his or her application for international protection". However, in March 2016, the European Union - Turkey Statement was stablished in order to deal with the increasing migration on the Eastern Mediterranean zone, "with a three-fold aim to: End irregular migration flows from Turkey to the EU; Enhance reception conditions for refugees in Turkey; and offer safe and legal pathways for Syrian refugees from Turkey to the EU" (European Asylum Support Office, 2020, p. 34). Following the Statement, the Greek Hotspots served not only a registration purpose but also as a manner to ensure quickly return to Turkey when appropriate, as well as a way to impede the possibility of refugees moving to secondary locations (Ziebritzki, 2018, p. 1).

The legality of the geographical restriction to the island or registration has been questioned, although the arguments against them vary from considering them as being somewhere between restriction on freedom of movement and *de facto* detention; to considering the migrants as being unlawfully on the territory for the duration of the border procedures (Tsourdi, 2016, p. 13). Among others, they have been cast doubt on by the Greek Council of State, which considered the geographical restriction to be against Article 31(2) of the Geneva Refugee Convention. While said article allows for necessary restrictions on freedom of movement, it was the opinion of the Council than it order to be in compliance with the Convention the border procedures (and the accompanying restrictions to the islands) ought not to last longer than a month (Carrera & Geddes, 2021, p. 50). Other arguments consider the asylum-seekers to be lawfully on Greek territory once having exited the initial detention at the RICs and analyze the legality of the geographical restriction on the basis of Article 12 of the ICCPR. This provision stablishes that "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" (Omwenyeke v. Germany, 2007, p. 5).

As mentioned in the introduction, General Comment Number 27 of the Human Rights Committee proclaims that restrictions to freedom of movement must be provided by law, clear, precise, and foreseeable. In relation to the requirement of being provided by law, Section 3 of Article 41(1)(d) of the Greek Law of Asylum Service

does indicate, when talking about the card given to asylum applicants to identify them, that it “may restrict the applicant’s movement to a part of the Greek territory after a decision by the Director of the Asylum Service”. However, an argument could be made that the manner in which it is phrased “lacks the necessary precision and clarity to prevent disproportionate use of this measure” (Majcher, 2018). This is reinforced by the increasingly prolonging length of time applicants spend on the islands, the collective nature of the restriction, and the living conditions to which asylum-seekers are subjected.

In the same manner, the situation of the Italian Hotspots dealt with similar issues regarding a lack of regulation by law. Despite the fact that the Hotspot Approach was stablished in 2015, it was not until February of 2017 that a legal definition for the Hotspots was provided through an amendment to the Consolidated Immigration Act. Furthermore, only in 2018 was the law reformed to include regulation of the Hotspot facilities with the Minniti-Orlando Decree-Law, although it still did not provide a complete framework for how these facilities ought to be operated. Before this moment, the only existing regulation could be found in an agreement between the Italian government and the European Commission regarding Standard Operating Procedures (SOPs), the nature of which was not even binding (European Council on Refugees and Exiles, 2021, p. 32). One of the main concerns with these SOPs is that, until after an individual has gone through the process of identification, no formal decision is made commanding them to remain in the center. Therefore, as in the case of the Greek islands, there is no possibility of a legal appeal.

Theoretically, asylum-seekers should be transferred to reception centers once they have registered their asylum claims, but in practice this relocation goes through constant delays, forcing the asylum-seekers to remain in the Hotspots for lengthy periods of time. During said time, they are allowed to leave the facilities during the day and return at night, which is why they can be considered a case of restriction of freedom of movement rather than detention (European Council on Refugees and Exiles, 2021). The conditions under which people have to live in these Hotspots, have been heavily criticized, among others, by the Italian Coalition for Civil Liberties and Rights as well as the Association for Juridical Studies on Immigration, as follows

> Asylum-seekers faced lengthy detention in the facility, known as a "hotspot," intended only for use to house asylum-seekers and other migrants for short periods while they are formally identified. It also found degrading conditions and lack of protection for women and children. (Sunderland, 2018).

Continuing with the failure to comply with the recommendations in General Comment No. 27, restrictions vary from one facility to another, with some granting residents passes which allowed them to leave during the day, and others only letting them do so in certain occasions. There is no clear legal regulation of this aspect in regard to the Italian Hotspots. Furthermore, asylum-seekers while staying at these facilities require permission to leave them for longer than a day for reasons such as visiting family members. While such permission is generally granted, if the period of time is exceeded the applicant risks not being allowed back into the facilities, and thus losing the material benefits that are given in it. The failure to provide a clear legal regulation of these restrictions was examined in *Khlaifia and others v. Italy*, in which the European Court of Human Rights considered that "the domestic provisions in force did not expressly provide for a confinement measure"[4]. This is problematic because, as it was explained in the introduction, under international law restrictions to freedom of movement have to be provided by law, as well as be clear, precise, and foreseeable.

4. State of the art and theoretical framework

A growing number of experts have expressed their concern regarding the new policies and approaches being implemented in the field of asylum law, and in particular those aimed at restricting asylum-seekers' freedom of movement, with some even wondering if it could be a case of "rule of law backsliding". This term has been defined in a broader sense as "systemic breaches relating to judicial independence, harassment of civil society organizations and educational institutions, and violations of the freedom of expression" (Tsourdi, 2021, p. 472).

[4] *Khlaifia and Others v. Italy*, no. 16483/12 ECtHR, par. 82

In an article concerning Asylum Law in the European Union, Evangelia Tsourdi identified the following issues: a continuing gap between the legal obligations of Member States and their practical application; and structural, and extensive violations of fundamental rights, in some cases even getting as far as constituting humanitarian emergencies (Tsourdi, 2021, p. 3). One instance which could be included in the former is the increase in cases of administrative detention. While it is legal under international law, administrative detention ought to be used as a measure of last resort, or in exceptional circumstances, not as a standard practice. This is due to the fact that it implies a deprivation of liberty being imposed not following a legal process, but rather by the administration, which in turn means that there are no judicial guarantees.

One argument that has been made as for why there has been an increasing use of detention in Asylum Law is that "while international refugee law regards the asylum-seeker as a presumptive refugee, European Union law seems to take a different view" (Mouzourakis & Costello, 2016, p. 1). This view refers to the fact that it has become a sorts of "rite of passage" for the prospective refugee to go through the stages of being an irregular immigrant first, an asylum-seeker second, and possibly a refugee thirdly. Therefore, as irregular migrants they are more at risk of being placed in detention, which is accepted as a way to make it more likely for them to comply with registration and identification procedures.

Furthermore, this proclivity towards detention relates to another trend in immigration law which has been developing for a longer time, and that is *Crimmigration*. This term was coined by Juliet Stumpf, law professor at Lewis & Clark Law School, to refer to the merger of criminal law and immigration and asylum law, or the subjection of migrants to crime control mechanisms. This includes both the use of deportation as a punishment for criminal offences, and the use of criminal law punishments (i.e.: detention) to sanction violations of (administrative) immigration regulations, for example irregular entry or stay. It has been said that "asylum detention under European Union law pursues penal law objectives, such as deterrence and retribution" (Majcher, 2020, p. 1); for example, by punishing absconding, or movement to a secondary country, by increasing the restrictions on freedom of movement.

One of the motives why this occurs is because of the fact that secondary movements are considered to be an element which undermines the functioning of the Dublin System, as well as the long-term viability of the Schengen regime. The Dublin System or Regulation (also known as Dublin III) refers to a part of European Union law which helps determine on which member state falls the responsibility to examine an individual's asylum application, with the responsibility generally falling on the country to which the asylum-seeker first arrived to within the Union. There are some, however, who disagree with this perspective, as they consider that viewing secondary or onward movement as something individuals choose to do "disregards the constraints and obstacles that asylum-seekers face when trying to access adequate and durable protection in the EU" (Carrera, Stefan, Cortinovis, & Luk, 2019, p. 2).

Additionally, in 2019, the European Union enacted new regulations on interoperability amongst European Union Borders and Security Information Systems which led to the implementation of a new framework to gather and share data. This new system runs the risk of "blurring of boundaries between different policy areas, in particular between the fields of migration, asylum, internal security, police cooperation and criminal justice" (Carrera, Stefan, Cortinovis, & Luk, 2019, p. 16). This *Crimmigration* phenomenon is greatly harmful for asylum-seekers, as it turns their search for refuge into a possible crime, by integrating criminal law objectives into asylum law, and making it harder for them to obtaining residency or asylum.

The rights that ought to be granted to immigrants has been a topic of scholarly debate for many years. Lea Ypi, for example, wrote about the concept of "justice in migration", and if such a thing was possible, on which principles it ought to be based upon. She separated this concept into justice in emigration and immigration. The latter of these two "indicates when restrictions on incoming freedom of movement are unjustified and provides a principled way of assessing the distribution of benefits and responsibilities between migrants and citizens of host societies" (Ypi, 2008, p. 391). Complementarily, she approaches this topic form the perspective of finding a balance between ensuring that the demands of both the immigrants and the citizens of the host society are met.

When it comes to the rights of asylum-seekers in particular, there seems to be even more uncertainty. Perhaps, this is because, unlike refugees, which have been a granted a definitive and more clear status, individuals applying for asylum are in a kind of limbo. Customarily, "states have [had] strong reservations about granting important rights to asylum-seekers because no final decision has been taken yet on the substantive issue of their application" (El-Enany, 2013, p. 175). Nevertheless, as Thomas Hammarberg, the former Commissioner for Human Rights of the Council of Europe, wrote, traditionally there has been certain principles which were considered fundamental when applying international refugee law for many decades (Hammarberg, 2015, p. 364). Among these principles were included the idea that restriction on freedom of movement ought to be the exception and not the norm, and that refugees who came into a country without authorization should not be penalized. In spite of this, it is considered that in numerous nations, freedom of movement has successfully been substituted by "an enforced lack of freedom to move or flee" (Commission on Human Rights, 1997, p. 16). This is due in part to the growing variety in asylum-seekers, which makes it harder to fit them into the traditional existing international categories.

On the topic of refugee and asylum law, as previously mentioned, one of the most important international legal instruments is the Geneva Convention. It is worth noting, however, that several of the countries receiving the most amount of asylum-seekers are not full signatories of said convention. Such is the case, for example, of Jordan, Lebanon, Thailand and Nepal (Betts & Collier, 2017, p. 49). Furthermore, another country which receives a great number of applications for asylum, Turkey, falls into a special category as it is a signatory but with a geographical limitation, as it has not ratified its 1967 Protocol, and thus, it only applies the 1951 Convention when it comes to individuals coming from Europe.

Given the fact that the emphasis of this thesis is the situation of Ceuta and Melilla, I wanted to focus on the opinions expressed by various international human rights mechanisms on the treatment of refugees and asylum-seekers in these two Autonomous Cities. The two Autonomous Cities have been a matter of concern for quite a while now, as seen in the 2010 Universal Periodic Review. The document is the

result of a process which involves an examination of the human rights records of each member of the United Nations by the Human Rights Council. In the summary, the Council pointed out the "worrying situation in the temporary detention centers for foreigners in Ceuta due to overcrowding and the practice of deporting immigrants to a third country" as well as the fact that, while the law theoretically provided for equality of foreigners and Spanish citizens, the reality proved to be otherwise (Human Rights Council, 2010, p. 8).

Furthermore, in the Compilation prepared by the Office of the United Nations High Commissioner for Human Rights, it expressed its concern that "applications can be rejected under accelerated procedures, even at the border itself", in addition to the fact that "judicial supervision of asylum applications has been reduced to a mere formality" (Human Rights Council, 2010, p. 10). Similar concerns have been expressed by the Committee Against Torture in its Concluding Observations on the sixth periodic report of Spain of 2015, in which it spoke of the "appalling conditions" of the temporary migrant centers, which it considered "a threat to the safety and physical and psychological integrity" of the immigrants living there (Committee Against Torture, 2015, p. 5).

Another issue which raised concerned, in this occasion expressed by the Special Rapporteur on the Human Rights of Migrants, was the "pushbacks". In their communication in 2015 they brought attention to what was then a draft for the Law for the Protection of Citizen Security, eventually approved that same year. The provisions included in said legislation "would not meet the minimum guarantees that ensure an individualized examination of each case of asylum and protection requests" (Special Rapporteur on the Humans Rights of Migrants, 2015, p. 4). This matter was brought up again in their Communications written last year, as they considered the pushbacks led to a lack of individual assessment of the possible protection needs of the refugees in contradiction of international human rights law.

Additionally, the Spanish Commission for Refugee Aid (CEAR, because of its Spanish acronym) compiled in 2017 a report on the "invisible walls" in the southern Spanish border, including the restriction to freedom of movement in Ceuta and Melilla. One of

the issues CEAR addressed was the lack of transparency and the discrimination of the criteria being used to determine which immigrants were transported to the peninsular territory. According to CEAR, only sub-Saharan Africans who have not applied for asylum were being transported (Spanish Commission for Refugee Aid, 2017, p. 22). A consequence of this was that many people who could perhaps be eligible for asylum did not apply, as they believe it would make them less likely to be relocated to the peninsula. The report also addressed the issue of the pushbacks, a practice which the CEAR considered to be "illegal because it is contrary to the Spanish Constitution, to the legislation on aliens and asylum and the European and international regulations which Spain is obliged to comply" (Spanish Commission for Refugee Aid, 2017, p. 26).

This practice, however, was made into law by a legislative reform in 2015, which introduced into the Law 4/2000 on the rights and freedoms of foreigners in Spain, which added a tenth additional provision stating the following,

> Aliens who are detected at the border line of the territorial demarcation of Ceuta or Melilla while attempting to overcome the border containment elements in order to cross the border irregularly may be turned back in order to prevent their illegal entry into Spain.

Finally, I consider it worth mentioning that, despite the importance and gravity of the issue of restrictions on the freedom of movement being imposed on asylum-seekers, and particularly the seriousness of the situation taking place in Ceuta and Melilla, the number of articles exploring the latter is shockingly minor. Particularly, given the importance of the judgement issued last year by the Spanish Supreme Court recognizing once more the right to freedom of movement for asylum-seekers; and yet, there are not many academic articles analyzing the case. This is another additional aspect because of which I consider the analysis carried out throughout this thesis to be important, as this is an issue more than worthy of attention.

5. Objectives and Questions

The detention of asylum-seekers, and the manner in which it is carried out, has been a heavily debated topic for many years. But while depriving individuals who are seeking protection of their right to liberty is an issue which undoubtedly ought to be discussed, there is another measure that, while being less restrictive, is also deserving attention, and that is the restriction of the right to freedom of movement. As it has been explained previously in this thesis, there are many forms in which movement can be restricted, for instance, by depriving asylum-seekers from moving from an island to the host country's mainland or as a consequence of practical aspects such as being hosted in a reception center within a long distance from the city, lack of access to public transportation, or absence of economic means due to an status that normally prevents asylum-seekers from accessing the labor market.

Various restrictions on freedom of movement have been used in order to try to prevent secondary movement of asylum-seekers, such as asking states to "assign a specific place of residence to applicants, to impose reporting obligations and to make the provision of material reception conditions subject to the actual residence by the applicant in a specific place" (Carrera, Stefan, Cortinovis, & Luk, 2019, p. 9). While the visual of refugees being detained in camps might be more impactful, one must not undermine the gravity and importance of restrictions on freedom of movement, as limiting where and when individuals can go for indeterminate periods of time can in turn impair their ability to exercise other human rights. As said by the Human Rights Committee in General Comment 27, "liberty of movement is an indispensable condition for the free development of a person". Furthermore, the manner in which these restrictions are imposed is not always clearly in accordance with international law.

The importance of the right to freedom of movement, as well as the doubts surrounding the legitimacy of its restrictions, are the reasons why I sought through this thesis to analyse instances in which asylum-seekers' freedom of movement was being restricted. In particular, I wanted to focus on the case of the Spanish autonomous cities of Ceuta and Melilla, as it constitutes an example of an occasion in which the

restrictions where eventually found not to be in accordance with law and consequently repealed. Moreover, I sought to address whether the limitations were imposed in light of the fact that they were really the most ideal choice, taking into account the necessities of both the state administrations and the individuals and respecting the principle of proportionality. Or, on the contrary, if maybe there was a less onerous approach to accomplishing the objective being sought.

To be precise, I wanted to try to find an answer to the two following questions: can restrictions to asylum-seekers' freedom of movement be considered legitimate in light of international law? Can more abstracts ways of limiting asylum seekers' freedom of movement, such as the invisible fences created by be place in an island, be considered as restrictions to freedom of movement?

6. Methodology

The objective of this section is to briefly summarize the methodological approach used for the present thesis. In order to draw out a conclusion on the chosen subject, a desk-based research was conducted, revising the prevailing literature and international and national legal instruments and jurisprudence on the subject matter. To do so, I compiled a wide range of bibliographical resources through the use of a number of databases such as Dialnet, Google Scholar, and E-Journals, in addition to documents published on the website of official organisms. This literature consisted mainly of academic and journalistic articles, jurisprudence, and legal documents, including General Comments written by the United Nations Human Rights Committee, European Union Directives, and international treaties, related to the right to freedom of movement of asylum-seekers, the concept of "lawful presence", and other examples of restriction of freedom of movement in Europe.

The research was done through the reading, contrasting, and critical review of said literature, with the aim of attaining an accurate opinion on the subject. A number of legal documents were examined in order to present an appropriate legal framework of the right to freedom of movement of asylum-seekers, both at the national and

international level. Additionally, information was researched on the situation of the freedom of movement in several countries, mainly in the European region, with the objective of comparing different forms of restrictions.

This information was used to present an appropriate analysis of the subject, as well as to obtain enough information as to be able to produce an accurate discussion of its legality and consequences. Finally, to have the ability to reach a number of conclusions with basis on both academic and legal arguments from a wide variety of authors and institutions with great expertise on the matter.

7. Analysis and Discussion

a. Legal framework of the right to freedom of movement as it applies to Spain

The Spanish Constitution of 1978 stablishes, in Article 96(1), that "validly concluded international treaties, once officially published in Spain, shall form part of the domestic law". Therefore, it is of great importance, when examining whether the Spanish government is acting in accordance with the law, to study its obligations as they regard to international law. As we are analyzing asylum-seekers' right to freedom of movement, it seems natural to begin with the Geneva Convention, which Spain ratified in 1978. Specifically, there are two articles which must be taken into consideration: on the one hand, Article 26 grants freedom of movement to those refugees lawfully in the territory of their host state, on the other, Article 31(2) refers to restrictions of movements of those who are in the state without authorization:

> 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.

As it was discussed in the introduction, the matter of when an asylum-seeker is lawfully or unlawfully in a territory has been a matter of scholarly debate due to the ambiguity of the terms "lawfully staying". According to the Vienna Convention on the

Law of the Treaties, when the wording of a treaty "leaves the meaning ambiguous or obscure", recourse may be had to the preparatory works of the treaty in order to confirm its meaning (article 32). During the drafting process of the Geneva Convention, the representatives of some countries considered that "only those who had not applied, or whose applications had been refused, were in an irregular position" (Hathaway, 2005, p. 175), therefore regularization as used in Article 3(2) was not dependent on having obtained recognition as a refugee. Asylum-seekers therefore have a right to freedom of movement from the moment their application process begins. In more precise words, "once the refugee voluntarily and without delay reports to authorities and demonstrates that his or her unauthorized entry or presence was on account of a search for protection, Art. 31(2) governs" (Hathaway, 2005, p. 418). This would mean that, once an individual has notified the required authorities, thus taking the first step towards applying for asylum, he could only be subjected to necessary restrictions to his freedom of movement.

These restrictions could only be provisional until an initial investigation into the individual's circumstances has been completed, after which the asylum-seeker would have freedom of movement under Article 26 of the Geneva Convention, and any restrictions would have to meet the standard required for said article. It bears repeating that Article 26 states that "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". Additionally, if an individual was not granted asylum and had to be returned to his country of origin, if the host state was "unable or unwilling to remove an individual", then his or her presence "may be regarded as lawful for the purposes of the Refugee Convention" (Palacios-Arapiles & Madziva, 2017, p. 68).

Spain also ratified in 1979 the ECHR, which is overseen by the European Court of Human Rights. It is worth noting that the ECHR does not subscribe to the principle of nationality, which means that, as established in Article 1, "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms" recognized by the convention, regardless of whether they are a national of a member state of the Council of Europe or a third country. However, freedom of movement is

not safeguarded by this convention but rather by one of its protocols, in particular Protocol 4 which was ratified in 2009. It is Article 2 of Protocol 4 which stablishes the freedom of movement and residence to everyone lawfully within the territory of a state, while also stablishing that this freedom may be restricted "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". Any restrictions must comply with three requisites: be necessary in a democratic society, in accordance with the law and pursuant of a legitimate aim.

Nevertheless, this is quite a broad group of motives for restrictions, so the exact definition of each of them ought to be clearly stablished. It regards to national security or public safety, for example, it is considered that "a threat has to be clear at the particular moment when means of restriction are being taken by the national institutions of authorities" (Junevičius & Daugėlienė, 2016, p. 58). When applying this to asylum-seekers, one could understand it to mean that if a long time has passed since an individual engaged in criminal activity and its application for asylum, said activity must not be taken into consideration if it no longer entails serious danger.

Furthermore, the European Court of Human Rights has also made precisions of the understanding of the requisites. Firstly, in order to be in accordance with the ECHR, the restriction must not only have basis in a domestic law, "but also refers to the quality of the law in question, requiring that it should be *accessible* to the person concerned and foreseeable as to its effects", as established in the case of *Landvreugd v. The Netherlands*, among others.

When analyzing the matter of accessibility, it is important to take into consideration not only whether the law in question is made available to the public, but also the manner in which it is done. This to mean that any legislation affecting asylum-seekers, particularly that which imposes on them restrictions on their freedom of movement, should be accessible in a manner which takes into account any possible language or cultural barriers; otherwise, it could be argued that Spain would be violating their freedom of movement under the terms established in the ECHR.

Secondly, as it relates to being necessary in a democratic society, the Court has referred to the principle of proportionality, as means to ensure that restrictions are not useless, unnecessary, or disproportionate to the aim pursued. Finally, when referring to restrictions on freedom of movement, another measure which has been used is the so-called rule of "restriction of restrictions: the law restricting fundamental rights (restriction), has to be restricted itself" (Junevičius & Daugėlienė, 2016, p. 65).

Continuing with the topic of international treaties, Spain also ratified in 1976 the ICCPR, which entered into force in 1977 and which compliance with its overseen by the Human Rights Committee. As it was indicated in the Introduction, the Convention guarantees freedom of movement in its Article 12, which, bears remembering, states that "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". There are a number of ways in which compliance with this Convention is ensured. To begin with, Spain has to submit periodic reports proving his compliance to the HRC when it requires them; the Committee usually lists a number of concrete areas of concern for each State to address in its reports. In addition, given the fact that Spain also ratified the First Optional Protocol in 1985, Spanish citizens can submit individual complaints to the HRC of instances of violations of their rights under the ICCPR, if they have already exhausted the possible domestic remedies (International Justice Resource Center, n.d.). Finally, according to Article 41, other states can make a complaint if they consider Spain to have violated the ICCPR.

In addition, as a Member State of the European Union, Spain has to make sure its asylum policies are in accordance with the Common European Asylum System (CEAS), a legal and policy framework which aim is to harmonize international protection standards across EU countries. Among other aspects, CEAS lays its emphasis on "a shared responsibility to process applicants for international protection in a dignified manner, ensuring fair treatment and similar procedures in examining cases, irrelevant of the country where the application is lodged" (European Asylum Support Office, 2020, p. 67). The system is composed by a set of five legislative instruments, which include the previously mentioned Asylum Procedures Directive and Reception Conditions Directive, and it is overseen by the European Union Agency for Asylum.

Focusing now on the rights of asylum-seekers as provided by Spanish national law, we can find the basis for them in the Constitution of 1978. More specifically, on Title I, named "*Of fundamental rights and duties"*, and more concretely in Article 13(4), which stablishes that "the law will lay down the conditions in which citizens of other countries will enjoy the right of asylum in Spain". The law which develops this right is Law 12/2009, regulating the right to asylum and subsidiary protection (*Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria*), also known as Asylum Law. There is no specific article in this law granting freedom of movement to asylum-seekers, but it could perhaps be inferred from Article 18(2), which stablishes the obligations of asylum applicants. Among them, it is the obligation of informing the authorities of the chosen place of residency and any changes that are made to it. Furthermore, Article 36(1) does mention freedom of movement, but only as a right awarded to individuals after their application for asylum has been granted.

Like many countries, the asylum regime which is applied can vary depending on the area of the country to which you arrive. At the airports in Madrid and Barcelona, there are transit ad-hoc spaces (*Salas de Inadmisión de Fronteras*) in which individuals can be kept for up 10 days until such time as a decision of admission is made. However, this part of the process is not technically identified as detention; if the ten days have passed without a decision being made, the individual has to be let into the country for the duration of the rest of the application process. The situation is different, though, if you enter through Cadiz or Malaga, where people have had to remain in or Centers for the Temporary Assistance of Foreigners, and the decision for admission has to be made in 72 hours. After said time, a second procedure begins, during which applicants can remain in detention centers and which has less guarantees (European Council on Refugees and Exiles, 2021, p. 28).

The same thing happens if you enter through Ceuta or Melilla, except there you are originally detained in a police station for the first 72 hours. An issue that has been taking place in these cities though, is that of "labeling" migration, mainly affecting African immigrants and refugees. It refers to stablishing that individuals coming from the African continent are exclusively economic migrants, and therefore not eligible of applying for asylum. In the words of former Minister of Interior Jorge Fernández Díaz,

"the people who cross the perimeters in Ceuta and Melilla are immigrants for economic reasons, which, obviously, is a dramatic situation (...), but it does not legitimize them to request asylum, nor does it legitimize them to enter our country illegally" (López-Sala & Moreno-Amador, 2020, p. 7).

b. International jurisprudence regarding freedom of movement and its elements

While the judgements by international courts regarding the freedom of movement of asylum-seekers or refugees are few (beyond the already explained judgement of *Omwenyeke v. Germany*), there is among its case law a number of cases regarding aspects related to this matter which can be of interest, such as when an individual is lawfully present in a country, and the difference between deprivation or restriction of liberty.

To begin with, there is one judgement in which the European Court of Human Rights expressed its opinion regarding freedom of movement, and that is the case of *De Tommaso v. Italy,*[5] from 2017. In 2007, during a criminal trial Mr. de Tomasso was placed under police supervision and compulsory residence for a period of time of two years, which he considered to be a violation of several of his rights, including his right to freedom of movement under Article 2 of Protocol Number 4 to the ECHR. The Court found that the restriction fell under the possibilities provided by said article, and that it did meet the requirement of accessibility demanded to be in accordance with the law. However, it did not consider it to meet the other requirement of foreseeability, as it declared that "the law did not indicate with sufficient clarity the scope or manner of exercise of the very wide discretion conferred on the domestic courts and was therefore not formulated with sufficient precision to provide protection against arbitrary interferences".

[5] *De Tommaso v. Italy*, no. 43395/09, ECtHR 2017.

Additionally, another important aspect in relation to freedom of movement is the difference between restrictions on movement, and deprivations or restrictions of liberty. The European Court of Human Rights dealt with the latter in the case of *Guzzardi v. Italy*,[6] in which an individual was confined to an island while awaiting trial. Mr. Guzzardi was an Italian citizen who, while awaiting trial on kidnapping charges, was placed under special supervision, and ordered to reside on the island of Asinara. However, he claimed that the conditions on the island were such that he could not work, practice his religion, or provide an education for his son, and that the restriction amounted to a deprivation of his right to liberty under Article 5 of the ECHR. Initially, the European Court of Human Rights agreed with him, taking into consideration the small size of the island, the fact that he was under practically constant supervision, that it was near impossible for him to maintain any kind of social relations and the duration of the restriction. The Court later agreed, stating that "the difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance".

As it has been formerly explained, one important aspect in order to determine whether an individual is entitled to the right to freedom of movement is determining whether they are lawfully within a country. In the case of *Celepli v. Sweden*,[7] the HRC dealt with this particular aspect. Mr. Celepli was a Turkish individual who arrived in Sweden and applied for asylum on the basis of political prosecution. He was not granted refugee status and was later arrested, and an expulsion order was issued, but never enforced by the Swedish government, due to the fact that it was considered Mr. Celepli would face political prosecution. He was allowed to remain in Sweden, albeit under the limitations of being confined to his municipality of residence, a restriction which he appealed. In its opinion, the HRC validated the geographical restriction, as it claimed that in a situation in which an expulsion order has been issued but not enforced "because of the risk of ill-treatment upon return", the person is lawfully in the territory but "only under the restrictions placed upon him by the State Party".

[6] *Guzzardi v. Italy*, no. 7367/76, ECtHR 1980
[7] *Celepli v. Sweden*, CCPR/C/51/D/456/1991, UN HRC 1994

Meaning that, as long as he complied with the restrictions on his freedom of movement placed upon him by the State, he was lawfully within Swedish territory.

Finally, the European Court of Justice (hereinafter, ECJ) has also expressed its opinion regarding freedom of movement, in particular as it relates to beneficiaries of international protection, in the case of *Kreis Warendorf v Ibrahim Alo and Amira Osso v Region Hannover*[8]*.* Mr. Alo and Ms. Osso were Syrian nationals who had been granted subsidiary protection status in Germany, after having arrived there in 1998 and 2001 respectively. As by the German asylum laws, they were imposed certain residential restrictions, which they questioned before in the courts. The German Courts then asked the ECJ to solve whether said conditions restricting residence to a geographical area constituted a restriction of freedom of movement, and if so, whether it was compatible with European Union law.

The position of the ECJ was mixed, as it declared on one hand that "the Directive[9] requires the Member States to allow persons to whom they have granted subsidiary protection status not only to move freely within their territory but also to choose their place of residence within that territory". On the other hand, it also stated that "a place-of-residence condition may be imposed on beneficiaries of subsidiary protection if they face greater integration difficulties than other non-EU citizens who are legally resident in the Member State that has granted such protection". In connection with this reasoning, it is worth noting that beneficiaries of subsidiary protection, unlike asylum-seekers, have been already granted international protection and, thus, a residence permit.

[8] *Kreis Warendorf v Ibrahim Alo & Amira Osso v Region Hannover*, C-443/14 and C-444/14, CJEU 2016
[9] 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

c. Invisible fences: the case of Ceuta and Melilla

Situated at the border with Morocco and separated from it by the infamous fence, the autonomous cities of Ceuta and Melilla constitute the only land border between the European Union and the countries in Africa. In spite of this fact, it was not until 2014 that an application for asylum was made at one of the land border posts that exist between Morocco and the cities of Ceuta and Melilla. Asylum-seekers used to rent Moroccan passports to get through the border and then make their applications once they were in Spanish territory. Once people began applying for asylum at the border posts, the Spanish Ministry of Interior decided in 2014 to stablish asylum and international protection offices, which the United Nations High Commissioner for Refugees (UNHCR) acknowledged as an important step forward. Nonetheless, as Valles Ferrero notes (2016, p. 239), it was actually just "providing the means to comply with what was already provided for in the law 20 years ago, means that should have already existed and whose absence could have affected confidence in the asylum system".

The two cities are the main point of entry for migrants into Spain; in the first six months of the year 2019, almost 24% of arriving migrants did so through Ceuta or Melilla (Vieyra Calderoni, 2019, p. 164). As a result of this, the Spanish government started to implement some measures: the "pushbacks" (*devoluciones en caliente*) which refer to the possibility of rejection at the border; and the restriction of freedom of movement to Ceuta or Melilla for asylum-seekers. This last issue has been brought in front of the national courts by several NGOs over the years, as it was in the case explained in this section. Despite the fact that, as it has previously been mentioned, the Spanish Asylum Law grants freedom of movement to individuals applying for asylum, for a very long time those applying in either Ceuta or Melilla were the exception to the rule. This was not, however, an exception provided for by law and was therefore not complying with international law as indicated by the ECHR and the ICCPR, which state that restrictions to freedom of movement must be established by law, clear and accessible to those affected by them. The consequence of this exception was that for the duration of their asylum application procedure, asylum-seekers "remained immobilized for months and even years" (Garcés Mascareñas, Blanca, 2017) in the autonomous cities.

The geographical restriction to Ceuta and Melilla has the consequence, among others, of leading to overcrowding in the Centers for Temporary Residence for Immigrants. It can be particularly hard for individuals seeking asylum due to persecution in their countries of origin because of their sexual orientation or gender identity to be forced to remain in these centers, as they tend to be unwelcoming environments (Martín, 2020); migrant and refugee LGTBI people account for the bulk of hate crimes reported in the city for reasons of sexual orientation and gender identity. Moreover, the majority of LGBT asylum-seekers in Melilla originated from the Maghreb region, particularly from the area of Morocco near Melilla, which already makes it harder to access asylum as they tend to be classified as economic migrants (Robles Reina, 2022, p. 2).

In order to obtain refugee status in Spain, an individual has to request an appointment with the Police, in which they register your intention to apply for asylum and issue a "Manifestation of Will to apply for international protection". This document serves as identification for the authorities, in addition to protecting you from deportation. Later, an interview is conducted by a member of the police, which formally begins the application for asylum. After said interview, applicants are given a document known as "White Sheet", which serves as an identification document (UNHCR Spain, n.d.). However, when individuals applied for asylum in either Ceuta or Melilla, this document was given to them with the added specification of it being "Valid only in Ceuta", therefore not allowing them to travel to the peninsular territory of Spain.

In July of 2018, an individual applied for asylum in Ceuta and was given the "White Sheet" with the added specification. The individual then began a legal battle to challenge the practice and try to get the specification removed; while originally dismissed by the Administration, his appeal was admitted and upheld by the Superior Court of Justice of Madrid in the Judgement 14764/2019, on December 13th. The Court considered the restriction not in accordance with law, as there was no legal basis for it in the Spanish Asylum Law, nor in the regulation which developed it. This interpretation is in accordance with General Comment 27 of the Human Rights Committee, which as previously indicated states that restrictions to freedom of

movement may be legitimate in certain occasions, but only as long as they comply with a number of requirements, among which is included that they must be provided by law. Additionally, it considered that “the Administration has not respected the legally established procedure, in violation of the principle of equality and of the prohibition of discrimination”, as the geographical restriction was imposed only when applying in either one of the Autonomous Cities, but not in the rest of the country. Continuing to show the manner in which this judgement is in accordance with both the ICCPR and the ECHR, both guarantee equality and prohibit discrimination, respectively, in Article 26 and Article 14.

The sentence was then appealed by the State Attorney’s Office but dismissed by the Supreme Court in the Judgement 1552/2021 on April 14th, which declared that once an individual’s application for asylum has been admitted for processing, such individual has the right to freely move throughout the Spanish territory without any geographical restrictions. To be precise, the Supreme Court considered an individual which had obtained documentation identifying him as an asylum-seeker to be lawfully present within Spain, and thus having the right to freedom of movement within the country. This includes the freedom to travel from the autonomous cities of Ceuta and Melilla to the Peninsula, and to choose any place of residence he desires with the obligation of informing the authorities of wherever that may be, as well of any changes of residence.

Furthermore, the Supreme Court reaffirmed the opinion previously stated by the Superior Court of Justice of Madrid that the law does not establish any particularity or limitation when it comes to applications made in Ceuta or Melilla, as it refers “at all times and repeatedly to the national territory, with no exceptions in this regard, so that applicants for international protection in Ceuta and Melilla are in the same situation and with the same rights as all applicants in Spain" (Judgement 1552/2021, p. 6). However, this was not the first time the courts in Spain have ruled on this matter, although its many judgements in favor of recognizing freedom of movement to asylum-seekers have failed to lead to actual change in policies. The first ruling in this matter is from the Superior Court of Justice of Andalucía and dates back to over a

decade ago, in Judgment 1177/2010, of October 25th, 2010, at which time the court declared as follows:

> We must start from the premise that art. 5 of Law 4/2000 recognizes that foreigners who are in Spain in a regular administrative situation have the right to move freely within the national territory and to choose their residence. From this perspective, everything seems to indicate that the person whose asylum application has been admitted for processing is in Spain in an administrative situation of regularity, transitory if you will, but regular (Superior Court of Justice 1177/2010, p. 2).

Thus, for the Superior Court of Justice of Andalucía, people who have applied for asylum are considered to be in an "administrative situation of regularity" and therefore enjoy the right to freedom of movement in all of the Spanish territory.

In addition, the Superior Court of Justice of Madrid has also ruled similarly in the sense of recognizing freedom of movement to individuals legally within Spain, including those coming to the peninsula territory from Ceuta or Melilla. I refer to Judgement 490/2015, of May 11th as well as Judgement 949/2018, of December 7th. In the former, it agreed with the argument that foreigners with legal residence in Spain could be subject to identity and document checks when travelling from Ceuta and Melilla to peninsular Spain, but "in no case may they be prevented from exercising their right to freedom of movement for this reason" (Superior Court of Justice 490/2015, p. 7).

Moreover, even the judicial body at the top of the Spanish judiciary, the Supreme Court, has ruled in several instances in favor of granting the right to freedom of movement throughout all of Spain to individuals applying for asylum. The first ruling pronouncing on the right to freedom of movement for asylum-seekers is Judgement 2497/2020, of July 29th in a case brough forward by the Jesuit Service for Migrants (SJM). In that occasion it disagreed with the argument presented by the State's Attorney based on the application of article 4(2) of the Royal Decree 557/2011, according to which "[t]he General Commissariat for Aliens and Borders may authorize the entry into Spain of foreigners who do not meet the requirements set forth in the preceding paragraph when there are exceptional reasons". The Supreme Court considered said article to be unapplicable when it came to asylum-seekers travelling

from Ceuta to the rest of Spain, as they were already within Spanish territory (Supreme Court 2497/2020, p. 4). The Supreme Court ruled on this matter for a second time in another case supported by SJM, in Judgement 173/2021, in which occasion it dismissed the argument presented by the State's Attorney that based on European Union law, Ceuta and Melilla were exempt from complying with the freedom of movement of persons due to the particularity of their position in the control of migratory flows (Supreme Court 173/2021, p. 7).

As it has been explained throughout this analysis of the jurisprudence provided by the Spanish courts, and particularly by the Judgements 1552/2021 and 14764/2019, the lack of legitimacy of the restriction imposed in Ceuta and Melilla was that it did not meet the principle of legality, in other words, the law did not estipulate for such restrictions. This reasoning goes in line with ECtHR jurisprudence, as seen among others in *De Tomaso v. Italy* and *Khlyustov v. Russia*, in the former of which the Court declared that "any measure restricting the right to liberty of movement must be in accordance with law"[10]. In the case that Spain were to regulate such restrictions by law in the future, such law would still have to be accessible to the asylum seekers and be clear to comply with Article 12 of the ECHR and Article 2 of Protocol No. 4 of the ICCPR.

The ECtHR has clarified the meaning of "accessibility" and "clarity" in several judgments, such as *Khlyustov v. Russia,* in which it indicated that in order for a law to be accessible "the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case"[11]. Furthermore, in the case of *Timofeyev et Postupkin c. Russie*, the Court considered the measures in particular to meet the requirement of clarity, as they "described in detail the categories of persons to be covered by administrative supervision" and did not "leave any room for a discretionary assessment by the national courts as to the addressees of the preventive measures"[12].

[10] *De Tommaso v. Italy*, no. 43395/09, ECtHR 2017, par. 104
[11] *Khlyustov v. Russia*, no. 28975/05, ECtHR 2013, par. 68
[12] *Timofeyev et Postupkin c. Russie*, nos 45431/14 et 22769/15, par. 129

d. Consequences of restrictions on freedom of movement

The restriction of their freedom of movement can have grave consequences for the asylum-seekers, among others as it relates to their integration in the possible host country and their feeling of belonging. In the case of Germany which has some of the strongest restrictions, as previously explained it limits the movement of asylum-seekers beyond the assigned district, a study was conducted regarding the effects of these restrictions on the applicants for asylum. It was found that "a policy that was designed to inhibit ethnic segregation and the entrenchment of separate communities resulted stronger identification with refugees' country of origin" (Hilbig & Riaz, 2020, p. 3).

While those who defended the restrictions had done so with the argument that allowing asylum-seekers and refugees to freely choose their residence would lead to their self-segregation and the formation of ethnic enclaves. Furthermore, while the restriction did not reduce the contact asylum-seekers had with other applicants, it did reduce social engagement. It did not, however, have negative effects on the access to the labor market of those who had already been granted asylum, but this may be due to the fact that exceptions were made for employment.

Additionally, other legal consequence of these restrictions is that non-compliance with it its treated as a criminal act, thus if an asylum-seeker is found moving illegally, they may register as having committed a criminal act (if the host country has typified such conduct as a crime) and can lose any potential possibility of accessing asylum. This matter was treated in the case of *Omwenyeke v Germany*[13] in 2007, in which the European Court of Human Rights decided against Mr. Omwenyeke when he asked for damages because of the sanctions which had been imposed on him due to infringing the geographical restriction. The European Court for Human Rights stablished 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'". Therefore, it considered that Mr. Omwenyeke was no longer lawfully present in

[13] *Omwenyeke v. Germany*, No. 44294/04, ECtHR 2007

Germany, as he did not fulfill the required preconditions when he disobeyed the restrictions.

Regarding the case of Spain, as it has been explained last year in 2021 it was declared that limiting asylum-seekers freedom of movement to Ceuta and Melilla was not in accordance with the law. Before then, despite the fact that the situation had been greatly denounced, it continued to be standard practice. This had grave consequences for all those individuals who wanted to apply for asylum in Spain, but for which the only way to get there was to cross the border irregularly as they cannot meet the visa requirements necessary to enter regularly, as it is the case of those coming from Algeria, Morocco, or Sub-Saharan Africa. In the case that they were not immediately returned to their country of origin in what was called "pushbacks" (*devoluciones en caliente*), applicants in Ceuta or Melilla had to wait for the state's authorization to travel to the rest of Spain. In addition to this:

> "Authorizations for the transfer of Sub-Saharan applicants for international protection and migrants in an irregular situation to the mainland (the long sought Salida), along with some nationals from the Middle East, were very rare. Therefore, there is a feeling that migrants who have entered Melilla do not have a way out." (Jesuit Service to Migrants, 2020).

Concerning the Hotspots Approach in Greece and Italy, as previously explained one of the main concerns is the lack of legislation, which means a lack of legal basis for detention and thus a lack of possibility of filing for appeal against detention. Although this is something that affects every asylum-seeker, one of the most vulnerable groups is that of unaccompanied children. In both Italy and Greece certain priority is given to asylum-seekers on the basis of their nationality, and while this is not necessarily a bad thing it can cause undue delays to other applicants, including children.

The Hotspots facilities are not appropriate for anyone to live in for long periods of time, simply due to the fact that that was not the purpose they were built for. The living conditions in the Greek Hotspots, for example, were referred to by the Council of Europe Commissioner for Human Rights, Dunja Mijatović, as unsanitary as well as lacking in the facilitation of medical care (European Asylum Support Office, 2020, p. 31). It is particularly troubling to think about the children enduring these conditions;

and yet due to a lack of specialized accommodations and guardians, that is where many unaccompanied minors end up. This is in spite of the fact that the European Court of Human Rights has declared in several cases that the detention of unaccompanied minor migrants is a "measure of last resort", and that governments have to "take the appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance" (Popov v. France, 2012, p. 17).

8. Conclusion

From the beginning of this thesis, there were two ideas which strongly resonated with me, and continued to do so throughout its writing. The first, was the idea of freedom of movement as indispensable for the free development of a person, as declared by the UN Human Rights Committee. A similar idea was presented by Joseph Carens, who based his defense of freedom of movement (in his case, referring to movement between countries) in the value of an individual's autonomy (Hosein, 2013, p. 26). In my personal opinion, I agree with the statement said by Thomas Hammarberg that individuals who came into a country seeking intention protection, although they may do so illegally, should not be penalized. However, it is important to remember that besides from penalization, there are more abstract ways of restricting the individual rights and freedoms of asylum seekers, such as the "invisible fences" constructed by restrictions to freedom of movement which are the topic of this thesis. It is not just the about fact that individuals in very vulnerable situations are being penalized, but about how these penalizations and restrictions create hostile environments which makes their lives even harder.

The main takeaway from this thesis ought to be the numerous manners in which states introduce abstract measures which curtail asylum-seeker's freedom of movement. As it has been explained throughout this essay such measures include adding specifications to documents in order to impede individuals from travelling, such as the case of Ceuta and Melilla; assigning them to a particular municipality which they cannot leave, such as the case of Germany; or restricting their movement to an area or

facility intended to serve registration purposes, such as the case of the Italian and Greek Hotspots. Still, it is important not to forget that restrictions to freedom of movement can be legitimate under certain circumstances, as long as they comply with the established requirements, beginning with the principle of legality. As it was explicated in the previous chapter, the Spanish Supreme Court, in compliance with international human rights law, in particular Articles 12 and 2 of the ICCPR and Protocol No.4 of the ECHR respectively, and the jurisprudence by the ECtHR and the Human Rights Committee, has ruled that restrictions to someone's movement shall be stipulated by law, if not, it constitutes a violation of the right to freedom of movement

A recurrent aspect of which I became aware during the elaboration of this thesis was the uncertainty and overall lack of clarity surrounding the rights which should be granted to asylum-seekers. This is perhaps caused by the fact that there is no definite agreement even when it comes to who exactly belongs in this group. In particular when it comes to restrictions to freedom of movement, we can also find a lack of standardization. For example, as it was mentioned in the case of Germany, the reach of the restriction varied from one Federal state to another; a similar thing happened in the Italian Hotspots, as some only allowed residents to leave on particular occasions, and others allowed them to leave during the day and return only to spend the night. Both at a national level and regarding the European Union, it seems to me there is a need for the same concrete set of rights to be applied everywhere, as although there is harmonization in theory, the same cannot be said for the practice.

Furthermore, it appears that many of the issues examined in this thesis, such as the absence of the possibility of an appeal when it came to deprivation of freedom of movement in the Greek and Italian Hotspots, derive as Evangelia Tsourdi pointed out from the existing gap between the legal obligations of Member States and their application in practice. As it has been previously stated, the former UN Commissioner for Human Rights himself, Thomas Hammarberg, expressed that restrictions on freedom of movement were supposed to be the exception and not the norm. And yet, not only has it become standard, but in cases such as Germany its duration is being prolonged from three months in 2015 to eighteen months in 2019. It could also be argued that because European Union Member States were not prepared to deal with

the current number of asylum-seekers and refugees, which caused not a refugee crisis, but rather a crisis of management.

Among other elements, this lack of preparedness could be seen in the Hotspots. As it was pointed out, and as it names states the Hotspot Approach was simply a new "approach" to existing legal instruments. Geographical restrictions, in their various forms and manners of application, seem to serve a number of purposes for the states, and the European Union. To begin with, they allow host countries to conduct a brief enquiry into the asylum-seekers' cases before allowing them to move freely throughout their territory, and even possibly moving on to a secondary country. In the cases that an application for asylum is rejected, restrictions can also allow for a swift return to a country outside the European Union, such the case of Greece and the European Union-Turkey Agreement.

As it has been explained in various sections of this thesis, the prerequisites for restriction on freedom of movements theoretically include foreseeability, precision, clarity and provision by law, necessity and proportionality (Human Rights Committee, 1999, p. 41). Additionally, in the case of those countries which have ratified the ECHR, the restrictions must be necessary in a democratic society, in accordance with the law and pursuant of a legitimate aim; requisites which have been clarified in different occasions by the European Court of Human Rights (*Landvreugd v. The Netherlands*; *Guzzardi v Italy*; *De Tommaso v. Italy; Omwenyeke v. Germany*). However, it almost seems like these principles have been forgotten, or at least are no longer at the center of the policies been employed. This is said on the basis of two elements, which have been previously presented.

On the one hand, because of an apparent generalized substitution of freedom of movement of both asylum-seekers and refugees with "an enforced lack of freedom to move or flee" (Commission on Human Rights, 1997, p. 16). On the other, because of the frequently expressed concern over the living conditions to which asylum-seekers are subjected for the duration of the restrictions, in particular as they relate to the case of the Hotspots in Greece and Italy, in addition to the temporary migrant centers in Spain. These have been referred to, correspondingly, as "dire" (Majcher, 2018) and

"unsanitary" (Tsourdi, 2021, p. 491); "degrading" (Sunderland, 2018); and "a threat to the safety and physical and psychological integrity" (Committee Against Torture, 2015, p. 5).

Furthermore, in both the case of the Hotspots and the Autonomous Cities of Ceuta and Melilla in Spain, there are indications of discrimination as people are classified as asylum-seekers or economic migrants on the basis of their nationality or where they are coming from. I refer here to the aforementioned statement made by the former Spanish Minister of Interior, "the people who cross the perimeters in Ceuta and Melilla are immigrants for economic reasons" (López-Sala & Moreno-Amador, 2020, p. 7); as well as the examinations made by the European Council on Refugees and Exiles, "persons are often classified solely on the basis of their nationality." (European Council on Refugees and Exiles, 2021, p. 33). Furthermore, in the previously mentioned Summary of Universal Periodic Review of 2010, the Ombudsman emphasized "the need for the [Spanish] authorities to shift the focus from security and economic-labor issues in connection with aliens to socio-family and humanitarian matters" (Human Rights Council, 2010, p. 16).

Finally, I had to conclude by going back to Ceuta and Melilla, and the restriction of freedom movement, which was being imposed there on asylum-seekers, the case which was the foundation to delve into the analysis of the present subject matter. As it was pointed out, the importance of the frontier separating these two cities from Morocco derives from the fact that it constitutes not only the only land border between an African country and Spain, but also between it and the European Union. It is this circumstance, in addition to the fact that it is the main entry point for migrants into Spain, which can explain why the Spanish frontier police continued to restrict the movement of asylum-seekers who applied there to the two autonomous cities, despite the numerous judgements which over the years have recognized their freedom of movement (Judgement 1177/2010, Judgement 490/2015, Judgement 2497/2020, Judgement 173/2021 and Judgement 1555/2021).

The limitation, which led to overcrowding in the (supposedly) temporary migrant centers, understandably became even worse with the arrival of the Covid-19

virus, and the accompanying restrictions; the virus also led to the blocking of the asylum processes and deportations. During the height of the pandemic, the frustrations caused by many years spent waiting for their rights to be effectively recognized caused altercations “reminiscent of the fire at the Moira camp on the Greek island of Lesbos” (Vargas, 2020). One can only wonder, given their circumstances, how they continue to persevere on their journey towards a better life.

I wished to end with a quote from the book *The Deportation Regime,* by Nicholas de Genova, in which he asked “[w]hat, in the end, is movement—and therefore, the freedom of movement—if not a figure par excellence of life, indeed, life in its barest essential condition?”. Personally, it makes me reflect on how different my life, and myself, would be if I was not allowed to go beyond the limits of my municipality.

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