Article 26 1951 Convention

Freedom of Movement = Liberté de Circulation

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Article 26

(Freedom of Movement/Liberté de Circulation)

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

Tout État Contractant accordera aux réfugiés se trouvant régulièrement sur son territoire le droit d'y choisir leur lieu de résidence et d'y circuler librement sous les réserves instituées par la réglementation applicable aux étrangers en général dans les mêmes circonstances.

Select Documents

African Commission on Human and Peoples' Rights, General Comment No. 5 on the African Charter on Human and Peoples' Rights: The Right to Freedom of Movement and Residence (Article 12(1)), 10 November 2019

CCPR UN Human Rights Committee, General Comment No. 15: The Position of Aliens, UN Doc. HRI/GEN/1/Rev.6 (2003)

____, General Comment No. 18: Non-discrimination, UN Doc. HRI/GEN/1/Rev.9 (1989)

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

CoE, Explanatory Report to Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, 16 September 1963 (ETS 46)

UNHCR, UNHCR intervention before the ECtHR in the case of *Saadi v. United Kingdom*, Appl. No. 13229/03, 30 March 2007

The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. Second Edition. Edited by Andreas Zimmermann, Terje Einarsen and Franziska M. Herrmann, Oxford University Press. © The Many Contributors 2024.
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——, Comments on the European Commission's amended recast proposal for a Directive of the European Parliament and the Council laying down standards for the reception of asylum-seekers (COM (2011) 320 final, 1 June 2011), July 2012

Travaux Préparatoires[1]

Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons—Memorandum by the Secretary-General, UN Doc. E/AC.32/2 (1950)

Report of the Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/1618 E/AC.32/5 (1950)

Comments of Governments on the Report of the Ad Hoc Committee on Statelessness and Related Problems (document E/1660), UN Doc. E/1703 (1950)

Second Report of the Drafting Committee on articles of the draft Convention, UN Doc. A/AC.32/L.42/Add.1 (1950)

Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Fifteenth Meeting, UN Doc. E/AC.32/SR.11 (1951)

Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Fifteenth Meeting, UN Doc. E/AC.32/SR.15 (1950)

Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Twenty-Sixth Meeting, UN Doc. E/AC.32/SR.25 (1950)

Ad Hoc Committee on Refugees and Stateless Persons, Second Session: Summary Record of the Thirty-Eighth Meeting, UN Doc. E/AC.32/SR.38 (1950)

Ad Hoc Committee on Refugees and Stateless Persons, 41st Meeting, UN Doc. E/AC.32/SR.41 (1950)

Ad Hoc Committee on Refugees and Stateless Persons, Second Session: Summary Record of the Forty-Second Meeting, UN Doc. E/AC.32/SR.42 (1950)

Conference of Plenipotentiaries, Report of the Style Committee, UN Doc. A/CONF.2/102/Add.1 (1951)

Conference of Plenipotentiaries, 35th Meeting, UN Doc. A/CONF.2/SR.35 (1951)

A. Function of Article 26

1 Article 26 secures the right of refugees to choose their place of residence and to move freely within the territory of the State in which they find themselves. This freedom of movement is essential in the sense that it is often a pre-condition to making use of other rights laid down in the 1951 Convention such as the right to work, and more generally, it can be considered an indispensable condition for the free development of a person.[2]

[1] In the footnotes that refer to the documents listed below: the page numbers refer to the version of the relevant documents as available at UNHCR's website where only some of the documents retained the original paragraph numbers. When paragraph numbers were retained, reference is made to paragraph numbers.

[2] CCPR Human Rights Committee, General Comment No. 27, Article 12: Freedom of Movement, UN Doc. CCPR/C/21/Rev.1/Add.9 (1999), para. 1.

The freedom of residence and internal movement is not absolute: it may be restricted. Article 26 does not, however, indicate when and for what purposes restrictions are justified: no grounds are mentioned. It only provides that refugees may not be subjected to restrictions that only apply to them. Article 26 places refugees on the same footing as aliens,[3] and intends to grant to refugees equality of treatment with aliens.[4] **2**

B. Historical Development

I. Instruments Prior to the 1951 Convention

There are only a few instruments—Arrangements and Conventions—pertaining to refugees preceding the adoption of the 1951 Convention, most of them dating from the interbellum. A few of those address freedom of movement albeit confined to external freedom of movement. This freedom was made possible by the provision of travel documents such as visas affixed to identity documents,[5] and Nansen certificates.[6] Only one of the instruments, the 1938 Convention concerning the Status of Refugees coming from Germany,[7] contains a 'right of sojourn and residence' that includes internal freedom of movement.[8] **3**

II. Drafting History of Article 26

The debate started with Art. 21 of the Secretariat draft on identity papers: 'The High Contracting Parties undertake to issue identity papers (residence card, identity card etc.) to refugees (and stateless persons) authorized to reside in their territory.'[9] The Belgian representative observed that the Secretariat draft dealt with residence papers although it contained no provisions relating to the right to residence, a right that had been included in Art. 2 of the 1938 Convention Governing the Status of Refugees Coming from Germany:[10] **4**

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

In view of this gap, the chairman invited the Belgian representative to propose text for an article on the right of residence,[11] who then proposed to adopt the text of Art. 2 of the 1938 Convention.[12] The US representative pointed out that the first phrase of that article **5**

[3] UN Doc. E/AC.32/SR.15 (1950), para. 104 (Belgium).
[4] *Ibid.,* para. 114 (France).
[5] *Cf.* Art. 3 of the 1928 Arrangement of 12 May 1926 relating to the Issue of Identity Certificates to Russian and Armenian Refugees (League of Nations Treaty Series, Vol. LXXXIX, No. 2004).
[6] Art. 2 of the 1933 Convention relating to the International Status of Refugees (League of Nations Treaty Series, Vol. CLIX, No. 3663).
[7] League of Nations Treaty Series, Vol. CXCII, No. 4461.
[8] For the text, see *infra,* MN 4.
[9] UN Doc. E/AC.32/2 (1950).
[10] UN Doc. E/AC.32/SR.15 (1950), para. 58.
[11] *Ibid.*, para. 69.
[12] *Ibid.*, para. 70.

appeared to nullify in advance the rights granted to refugees in the latter part of the text,[13] and, in order to avoid any misinterpretation, he suggested the first part of the article should be drafted to read: 'Without prejudice to the right of the High Contracting Parties to regulate the right of entry for permanent residence in the country.'[14]

6 The reason the Secretariat had omitted to include a right of residence in the draft Convention was based on the case of the Spanish refugees who had presented themselves in large numbers at the French frontier towards the end of the Spanish Civil War, and for whom it had been necessary to set up reception camps to meet their immediate needs before regularizing their position and arranging for their dispersal throughout the country. The obligation to remain in those camps was clearly a considerable limitation of the right of movement granted by the 1938 Convention. Such a practice might, however, prove essential in certain circumstances. On the basis of this need, the Secretariat had preferred to omit the article on the right of residence from the draft Convention.[15]

7 The US representative pointed out that the Spanish refugees referred to raised a categorically different problem, since they had not been officially granted the right of residence. The proposed article applied to refugees to whom the right of residence had already been granted and was designed to guarantee them freedom of movement in the reception country.[16]

8 Referring to regulations prohibiting access to frontier or strategic zones to aliens, the Turkish representative wondered whether the American formula would permit applying such regulations to refugees.[17] In response, the US delegate suggested to insert the phrase 'subject to any general provision applicable to aliens in general'.[18]

9 Another concern that arose pertained to refugees who had been admitted as workers in assigned places of work and subsequently left those places and changed occupation.[19] With a view to clarifying the problem, the French delegate distinguished three different aspects: the treatment of refugees before they had reached an understanding with the host State; their right to have their situation regularized and the conditions in which that was to be done; and their rights after they had been lawfully authorized to reside in the country.[20] The concern that had been expressed could be resolved by the application of internal regulations applicable to foreigners.[21]

10 The US representative thereupon suggested the following text:

> Subject to the right of the High Contracting Parties to admit refugees on condition that for a given period they confine themselves to specified occupations or specific regions of the country, a refugee admitted for regular residence shall be entitled to move about freely and to sojourn or reside in the place of his choice.[22]

[13] *Ibid.*, para. 71.
[14] *Ibid.*, para. 73.
[15] *Ibid.*, para. 74. These concerns were eventually addressed in the context of Art. 31, para. 2.
[16] UN Doc. E/AC.32/SR.15 (1950), para. 75.
[17] *Ibid.*, para. 76. The reference is to the suggestion mentioned *supra*, MN 5.
[18] UN Doc. E/AC.32/SR.15 (1950), para. 79.
[19] *Ibid.*, para. 80 (Venezuela); see also *infra,* MN 51, 52.
[20] UN Doc. E/AC.32/SR.15 (1950), para. 81.
[21] *Ibid.*, para. 83.
[22] *Ibid.*, para. 91.

France suggested an alternative text covering the same intention: **11**

> Refugees once authorized to reside within a territory shall have the right to fix the place of their residence and to move freely, subject to regulations governing foreigners in general.[23]

The US and IRO representatives thought provisions should be included for refugees who had not yet been regularly admitted into a country bearing in mind the possibility of large influxes such as the Spanish refugees referred to earlier.[24] The chairman suggested to first decide the issue of refugees who had been regularly admitted to a country, as per the French draft text. **12**

In view of the restrictions that were applied in various States regarding freedom of movement, he suggested to complete the French text by a supplementary guarantee, and to add the following words: 'subject to the conditions under which they were admitted'.[25] This suggestion was not adopted since, with this addition, the text would provide few safeguards for the refugees.[26] Instead, the French text was adopted.[27] **13**

Subsequently, the Working Group nonetheless—and despite the fact that this addition had been rejected—proposed the following text: **14**

> The Contracting States shall accord to refugees lawfully in their territory the right to choose their place of residence and to travel freely within their territory, subject to any regulations governing aliens generally [and to the conditions under which such refugees were admitted].[28]

At the suggestion of the US delegate, the words 'governing aliens generally' were (in the text that did not comprise the part put in brackets) replaced by 'applicable generally to aliens in the same circumstances', and Art. 21, thus amended, was then adopted.[29] **15**

However, the UK representative indicated that Art. 21 was only acceptable to his government if it would not in any way affect the right of States to restrict the movement of refugees of a particular class or nationality if it should be considered necessary to the security of the State to restrict the movement of aliens of that class or nationality in a time of a national crisis.[30] The chairman of the Ad Hoc Committee pointed out that Art. 21 provided not for absolute freedom of movement but for freedom of movement subject to any regulations applicable to aliens generally in the same circumstances, and if a government closed some areas of its territory to aliens, those areas would also be closed to refugees. His proposal to send Art. 21 to the drafting Committee was accepted.[31] **16**

[23] *Ibid.*, para. 93.
[24] *Ibid.*, paras. 94, 96, 97.
[25] *Ibid.*, para. 111.
[26] *Ibid.*, paras. 113 (UK representative), 114 (French representative).
[27] *Ibid.*, para. 119.
[28] UN Doc. E/1618 E/AC.32/5 (1950), p. 21. Brackets inserted by the author.
[29] UN Doc. E/AC.32/SR.25 (1950), para. 30.
[30] UN Doc. E/1703 (1950), p. 4. The Canadian delegate indicated that the UK comment on Art. 21 covered the position of his own government, UN Doc. E/AC.32/SR.38 (1950).
[31] UN Doc. E/AC.32/SR.38 (1950).

17 The Drafting Committee proposed the following text:

> The Contracting States shall accord to refugees lawfully in their territory the right to choose their place of residence and to travel freely within their territory, subject to any regulations applicable to aliens generally in the same circumstances.[32]

18 The article was then adopted.[33] Only one change was made: the word 'résidant' in the French version of the text was deleted,[34] and at the Conference of Plenipotentiaries, the representative of Belgium proposed amending the French text of the article, as a result of which it now includes the reference to 'réfugiés se trouvant régulièrement sur leurs territoires'.[35] The Australian representative, lastly, said that his government had no objection to the principle enunciated in the article, but noted that it would require interpretation in order to make clear whether it would apply to, for instance, refugees entering Australia under the labour contract system practised there. This and other articles should be covered by a special interpretative clause in the 1951 Convention.[36] Such a clause, however, has not been included in the Convention.[37]

19 The article was subsequently adopted by 19 votes to none, with two abstentions. The Style Committee proposed, subsequently, the wording of the article that is part of the 1951 Convention.[38] The proposal of the Style Committee was adopted by 23 votes to none.[39]

C. Declarations and Reservations Made with Regard to Article 26

20 Article 42 allows States to make reservations to Art. 26, and 17 States did so.[40] The most far-reaching of the reservations made are the reservation made by Papua New Guinea to the effect that it does not accept the obligations stipulated in Art. 26,[41] and the one made by Iran that simply states that it considers Art. 26 to be only a recommendation.

[32] Second Report of the Drafting Committee on articles of the draft Convention, UN Doc. E/AC.32/L.42/Add.1 (1950), p. 5.

[33] UN Doc. E/AC.32/SR.41 (1950), p. 19.

[34] UN Doc. E/AC.32/SR.42 (1950), p. 21; on the reason why, see *infra,* section F. I.

[35] UN Doc. A/CONF.2/SR.11 (1951), p. 16; a suggestion made earlier by the UK delegate, UN Doc. E/AC.32/SR.42 (1950), p. 14.

[36] UN Doc. A/CONF.2/SR.11 (1951), p. 16. Canada concurred, observing that persons who came to Canada under group-settlement schemes were frequently required to give a pledge that they would remain in a specific job for a certain period of time. He did not believe that such a requirement conflicted with the principle of freedom of movement, but the point must nonetheless be borne in mind.

[37] Australia subsequently made a reservation to Art. 26 so that it would neither preclude the imposition of conditions upon which a refugee may enter Australia where the entry is made for a specific purpose nor the making of arrangements under which a refugee is required to undertake employment for a specified period after entry into Australia, 189 UNTS, p. 202. This reservation was withdrawn in 1967. See *infra*, MN 50 *et seq.*: the concern is met when those conditions apply to all foreigners.

[38] UN Doc. A/CONF.2/102/Add.1 (1951) p. 1 (the only change made consisted of replacing the words 'The Contracting States' by 'Each Contracting State').

[39] UN Doc. A/CONF.2/SR.35 (1951), p. 9.

[40] Declarations and Reservations to the 1951 Convention, and the 1967 Protocol, available at the United Nations Treaty Collection (UNTC, Depository: Status of Treaties). Some reservations have been withdrawn, notably those of Australia (in 1967) (see *supra*, fn. 37), Greece (in 1978), and Honduras (in 2013): those reservations are not addressed in this section.

[41] On 20 August 2013, the Government of Papua New Guinea notified the Secretary-General of its decision to partially withdraw its reservation made upon accession: 'Papua New Guinea withdraws its reservation with

21 It is remarkable that a number of States simply indicated a reservation to Art. 26 without explaining what the reservation consisted of, or whether or not it would only apply in specific circumstances. Botswana, for instance, formulated its accession '[s]ubject to the reservation of articles 7, 17, 26, 31, 32 and 34 and paragraph 1 of article 12 of the Convention', and Sudan '[w]ith reservation as to article 26'. The legal effect of those blanket reservations could well boil down to denying the right to freedom of movement and residence altogether. Mexico reserved the right to assign the place or places of residence of refugees and to establish the conditions for moving within the national territory, and three other States likewise take Art. 26 as not precluding the adoption of special measures concerning the place of residence of particular refugees (Spain) and refugees (Zambia and Zimbabwe).

22 Other reservations provide the reason for the envisaged restrictions but more often than not, those reasons are very broad. Moldova, for instance, reserved the right to establish the place of residence for certain refugees or groups of refugees in the interest of the State and society. Comparable is the reservation made by the Netherlands that reserves the right to designate a place of principal residence for certain refugees or groups of refugees in the public interest.

23 Angola reserved the right to prescribe, transfer, or circumscribe the place of residence of certain refugees or groups of refugees, and to restrict their freedom of movement, whenever considerations of national or international order make it advisable to do so. Rwanda reserved the right to determine the place of residence of refugees and to establish limits to their freedom of movement for reasons of public policy (*ordre public*). Other States reserved the right to designate the place(s) of residence of refugees, and to restrict their movements whenever considerations of national security or public order so require (Latvia, Malawi, Mozambique, Namibia).

24 Worth mentioning is the reservation made by Burundi:[42] it accepts the provisions of Art. 26 only subject to the reservation that refugees do not choose their place of residence in a region bordering on their country of origin, and refrain, in any event, when exercising their right to move freely, from any activity or incursion of a subversive nature with respect to the country of which they are nationals.

25 When compared to the number of States parties to the 1951 Convention and/or 1967 Protocol, the number of reservations made to Art. 26 is limited. Some are arguably redundant in the sense that the concerns that informed them can be addressed by domestic regulations that apply to all foreigners. Other reservations militate against the intention of Art. 26 to treat refugees and other aliens on the same footing by exclusively focusing on refugees, and the limitation of their freedom of movement and residence. However, none of the other States objected to (any of) the reservations that were made, nor did UNHCR.[43]

respect to the provisions contained in articles 17 (1), 21, 22 (1), 26, 31, 32 and 34 of the Convention in relations to refugees transferred by the Government of Australia to Papua New Guinea and accepts the obligations stipulated in these articles in relation to such persons. This withdrawal has immediate effect. The reservation remains in effect for all other persons.'

[42] This reservation was not made when Burundi acceded to the 1951 Convention in July 1963 but when it acceded to the 1967 Protocol in March 1971.

[43] See Zieck on Art. 35, MN 58.

D. Interrelationship of Article 26 with Other Provisions

26 Article 26 provides that the internal freedom of movement of refugees lawfully in the country of refuge may only be subject to any regulations applicable to aliens generally in the same circumstances. It confirms Art. 7, which provides that refugees shall be accorded the same treatment as is accorded to aliens generally (except when more favourable treatment is prescribed):[44] a Contracting State may not impose restrictions that are applicable only to refugees.[45]

27 Other relevant articles are Art. 9 (Provisional measures) and Art. 31 (Refugees unlawfully in the country of refuge) that both allow (temporal) restrictions on freedom of movement. Article 9 only applies in time of war or other grave and exceptional circumstances and authorizes the host State to take provisional measures which it considers essential to national security, such as detention and curfew, in the case of a particular person pending a determination by that State that that person is in fact a refugee, and only until that determination is made.[46] Article 31 applies to refugees unlawfully in the country. Their movement may be restricted but only until the presence of the refugees concerned has been 'regularized',[47] which is tantamount to lawful presence. Once lawfully present, those restrictions give way to the freedom provided in Art. 26.[48] The last provision is Art. 28 on travel documents, which implies and enables external freedom of movement and thus supplements Art. 26.

E. Other Relevant Norms of International Law

28 Article 26 will often apply besides other international norms that regulate (internal) freedom of movement: either norms that are laid down in regional treaties pertaining to refugees that address this freedom or in (general) universal and regional human rights treaties.

29 Neither the 1969 African Union Convention Governing the Specific Aspects of Refugee Problems in Africa nor the 1984 Cartagena Declaration on Refugees addresses the right of internal freedom of movement as such, but both arguably touch upon it with the stipulation that countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin.[49] The question is whether this is compatible with Art. 26. The answer is arguably yes if, in conformity with the wording of the relevant provisions, this boils down to merely promoting residence in areas safe from border incursion or incitement to hostility and does not involve a forced move to or confinement in such areas.[50]

[44] *Cf.* Robinson, *Commentary*, p. 133: 'The intent of Art. 26 is to assimilate refugees to "aliens in general"'.
[45] Grahl-Madsen, *Commentary on the Refugee Convention 1951: Articles 2–11*, 13–37 (1997), Art. 26, para. 2.
[46] Hathaway, *Rights,* p. 295.
[47] See Noll on Art. 31, MN 116.
[48] Robinson, *Commentary,* p. 154 on Art. 31: 'formally, once the position of an illegal refugee is regularized, he is "lawfully in the country" and enjoys the benefits of Art. 26'.
[49] Art. II, para. 6 AU Convention; and more elaborately, Art. III, para. 6 Cartagena Declaration: 'To reiterate to countries of asylum that refugee camps and settlements located in frontier areas should be set up inland at a reasonable distance from the frontier with a view to improving the protection afforded to refugees, safeguarding their human rights and implementing projects aimed at their self-sufficiency and integration into the host country.'
[50] Hathaway, *Rights*, p. 877.

In the European Union, the (recast) Reception Directive[51] provides in Art. 7 that asylum seekers or rather 'applicants'—an applicant is defined in Art. 2(b) as 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—may move freely within the territory of the host State or within an area assigned to them by that State. However, the host State 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. In addition, it may make provision of material reception conditions subject to actual residence by the applicants in a specific place, to be determined by the host State. **30**

First of all, Art. 7 is confined to 'applicants' and *a contrario* the inference can be made that the limitations of Art. 7 no longer apply when a final decision has been made on the application for international protection.[52] The question is whether the restrictions provided in Art. 7 are compatible with Art. 26, especially in view of the fact that the establishment of a Common European Asylum System has to be based 'on the full and inclusive application of the Geneva Convention Relating to the Status of Refugees'.[53] Assuming the applicants are lawfully present in the host State—as is set out in section F1 *infra*—they are entitled to internal freedom of movement. This, in turn, entails that the restrictions of Art. 7 are incompatible with Art. 26, and consequently in breach of the 1951 Convention.[54] **31**

Article 33 of the Recast Qualifications Directive provides that Member States shall allow freedom of movement within their territory to beneficiaries of international protection (refugees and beneficiaries of subsidiary protection), under the same conditions and restrictions as those provided for other third-country nationals legally resident in their territories.[55] This appears to be substantively similar to Art. 26. The Court of Justice of the European Union (CJEU) observed that there was nothing to suggest that the EU legislature chose to include only the right to freedom of movement of Art. 26 in Art. 33 but not the right of refugees to choose their place of residence.[56] Accordingly, it ruled that requiring a beneficiary of Art. 33 to take up residence in an allotted, geographically limited area such as a municipality, district, or region is not compatible with Art. 33.[57] **32**

The second category of relevant norms are (general) human rights. The 1948 Universal Declaration provides in Art. 13, para. 1 that everyone has the right to freedom of movement and residence within the borders of each State. This right was subsequently included in the 1966 Covenant on Civil and Political Rights (CCPR). Article 12, para. 1 provides **33**

[51] EC Directive 2013/33/EU of 26 June 2013, OJ L 180/96.

[52] This is regulated in Art. 33 Qualification Directive, EC Directive 2011/95/EU, 13 December 2011, OJ L 337/9, on which, see MN 32.

[53] *Ibid.*, Preamble, para. 3.

[54] It is remarkable that UNHCR—charged with supervising the 1951 Convention, see Zieck on Art. 35—did not address Art. 7 in its commentary on the recast proposal for the Reception Directive: UNHCR Comments on the European Commission's amended recast proposal for a Directive of the European Parliament and the Council laying down standards for the reception of asylum-seekers (COM (2011) 320 final, 1 June 2011), July 2012. ECRE did, and suggested deleting Art. 7, though not based on its incompatibility with Art. 26, which is not even mentioned, but on account of the fact that the restrictions comprised in Art. 7 have hindered asylum seekers' access to other entitlements laid down in the Directive such as the right to employment or education. ECRE, Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Reception Conditions Directive, April 2009.

[55] *Cf. supra*, fn. 52.

[56] ECJ, Joined Cases C-443/14 and C-444/14, *Warendorf v. Ibrahim Alo* and *Amira Osso v. Region Hannover*, para. 35.

[57] *Ibid.*, para. 40.

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.' The first question is, what does 'lawfully within the territory' mean?[58] The Covenant does not specify this, but the Human Rights Committee explained that an alien who entered the State illegally, but whose status has been regularized, must be considered to be lawfully within the territory for the purposes of Art. 12.[59] It would seem, therefore, that the condition of 'lawful presence' in both Art. 26 and Art. 12, para. 1 is the same.[60] The difference between both provisions appears to be the restrictions they (do not) allow.[61]

34 Article 12, para. 3 provides that the right to freedom of movement may not be subject to any restrictions except those which are provided by law; are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. The Human Rights Committee indicated that differences in treatment between aliens and nationals or between different categories of aliens need to be justified in terms of Art. 12, para. 3.[62] This implies, despite the prohibition of discrimination in Art. 2, para. 1,[63] that restrictions may (only) target refugees. That, in turn, would conflict with Art. 26 which prohibits refugee-specific limitations.

35 There are several regional human rights instruments that comprise the right to freedom of movement. The 1981 African Charter on Human and Peoples' Rights (also: Banjul Charter) provides in Art. 12, para. 1 that every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law. In its General Comment on Art. 12, para. 1, the African Commission on Human and Peoples' Rights clearly states that 'every individual' implies that 'a rights holder under this provision is not conditional on being legally within a state'.[64] The Commission adds, 'As such, "every individual" includes those who are legally and irregularly in the state including nationals, permanent residents, internally displaced persons, asylum seekers, refugees … '.[65] The Commission contrasts this with Art. 12, para. 1 CCPR that does require lawful presence.[66]

36 However, when focusing on the right to move freely laid down in Art. 12, para. 1,[67] the Commission observes that '[n]on-nationals, unlawfully in the territory of a state, whose

[58] Art. 26 is predicated on refugees 'lawfully' in the territory of the Contracting State, Art. 12, para. 1 CCPR also refers to a person 'lawfully' within the territory of a State. The French texts are not identical, 'se trouvent régulièrement sur son territoire' in Art. 26, and 'se trouve légalement sur le territoire' in Art. 12, para. 1, see Schabas, *U.N. Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd edn., 2019), p. 305.

[59] CCPR, General Comment No. 27: Freedom of Movement (Art. 12), UN Doc. CCPR/C/21/Rev.1/Add.9 (1999), para. 4. See also *infra,* MN 26–27 and MN 43–48.

[60] See Zieck, 'Refugees and the Right to Freedom of Movement: From Flight to Return', *MichJIL* 39 (2018), p. 82.

[61] See also *infra*, MN 55–57.

[62] *Ibid*.

[63] CCPR, General Comment No. 18: Non-discrimination (1989), paras. 6–7; *cf.* CCPR, General Comment No. 15: The Position of Aliens Under the Covenant (1986), para. 2.

[64] African Commission on Human Rights and Peoples' Rights, General Comment No. 5: The Right to Freedom of Movement and Residence (Art. 12 (1)), 10 November 2019, para. 8.

[65] *Ibid*.

[66] *Ibid.*; *supra*, fn. 7, p. 18.

[67] 'Freedom to choose residence encompasses the prerogative of individuals to freely choose and change their place of dwelling within a state. It does not matter whether the place is a temporary residence or a place of permanent residence, or whether the person owns such a place, rents it or belongs to it. Mandatory residence must not be imposed upon anyone, unless prescribed by the law', African Commission on Human Rights and Peoples'

status become regularized either by becoming a refugee, permanent resident, holder of a temporary residence permit or any other equivalent document are entitled to move freely in the state',[68] which seems to detract from the definition of the rights-holder of Art. 12, para. 1. So does another observation regarding 'specific categories' that include asylum seekers and refugees amongst others. Whilst asylum seekers are accorded the right to move freely, restrictions on their movement must not be indefinite, moreover they must be subject to regular review.[69] With respect to refugees, the Commission indicates that States must ensure efficient and quick processing of documentation to allow them freedom of movement and residence within their borders.[70] In short, the General Comment is ambiguous, and despite the fact that the freedom of movement and residence accrues to every individual, it would seem refugees nonetheless need to regularize their presence in order to benefit from it.

37 Article 12 of the Charter does not refer to limitations with respect to freedom of internal movement and residence.[71] Freedom of movement is only conditioned by law-abidance. It is not clear what this condition consists of, but at any rate, it may not be interpreted in a way that conflicts with international human rights law.[72] It is probably an oblique reference to the possibility of limitations. They are considered to be permissible by the African Commission when they serve a legitimate aim, are proportionate with, and absolutely necessary for the advantages that are to be obtained.[73] They should, moreover, be in accordance with international law standards including human rights in the regulation of the right to freedom of movement.[74] It is not clear whether that extends to the prohibition of restrictions that only target refugees in Art. 26 of the 1951 Convention: since the Commission itself refers to Art. 26 in its Comment, and also indicates that restrictions must not be exercised indiscriminately or targeted specifically at stigmatizing a particular group,[75] arguably it does.

38 Whereas the 1948 American Declaration on the Rights and Duties of Man confines freedom of movement to nationals,[76] the 1969 American Convention on Human Rights provides in Art. 22, para. 1 that every person lawfully in the territory of a State party shall have the right to move about and to reside in it subject to the provisions of the law. As to aliens, once admitted to a State, they are 'lawfully' in the country and enjoy freedom of movement on a par

Rights, General Comment No. 5: The Right to Freedom of Movement and Residence (Art. 12 (1)), 10 November 2019, para. 11.

[68] *Ibid.*, para. 9, in the next sentence the Commission emphasizes that it is crucial that States afford the same treatment to everyone in its territory, including asylum seekers.

[69] *Ibid.*, para. 48.

[70] *Ibid.*, para. 49.

[71] Art. 12, para. 2 comprises limitations pertaining to the right to leave one's country. However, Art. 27, para. 2 ('The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest') may serve as the legal basis for limitations of the right of freedom of movement and residence, and at any rate sets limits to such restrictions in that they are only allowed for the purposes set out in this provision, *ibid*., para. 15.

[72] *Ibid.*, para. 13.

[73] *Ibid.*, para. 14.

[74] *Ibid.*, paras. 27, 32, 60.

[75] *Ibid.*, paras. 9, 15, 49.

[76] *Cf.* Art. VIII.

with nationals.[77] To the extent that the requisite admission is more demanding than simply regularizing one's presence, this condition contravenes Art. 26 of the 1951 Convention.

39 The freedom of movement and residence in Art. 22, para. 1 is not absolute. Art. 22, para. 3 provides that restrictions are allowed but only pursuant to a law, and to the extent indispensable in a democratic society in order to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others. Article 22, para. 4 provides that freedom of movement may also be restricted by law in designated zones for reasons of public interest. However, such a restriction should satisfy conditions of legality, necessity, proportionality, and not nullify the right concerned.[78]

40 Turning to Europe,[79] Art. 2, Protocol 4 (Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and in the First Protocol Thereto) to the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms provides 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. So the key question is, once again, what 'lawful presence' means.[80] Apparently, its meaning is not clear and is, in addition, wholly left to the discretion of States.[81] The *Omwenyeke* case[82] illustrates this discretion. The case concerned a Nigerian asylum seeker who, pending the decision on his asylum request, had been issued a temporary residence permit that was territorially restricted to a particular city (in accordance with German domestic law—the Asylum Procedure Act). Consequently, he was only lawfully present in the assigned city, but not outside of its boundaries, so not lawfully in Germany (at large), and hence not entitled to freedom of movement in Germany.[83] The ECtHR considered this restriction to be compatible with Art. 2 of Protocol 4.[84] It is clearly not compatible with Art. 26.

41 Article 2 contains two sets of limitations. First, Art. 2, para. 3 provides that the rights in Art. 2, para. 1 are subject to restrictions provided they are in accordance with law, are necessary in a democratic society in the interests of national security or public safety, for the

[77] Uprimny Yepes, Sánchez Duque, 'Articulo 22. Derecho de Circulación y de Residencia', in *Convención Americana sobre Derechos comentada* (Steiner/Uribe, eds., 2014), p. 535.

[78] *Ibid.*, p. 538 (an example of such designated zones are places of ecological interest).

[79] The 2000 Charter of Fundamental Rights of the European Union confines the right to freedom of movement and of residence to citizens of the Union (Art. 45), and is therefore not relevant in the present context.

[80] The word 'legally' in the draft text was changed to 'lawfully' following (then draft) Art. 12 CCPR, Explanatory Report to Protocol No. 4, para. 7; a proposal to insert 'residing' (it would then become: lawfully residing in) with a view to preventing an alien lawfully within the territory of a State from invoking Art. 2, para. 1 as a provision conferring on him or her the right to remain permanently in that State was not accepted, *ibid*., para. 8; Gerards, 'Freedom of Movement (Art. 2, Prot. 4)', in *Theory and Practice of the European Convention on Human Rights* (van Dijk/van Hoof/van Rijn/Zwaak, eds., 5th edn., 2018), pp. 933–944, observes regarding the condition of 'lawful presence' that Art. 2, para. 1 'does not prevent the States Parties from setting conditions for the entry or stay of foreigners', p. 935.

[81] Hidalgo, 'Liberty of Movement within the Territory of a State (Article 2 of Additional Protocol No. 4 ECHR)', in *Europe of Rights: A Compendium on the European Convention of Human Rights* (García Roca/Santolaya Machetti, eds., 2012), p. 613.

[82] ECtHR, *Sunday Omwenyeke v. Germany*, Appl. No. 44294/04, 20 November 2007.

[83] For the perspective of the refugee concerned, see his testimony in ECRE, Setting Limits, Research paper on the effects of limits on freedom of movement of asylum seekers within the borders of the European Union Member States, January 2002, pp. 7–9.

[84] ECtHR, *Sunday Omwenyeke v. Germany*, *supra*, fn. 82, pp. 6–7.

maintenance of *ordre public*, for the prevention of crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.[85] In addition, the rights given in Art. 2, para. 1—comparable to Art. 22, para. 4 American Convention—'may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society'.[86] The latter restriction was inserted with a view to enabling restrictions that would fall outside the scope of '*ordre public*' in Art. 2, para. 3 such as restrictions on the ground of economic welfare.[87]

42 The possibility of derogation has not yet been addressed: the right to freedom of movement in human rights treaties is subject to derogation in times of a public emergency that threatens the life of the nation.[88] In the absence of a substantive bar against restrictions in Art. 26, any measure that (lawfully) restricts internal freedom of movement, including in times that justify derogating from the right concerned, can be considered to be lawful under Art. 26 provided the measure(s) taken are not refugee-specific. In short, Art. 26 may ward off any measure that does not treat refugees and aliens alike, but in the absence of any other delimitation, in principle virtually any restrictive measure short of denying freedom of movement altogether could be taken.[89] In that sense, the limits on limitation and derogation in human rights treaties reinforce the rights given in Art. 26.

F. Analysis

I. '… lawfully in its territory …'

43 Article 26 is predicated on lawful presence: it applies to refugees lawfully present in the country, as are the right to self-employment (Art. 18),[90] and to some extent protection against expulsion (Art. 32).[91]

44 The 1951 Convention distinguishes between various modes of attachment to the country of refuge: being subject to its jurisdiction, physical presence, lawful presence, lawful stay, and durable residence. Each right in the Convention is connected to a particular mode of attachment and, along with the passage of time and corresponding change in mode of attachment, the refugee acquires more rights: the 1951 Convention lays down an incremental structure of entitlement.[92] This implies that each mode of attachment has a distinct meaning. Two questions should be addressed: what did the drafters mean by lawful presence, and the

[85] The Court has tended to give a liberal interpretation to these terms, Schabas, *The European Convention on Human Rights: A Commentary* (2015), p. 1063.
[86] Art. 2, para. 4.
[87] Explanatory Report to Protocol No. 4, paras. 15, 18. Unlike the Explanatory Report, Gerards refers to economic welfare and other social objectives/social welfare, and by way of example refers to the possibility of restrictions to stimulate an even distribution of certain groups, *supra*, fn. 80, p. 941.
[88] See Art. 4 CCPR; Art. 27 American Convention on Human Rights; Art. 6, Protocol 4 to the European Convention *jo.* Art. 15 European Convention. The African Charter on Human and Peoples' Rights does not contain a derogation clause.
[89] This paragraph draws on Zieck, *MichJIL* 39 (2018), pp. 86–87; see also *infra*, MN 55–57.
[90] *Cf.* Edwards, Art. 18 MN 12–21.
[91] *Cf.* Davy/Gil-Bazo, Art. 32 MN 52–59.
[92] Hathaway, *Rights*, pp. 176–178.

related question regarding the extent to which lawful presence is defined or governed by domestic law.

45 The drafters took 'lawful presence' as a very wide term.[93] For instance, lawful presence was considered to comprise the situation where a refugee has applied for a residence permit and has the receipt for that application,[94] and where he is admitted to a State's territory, *i.e.* authorized to be there, even if for a limited time,[95] and the period of time between irregular presence and the recognition or denial of refugee status,[96] including appeals and reviews.[97]

46 There was nonetheless quite some debate about what lawful presence actually means, also in view of the next, more demanding, level of lawful stay. In order to understand both notions, recourse was taken to domestic law—or rather Roman and common law—and its legal implications with a view to ensuring that the relevant notions would not have a particular domestic connotation and meaning. In the words of the chair, the point was to arrive at a meaning that would be neither Anglo-American nor French law but international law in two languages.[98] Naturally, the debate was not confined to Art. 26 but extended to the use of the pertinent designation in the entire Convention (six articles at the time).

47 The need to do so came to the fore when it appeared there was a discrepancy regarding the meaning of lawful presence and lawful stay between the English and French versions of the Convention text. The discrepancy was noted with respect to draft Art. 10 regarding the right of association: the reference to 'refugees lawfully in their territory' was not identical to the French reference to 'tout refugié qui réside regulièrement sur leur territoire'.[99] The US delegate understood the phrase 'lawfully in their territory' to apply to refugees who were not legally resident,[100] whereupon the chairman indicated the French text must be changed if there was any danger that it might appear to have a narrower application than the English.[101] The US delegate explained that English-speaking representatives understood 'refugees lawfully in their territory' to mean anyone lawfully in their territory, whether legally resident or not: no change would be needed if the corresponding French version was understood in the same way.[102] The UK delegate suggested using the words 'se trouvant', but those are not part of French legal terminology hence had no very precise meaning in law and,[103]

[93] UN Doc. E/AC.32/SR.42 (1950) (France) p. 9 ('a very wide term applicable to any refugee, whatever his origin or situation').

[94] UN Doc. E/AC.32/SR.15 (1950), para. 109 (France).

[95] UN Docs. E/AC.32/SR.25 (1950), paras. 16 (Brazil: 'refugees in transit through a territory') and 17 (US: 'brief sojourn'); E/AC.32/SR.41 (1950), p. 10 (US: 'even for a few hours'); E/AC/32/SR.42 (1950), p. 13 (US: 'refugees merely passing through a territory'). Weis, *The Refugee Convention, 1951* (1995) summarizes the meaning of lawful presence as follows in his commentary: 'Thus, physical presence, even a temporary stay or visit are sufficient, in distinction to lawfully staying' (with respect to Art. 18).

[96] UN Doc. E/AC.32/SR.15 (1950), para. 68 (France); Hathaway, *Rights*, p. 198.

[97] Hathaway, *Rights,* pp. 198, 208 ('lawful presence is an intermediate category which occupies the ground between illegal presence on the one hand, and a right to stay on the other'); *cf.* Robinson, *Commentary*, p. 117: 'the mere fact of lawfully being in the territory, even without any intention of permanence, must suffice'.

[98] UN Doc. E/AC.32/SR.42 (1950), p. 15.

[99] UN Doc. E/AC.32/SR.41 (1950), p. 7 (representative of the IRO).

[100] *Ibid*.

[101] *Ibid*., p. 8.

[102] *Ibid*.

[103] UN Doc. E/AC.32/SR.42 (1950), p. 14. The French delegate explained that 'se trouver' had been used in Art. 26, *i.e.* it referred to a procedure which could not be refused to anyone, whatever their status or the legality of their presence in a given territory; that was why it had been used in connection with identity papers, which were not a legal document, *ibid*.

moreover, implied an element of fortuitousness: the French delegate therefore preferred to retain the words 'résidant regulièrement' which he considered to be an accurate translation of the English words 'lawfully in their territory'.[104] The US delegate explained that the expression 'lawfully in their territory' included persons entering the territory even for a few hours, provided they had been duly authorized to enter, and therefore favoured use of the words as 'se trouvant'.[105] The debate continued and the chair was adamant there should be no ambiguity as the Convention would be ratified by many States.[106] The Secretariat concurred with the US delegate: 'résidant' implied permanence.[107] The US delegate insisted the two versions be harmonized, and wished the Convention to cover all refugees for however short they were lawfully in a territory. Accordingly he preferred the English version to be adopted.[108] Asked by the French delegate to explain the precise difference of substance, in law and in practice, between the French concept 'résidant régulièrement', and the English concept 'lawfully in their territory', the US delegate explained that the French wording would not cover persons who were not legally resident in the English sense such as a person staying in the United States on a visitor's visa.[109] The need to transcend the differences in interpretation—and substance—of Anglo-Saxon and Roman law in favour of international law was clear in an instrument which should be as universal as possible and comprehensible to everyone.[110] Subsequently, the French word 'résidant' was deleted from a number of articles, including Art. 21,[111] and the current French version of the text was suggested by the Belgium delegate.[112]

On the basis of those debates, the inference can be made that the drafters attempted to give **48**
the relevant terms—lawfully present, lawful stay—an autonomous (universal) meaning in the Convention in the sense that it should transcend domestic legal particularities and implications by clearly delineating what they meant and were not meant to intend. That, in turn, means that the implementation of the Convention, and hence domestic law, should clearly follow the meaning given to the relevant terms in the Convention. Put differently, defining lawful presence in domestic law is clearly constrained by the 1951 Convention: the domestic definition may not qualify a presence as unlawful when the Convention deems it lawful, nor may it conflate modes of stay (in particular lawful presence and lawful stay)[113] to the detriment of the structure of entitlement laid down in the Convention. In other words, the range within which domestic law can operate in this respect is very small, if it exists at all.[114]

[104] UN Doc. E/AC.32/SR.41 (1950), pp. 10–11.
[105] *Ibid.*, p. 10.
[106] *Ibid.*
[107] *Ibid.*, p. 11.
[108] UN Doc. E/AC.32/SR.42 (1950), pp. 14–15.
[109] *Ibid.*, pp. 14–15.
[110] *Ibid.*, p. 15.
[111] *Ibid.*, p. 21.
[112] See *supra*, MN 18.
[113] Hathaway, *Rights*, pp. 205–206.
[114] *Cf.* the German Federal Administrative Court, which stated that it is not national law that gives the term 'lawfully' in Art. 26 its content, *Bundesverwaltungsgericht* (Federal Administrative Court, Germany), 1 C 17/07, 15 January 2008, BVerwGE 130, 148.

II. '… the right to choose their place of residence and to move freely within its territory …'

49 Lawfully present refugees have the right to choose their place of residence and to move freely within the territory of the State concerned.[115] Quite remarkably, the drafters did not discuss the substantive right of Art. 26, presumably since the primary intent of Art. 26 was to assimilate refugees to aliens in general, and this 'was considered sufficient because free residence and movement are ordinarily granted all aliens'.[116] Whilst the right itself was apparently taken to be self-evident, its limitations were not.

III. '… subject to any regulations applicable to aliens generally in the same circumstances …'

50 The freedom of movement and residence provided in Art. 26 is not absolute. Although the first drafts of Art. 26 delimited this right with a general reference to applicable domestic law ('to move about freely … in the territory … in accordance with the laws and internal regulations applying therein'),[117] the question was raised whether the prohibition of access to frontier or strategic zones applicable to aliens also extended to refugees.[118] With a view to allowing this possibility, the phrase 'subject to any general provision applicable to aliens in general' was inserted.[119]

51 The question that was raised by Venezulea is worth mentioning since it reflects the resettlement practice of the International Refugee Organization in the wake of the Second World War:[120] what if refugees admitted as agricultural workers were to leave the farms to which they had been assigned and engage in trade in the towns, refusing to return to agricultural work?[121] France observed that this was a question that could be answered by the application of domestic regulations, 'which certainly provided penalties for the case of a foreigner who left the region in which he was permitted to reside or changed his occupation without authorization'.[122]

52 Denmark added other examples of limitations of the right to circulate freely: it would, for instance, have hesitated to admit German refugees in 1938 if it had been obliged to allow them to settle in areas already inhabited by minorities, and secondly, Denmark had admitted young German Jews on condition that, following the completion of their agricultural

[115] The right extends, and is confined, to that territory: the right to leave it, and re-enter it is addressed in Art. 28 and the Schedule.

[116] Robinson, *Commentary*, p. 133. UN Doc. E/AC.32/SR.15 (1950), para. 82 (France: 'it would be sufficient to apply to refugees the rules in force for aliens in general').

[117] See *supra*, MN 4.

[118] UN Doc. E/AC.32/SR.15 (1950), para. 76 (Turkey).

[119] *Ibid.*, para. 79 (United States), see also *supra*, MN 11, 13.

[120] A form of (labour) migration; in the present-day regime, resettlement of refugees proceeds from protection problems in the country of refuge and aims to provide the requisite protection of the refugees, as refugees, in third States.

[121] UN Doc. E/AC.32/SR.15 (1950), para. 80; the delegate of Brazil explained that refugees authorized to enter Brazil as farm workers were required to remain so for a certain number of years, but the same applied to aliens, *ibid.*, para. 110.

[122] UN Doc. E/AC.32/SR.15 (1950), para. 83.

training, they would leave the country.[123] The United States suggested thereupon to amend the text of Art. 26 with a view to distinguishing between those refugees who had been admitted under certain conditions and others admitted without such conditions: only the latter would enjoy freedom of movement and residence.[124] France suggested deleting the former part, and to focus only on those refugees who, in the final version of the text, were lawfully present in the country subject to regulations governing foreigners in general,[125] adding that it was advisable to indicate clearly that only those restrictions and limitations which applied to aliens in general should be imposed upon refugees lawfully present in the country.[126]

Nonetheless, the chairman wondered if the French text should not be supplemented with **53**
a reference to the conditions under which those refugees were admitted.[127] With such an addition, the UK delegate observed, the text would provide few safeguards for the refugees.[128] France concurred: 'If new restrictions were introduced into a provision which was intended to grant to refugees simple equality of treatment with aliens, an equality which, it seemed to him, should be taken for granted, it would look as though States were being invited to treat the refugees with less consideration than was accorded to aliens'.[129] The French text was thereupon adopted.[130] The words 'governing aliens generally' were subsequently replaced by 'applicable generally to aliens in the same circumstances'.[131]

Article 26 prescribes that refugees have to be treated in the same way as other foreigners. **54**
The words 'in the same circumstances' were introduced to clarify this assimilation because the treatment of foreigners need not necessarily be uniform.[132] Article 6 explains the term 'in the same circumstances' for the purpose of the Convention. The term 'implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling'.[133] An explanation that entails with respect to Art. 26 that the constraints on freedom of movement which apply to aliens generally 'requires the non-mechanistic application to refugees of even limits routinely applied to other non-citizens'.[134]

G. Evaluation

Refugees and other aliens are to be treated substantively on a par with respect to freedom **55**
of movement and choice of residence. The freedom of movement and choice of residence

[123] *Ibid.*, paras. 86–88.
[124] *Ibid.*, para. 91: for the text of the suggested text, see *supra*, MN 10.
[125] For the text, see *supra*, MN 11.
[126] UN Doc. E/AC.32/SR.15 (1950), para. 93.
[127] *Ibid.*, para. 111.
[128] *Ibid.*, para. 113.
[129] *Ibid.*, para. 114.
[130] *Ibid.*, para. 119.
[131] UN Doc. E/AC.32/SR.25 (1950), para. 30 (United States).
[132] Robinson, *Commentary*, p. 80.
[133] Those words ('in the same circumstances') appear in Arts. 13, 18, 19, 21, 22, and 26.
[134] Hathaway, *Rights*, p. 879.

of refugees may, however, be restricted, provided the restrictions apply to all non-citizens. However, beyond non-discrimination in the sense indicated, Art. 26 does not provide limits to the restrictions themselves, and in that sense allows inroads on the freedoms involved for all aliens. The point can be illustrated by means of a question that was raised by the Turkish delegate in the first session of the Ad Hoc Committee: 'what the position would be in the case of a State which, having adopted a very liberal attitude with regard to aliens, who were subject to no restrictions of time or place, received refugees and wished in some way to restrict the conditions of residence of those refugees. Such a State might be prompted to modify its legislation concerning aliens, which would be a highly regrettable measure.'[135]

56 The 1951 Convention itself does not contain any provision that could prevent this possibility. Fortunately, the CCPR provides such limits in Art. 12, para. 3: restrictions must be provided by law, and be necessary to protect national security, public order (*ordre public*), public health or morals, or the rights and freedoms of others, and in addition be consistent with the other rights listed in the CCPR. The Human Rights Committee indicated that the freedom of movement of lawfully present aliens may only be restricted in accordance with Art. 12, para. 3:[136] differences in treatment in this regard between aliens and nationals, or between different categories of aliens, need to be justified under Art. 12, para. 3.[137] However, such difference in treatment would be incompatible with Art. 26. In the absence of a substantive bar against restrictions of the rights concerned in Art. 26, any measure that restricts the (same) rights granted in Art. 12, para. 1 CCPR that can be considered to be lawful in the sense of Art. 12, para. 3 would also be lawful under Art. 26 unless the measure taken is refugee-specific in which case the measure could be deemed lawful under the CCPR but not under the 1951 Convention.[138] The same applies with respect to restrictions that are considered lawful on the basis of Art. 4, para. 2 of Protocol 4 ECHR but are not compatible with Art. 26 on account of their being refugee-specific.[139]

57 A similar situation, *i.e.* that a particular practice is simultaneously lawful and unlawful depending on the instrument that is used as the legal yardstick, may occur when detention under the ECHR is evaluated solely under the terms of the ECHR without taking Art. 26 into consideration:[140] the ECtHR is bound to apply the ECHR (and its jurisdiction is confined to that instrument), and that means that States themselves have to observe Art. 26. Considering the 1951 Convention was drafted to ensure refugee-specific

[135] UN Doc. E/AC.32/SR.15 (1950), para. 99.

[136] See *supra*, MN 34.

[137] CCPR, General Comment No. 27: Freedom of Movement, UN Doc. HRI/GEN/1/Rev.7 (2004), para. 18 ('Thus, it would be a clear violation of the Covenant if the rights enshrined in article 12, paragraphs 1 and 2, were restricted by making distinctions of any kind, such as on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.').

[138] This paragraph has been taken from Zieck, *MichJIL* 39 (2018), pp. 86–87.

[139] See *supra*, MN 40 on the *Omwenyeke* case.

[140] A case in point is ECtHR, *Saadi v. The United Kingdom,* Appl. No. 13229/03, 29 January 2008. Saadi applied for asylum in the United Kingdom, was temporarily admitted, and subsequently detained. The ECtHR did not consider the detention a violation of Art. 5, para. 1 ECHR. Since Saadi had already been temporarily admitted to the country, *i.e.* his status had been regularized and he was considered to be lawfully present in the country (see *ibid.*, para. 21), his status had been regularized, and he should have benefited from Art. 26 of the 1951 Convention, *cf.* UNHCR intervention before the ECtHR in the case of *Saadi v. The United Kingdom,* Appl. No. 13229/03, 30 March 2007, para. 27.

protection and to assure refugees the widest possible exercise of fundamental rights and freedoms,[141] States should not erase that on the basis and in favour of general instruments.[142]

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[141] Preamble to the 1951 Convention.

[142] But see, for an alternative, the case of *Saadi v. The United Kingdom*, *supra*, fn. 140, para. 55, where UNHCR 'reminded the Court that, as with the Refugee Convention, the European Convention on Human Rights had to be interpreted in harmony with other rules of international law of which it formed part, particularly where such rules were found in human rights treaties which State Parties to the Convention had ratified and were therefore willing to accept … It further had to be interpreted in a manner which ensured that rights were given a broad construction and that limitations were narrowly construed, in a manner which gave practical and effective protection to human rights … '.

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