



## Expert Opinion:

**Legality of sanctions on the noise protest by asylum seekers in a reception centre**

March 2024

Migration Law Clinic
www.migrationlawclinic.org

**Migration Law Clinic and Migration Law Expertise Centre**

This is an expert opinion by the Migration Law Clinic. The Migration Law Clinic of the Vrije Universiteit Amsterdam provides legal advice to lawyers, Non-Governmental Organisations, and other organisations on complex legal questions of European migration law. Top students in the last years of their study at the Law Faculty of the Vrije Universiteit Amsterdam carry out research and write legal advice at the Clinic. They are closely supervised by the staff of the Migration Law Section of this Faculty.

The Migration Law Clinic is the responsibility of the Foundation (Stichting) Migration Law Expertise Centre (No. 59,652,969 Chamber of Commerce). For more information, see: www.migrationlawclinic.org.

The following persons contributed to this expert opinion: E.B. Lawton, Y. Eddarif, J.S. Emmens, A.L. Blom (students), prof. mr. L. Slingenberg and dr. K. Swider (supervisors), mr. dr. Y. Arbaoui and mr. F.S. Fahad (clinic coordinators).

# Table of Contents

# Chapter 1. Introduction

In March 2023, approximately thirty asylum seekers protested against their living conditions in a reception centre in the Netherlands. They used pots and spoons to generate noise during their protest inside the reception centre. A sanction was imposed on the protesting asylum seekers because they refused to stop generating noise. This Expert Opinion addresses the legality of the imposed sanction by answering two main questions:

1. Has the imposed sanction violated the asylum seekers human right to protest? (Part I)

2. Was the imposed sanction in accordance with the EU Reception Conditions Directive? (Part II)

This remained of the introductory chapter is structured as follows. Firstly, the right to protest is briefly introduced in section 1.1. Section 1.2 outlines the reception conditions for asylum seekers in the Netherlands. Section 1.3 summarises the facts and national proceedings. In section 1.4 we introduce the legal framework relevant for answering our two main questions. Section 1.5 outlines the structure of this Expert Opinion.

## 1.1. Right to protest[1]

Organising and participating in a protest is encompassed within the right to freedom of peaceful assembly.[2] This right is a foundational pillar in democratic societies, akin to the right to freedom of expression.[3] This fundamental right is to be widely interpreted.[4] It has been acknowledged throughout history, in its many forms. One example is the tradition of demonstrating with noise, and specifically, the act of protesting with pots and pans. This form of protest has a rich history as a legitimate form of peaceful assembly. It originated in the 1830s during the July Revolution in France,[5] and is now used in countries across the world. It is known as '*lawaai demonstraties'* in the Netherlands[6] and *'cacerolazo'* in Latin America[7]. The historical roots of this form of protest highlight its enduring relevance and effectiveness in mobilising people against different forms of oppression and dissatisfaction.

## 1.2. Reception conditions for asylum seekers in the Netherlands

The Netherlands is bound by the EU Reception Conditions Directive[8], which lays down European-wide standards for the reception of asylum seekers. Article 18 of this Directive contains the modalities for

[1] In this Opinion, the terms "the right to protest", "the right to demonstrate" and "right to peaceful assembly" are used interchangeably.
[2] ECHR 8440/78 case of Christians against racism and fascism v. United Kingdom, para 48.
[3] Guide on Article 11 of the European Convention on Human Rights, Updated on August 31, 2022, www.echr.coe.int/documents/d/echr/guide_art_11_eng.
[4] ECtHR [GC] 15 October 2015 Kudrevičius and Others v. Lithuania, Appl no 37553/05.
[5] Helen Sullivan, 'The Long History of Protesting with Pots and Pans' *The Guardian* (25 April 2023) www.theguardian.com/world/2023/apr/21/the-long-history-of-protesting-with-pots-and-pans accessed 14 November 2023.
[6] Tom van Midden, 'Lawaaidemonstratie tegen hogere energierekening: "Mensen komen zwaar in de problemen' *NHnieuws* (11 January 2022) www.nhnieuws.nl/nieuws/297590/lawaaidemonstratie-tegen-hogere-energierekening-mensen-komen-zwaar-in-de-problemen accessed 14 November 2023.
[7] Helen Sullivan, 'The Long History of Protesting with Pots and Pans' *The Guardian* (April 25, 2023) www.theguardian.com/world/2023/apr/21/the-long-history-of-protesting-with-pots-and-pans accessed 13 November 2023, and Nicole Narea, "George Floyd Protests: Why Protesters Are Banging Pots and Pans Outside Their Windows" *Vox* (June 5, 2020) www.vox.com/identities/2020/6/5/21279690/protest-george-floyd-cacerolazo-bang-pots accessed 14 November 2023.
[8] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180, 29.6.2013, p 96–116.

reception conditions, focussing on what kind of housing should be provided, and what protections are guaranteed in this housing. Under Article 14(4) of the 'Regulation of provisions for asylum seekers and other categories of foreigners' (*Regeling verstrekkingen asielzoekers en andere categorieën vreemdelingen*; hereafter - Rva) an asylum seeker is provided with an allowance (€12.95 per week[9]) to cover clothing and other personal expenses. This allowance ought to cover all expenses other than food, including, but not limited to, all personal hygiene products, cleaning products, clothing and any travel that is not accounted for under the travel rules of the Central Agency for the Reception of Asylum Seekers (*Centraal Orgaan opvang asielzoekers;* hereafter - COA). The allowance is thereby crucial for the asylum seekers' ability to exert, however limited in this case, agency over their lives.

Article 18(9)(b) of the Reception Directive lays out conditions for temporarily providing different reception conditions when 'housing capacities normally available are temporarily exhausted'. Due to the 'reception crisis' in the Netherlands, where there was not enough housing for asylum seekers, there was a move to utilising temporary and emergency housing. In October 2022 the District Court of The Hague ruled that the reception conditions did not meet the standards of the Reception Directive and that the 'reception crisis' was caused by national policies. The court ruled that immediate changes had to be made to the reception conditions, and that the undesirable situation in the reception centres was due to policies implemented by the government.[10] This decision was upheld by the Court of Appeal in December 2022.[11] This court ruled that neither the state nor the COA 'can guarantee the physical and mental health of the asylum seekers staying there' and pointed to issues with 'lack of privacy in many (crisis) emergency reception locations, noise nuisance and inadequate access to necessary health care'.[12] Due to the long asylum procedures and the lack of housing, emergency shelters that are only meant to be short term solutions are used to house people for many months.[13] The protesting asylum seekers had lived in this emergency housing for extended periods of time.

### 1.3. Facts and national proceedings

On 28 March 2023, approximately thirty asylum seekers protested in the reception area of the emergency shelter location in The Hague. The asylum seekers first asked to speak to the manager to complain about the conditions, but this request was denied. Following this, there was a spontaneous protest. On 3 April 2023, the protesting asylum seekers received a letter from the COA stating as follows: the excessive noise-making and the refusal to follow requests to stop the noise is a breach of the COA House Rules; because of this, the weekly allowance (€12.95) will be withdrawn during a period of four weeks; this sanction is based on the third measure of the 'Regulations regarding withholding of provisions' (*Reglement onthouding verstrekkingen*; hereafter - ROV 3 measure/sanction), and on Article 10 and 19 of the Rva.

On 17 April 2023, three asylum seekers appealed the COA's decision. They argue that the noise of banging pots and pans was used to protest due to their dissatisfaction with their living conditions. In response, the COA states that the protesters caused a 'noise nuisance'; COA's employees repeatedly

[9] It has now been increased to €14.02 to correct for inflation.
[10] Rb Den Haag 6 oktober 2022, ECLI:NL:RBDHA:2022:10210. See also: 'Conditions in Reception Facilities in the Netherlands' (2023) Asylum Information Database, European Council on Refugees and Exiles www.asylumineurope.org/reports/country/netherlands/reception-conditions/housing/conditions-reception-facilities/#_ftnref7 accessed 1 November 2023.
[11] Gerechtshof Den Haag 20 december 2022, ECLI:NL:GHDHA:2022:2429. See also: 'Appeal Asylum Reception – State of the Netherlands and COA Violate the Rights of Asylum Seekers' (*Prakken D'Oliveira Human Rights Lawyers*, 20 December, 2022) www.prakkendoliveira.nl/en/news/2022/appeal-asylum-reception-the-state-and-coa-violate-the-rights-of-asylum-seekers accessed 24 November 2023.
[12] Ibid.
[13] Vluchtelingenwerk 'Gevangen in een vastgelopen asielsysteem: Gevolgen en verhalen uit de praktijk' (November 2019) www.vluchtelingenwerk.nl/sites/default/files/u32926/gevangen_in_een_vastgelopen_asielsysteem.pdf accessed 4 November 2023.

requested the protesters to stop producing noise pollution because it was disturbing other residents of the reception centre; the protest itself was allowed to proceed, but producing noise pollution is not allowed.

On 27 October 2023 one of the three appeals was declared unfounded.[14] The court ruled that the COA has the right to impose a ROV-3 sanction on the noise nuisance pursuant to the Rva. This court acknowledges that there was a demonstration but explains that the request to stop making noise was appropriate as the COA only attached the negative consequences (i.e. sanction) to their behaviour. It also notes that the protesters ignored the repeat call to stop making noise. The court is of the opinion that this means there has been no limitation on the right to protest. The two other appeals were declared unfounded on similar grounds.[15]

On 16 November 2023, the Dutch Council of State declared the higher appeal against the judgment of the district court unfounded.[16] The Council of State did not provide reasons for the decision they made; a power that is provided to them in the context of migration law only.[17]

### 1.4. Legal framework

Regarding our first main question, this Expert Opinion focuses on the European Convention on Human Rights (ECHR) and the case law from the European Court of Human Rights (ECtHR). The Opinion includes insights from Dutch law and the General Comment No. 37[18] and Views of the Human Rights Committee (HRC) on the right to protest as included in the International Covenant on Civil and Political Rights (ICCPR). These three legal frameworks (ECHR, ICCPR and Dutch law) are introduced below. As to our second main question, this Opinion relies on the text of the EU Reception Conditions Directive and case law of the Court of Justice of the EU (CJEU). This EU framework is outlined in Part II: Chapter 6.

#### *1.4.1. ECHR*

This Opinion focuses on the right to freedom of assembly and association (Article 11 ECHR), with case law often referring to the associated right of freedom of expression (Article 10 ECHR). Article 11 of the ECHR reads as follows:

> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

The ECtHR considers Article 11 ECHR as *lex specialis* when the freedom of expression takes the form of a protest.[19] The fundamental purpose of this provision is the protection of an individual against arbitrary interference in the exercise of that right. Organising and participating in a demonstration is

[14] Rb Den Haag, zp Groningen 19 July 2023, ECLI:NL:RBDHA:2023:10593.
[15] Rb Den Haag, zp Arnhem 27 oktober 2023, AWB 23/4280 (unpublished) and Rb Den Haag 8 november 2023, AWB 23/4281 (unpublished).
[16] ABRvS 16 November 2023, no. 202305076/1/v1 (unpublished).
[17] Article 91(2) of the Dutch Aliens Act holds: 'if the Administrative Jurisdiction Division of the Council of State is of the opinion that a ground of appeal does not warrant the setting aside of the decision it may confine itself to this opinion when stating the grounds of its judgment'.
[18] HRC, General Comment 37 (2020, CCPR/C/GC/37).
[19] ECtHR 12 June 2014, *Primov and Others v. Russia*, App no. 17391/06 para 91-92.

encompassed within Article 11.[20] The close relationship with Article 10, freedom of expression, means they are typically discussed together, especially in case law.[21] Based on ECtHR rulings, it is clear that Article 11 should not be interpreted restrictively.[22]

### *1.4.2. ICCPR*

Article 21 of the ICCPR covers the right to peaceful assembly, with the related Article 19 laying out the right to hold opinions without interference, including the right to orally impart information. Article 21 reads as follows:

> The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others.

This provision is interpreted by the HRC in General Comment No. 37 which aims to give 'a comprehensive overview on the right of peaceful assembly, outlining the responsibilities of states in ensuring the right as well as providing guidance for protest organizers'.[23] General Comments of the HRC contain significant normative guidance and the competence of the HRC 'to adopt General Comments is now firmly established'.[24] The Views and decisions of monitoring bodies hold significant weight in legal interpretation. Various arguments support the relevance of treaty-monitoring bodies' opinions, including considering them as 'judicial decisions' or as part of 'subsequent practice' under international law.[25] The fact that states voluntarily accept monitoring power by becoming treaty parties is also a crucial factor in giving weight to the interpretations of these bodies.[26] The competence of the HRC is established not only in Article 40 of the ICCPR but also through state practice in relation to these comments, as no state has ever protested against the drafting of these comments.[27]

### *1.4.3. Dutch law*

Article 9 of the Dutch Constitution protects the right to assemble and to demonstrate. This provision reads as follows:

1. The right to assembly and demonstration is recognized, subject to everyone's responsibility according to the law.
2. The law may establish rules to protect health, in the interest of traffic, and to combat or prevent disorder.

The first paragraph of this provision acknowledges the right to gather and demonstrate, while also emphasising everyone's responsibilities under the law. According to the second paragraph, rules may be established to safeguard public health, protect traffic interests, and address or prevent disturbances.[28] The right to assembly and demonstration ensures that individuals have the liberty to assemble, exchange ideas and opinions, participate in demonstration and voice dissent without the

[20] ECtHR 16 July 1980, *Christians against racism and fascism v. United Kingdom*, App no 8440/78 para 48.
[21] NTM/NJCM-bull. 2023/3, 'De reikwijdte van het bijkans heilige demonstratierecht' [The scope of the nearly sacrosanct right to demonstrate], para 2.
[22] ECtHR 28 May 2019, *G. v. Germany*, App no 65210/09 para 256.
[23] HRC, General Comment 37 (2020, CCPR/C/GC/37)
[24] G Ulfstein, 'Law-making by human rights treaty bodies' in R Liivoja and J Petman International Law-Making (London, Routledge, 2013) p 3.
[25] L Slingenberg, '*The Reception of Asylum Seekers Under International Law: Between Sovereignty and Equality'* (Hart Publishing 2014) p 28-29.
[26] ibid.
[27] G Ulfstein, 'Law-making by human rights treaty bodies' in R Liivoja and J Petman International Law-Making (London, Routledge, 2013).
[28] Rb. Arnhem 13 mei 2005 *betoging Kusters,* ECLI:NL:RBARN:2005:AT5504, AB 2005/294, p 2.

need for prior authorisation, even when intending to criticise governmental actions.[29] There is no explicit restriction on the scope of the right to assembly and demonstration in Article 9 of the Constitution. The exact boundaries of this right are decided by courts on an individual basis.[30]

Further, the Public Manifestations Act (*Wet openbare manifestaties*, hereafter - Wom) is relevant as it regulates the exercise of the right to assembly and demonstration, thus implementing Article 9 of the Constitution. This Act establishes how this right can be restricted and interfered with based on listed purpose grounds.[31]

### 1.5. Outline of this Expert Opinion

This Opinion consists of two parts. The first part (chapters 2-5) addresses the question of whether there has been a violation of the asylum seekers' right to protest. In chapter 2, we determine whether the case falls under the scope of the right to protest. In chapter 3, we discuss whether there has been an interference with the right to protest. In chapter 4, we delve into possible justifications for the interference. In chapter 5 we provide the answer of our first main question. In the second part (chapter 6), we answer the question of whether the imposed sanction is in line with the EU Reception Directive. In the concluding chapter, we summarise our Expert Opinion.

[29] G. Leenknegt (2014) 'Commentaar op artikel 9 Grondwet, in: *Tekst & Commentaar Grondwet en Statuut'*, Nederland Rechstaat.
[30] ibid.
[31] ibid.

# Part I: Right to protest

## Chapter 2. Scope of the right to protest: Who, where and what?

This chapter defines the boundaries within which the right to protest operates according to the ECHR, ICCPR and Dutch law. The analysis discusses the 'who, where, and what' parameters of this right. The examination of 'who' focuses on which individuals and groups are entitled to exercise the right to protest. 'Where' delves into whether the right extends to choosing the time, place, and manner of protest, and how any geographical or temporal restrictions may impact this right. Lastly, we look at 'what' constitutes a protest and discuss when a peaceful assembly is no longer peaceful.

### 2.1. Who has the right to peaceful assembly?

#### *2.1.1. ECHR*

In order to understand who has the right to peaceful assembly under the ECHR, we can first turn to Article 1 of the ECHR which reads, *'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'*. Here, the scope clearly relates to anyone who is on the territory of the Netherlands, and within their jurisdiction. Further, Article 11(1) ECHR also begins with *'Everyone has the right to freedom of peaceful assembly and to freedom of association with others (…)'*. The ECHR's understanding of who has the right to protest is thus, everyone under the jurisdiction of the contracting state, regardless of nationality.

#### *2.1.2. ICCPR*

The HRC has the same interpretation of the personal scope of the right to demonstrate in the General Comment No. 37,[32] where it clarifies that 'migrants (documented or undocumented), asylum seekers, refugees and stateless persons' are included in the right of peaceful assembly for everyone. Further, it emphasises that 'this right is of particular importance to marginalised individuals and groups'.[33] Failure to respect and ensure the right of peaceful assembly is 'typically a marker of repression'.[34] It is worth noting that the right to peaceful assembly is seen as necessary for all persons, but a particular effort should be placed on ensuring the equal and effective facilitation and protection of the right to protest for those who are marginalised and may face particular challenges in participating in assemblies.[35] This is relevant in the case of asylum seekers in dire living conditions within reception centres in the Netherlands, who are a marginalised group facing such challenges.

#### *2.1.3. Dutch law*

Based on Article 9 of the Dutch Constitution, everyone has the right to demonstrate[36], as indicated by the formulation of the Article: *'The right to assemble and demonstrate is recognized, subject to everyone's responsibility under the law.'* Furthermore, the original Article on freedom of assembly from the 1798 Constitution referred to 'every citizen', and this changed to 'residents' in the 1848 revision. In 1983 Article 9 of the Dutch Constitution was formulated without a reference to nationality, using the neutral term 'everyone's'.[37] This deliberate change of wording indicates that Article 9 of the Dutch Constitution is intended to apply to everyone, including asylum seekers, under Dutch jurisdiction.

[32] HRC, General Comment 37 (2020, CCPR/C/GC/37) para 5.
[33] ibid para 2.
[34] ibid para 2.
[35] ibid para 25.
[36] B Roorda, '*Mag Je Áltijd Demonstreren Als Je Het Ergens Niet Mee Eens Bent?*' (Rijksuniversiteit Groningen, 7 August 2023).
[37] ibid.

## 2.2. Where can a peaceful assembly take place?

### *2.2.1. ECHR*

In the ECtHR case of *Lashmankin and Others*, the applicants sought to organise multiple assemblies, including commemorating a human rights lawyer and a journalist's killing, protesting a draft law, and advocating for LGBTQ+ rights.[38] Authorities imposed restrictions on the location, time, and manner of these assemblies. The applicants argued that these limitations rendered the events invisible to their intended audience. The Court held that:

> "The organisers' autonomy in determining the assembly's location, time and manner of conduct, such as, for example, whether it is static or moving or whether its message is expressed by way of speeches, slogans, banners or by other ways, are important aspects of freedom of assembly. Thus, the purpose of an assembly is often linked to a certain location and/or time, to allow it to take place within sight and sound of its target object and at a time when the message may have the strongest impact. (…) Accordingly, in cases where the time and place of the assembly are crucial to the participants, an order to change the time or the place may constitute an interference with their freedom of assembly, as does a prohibition on speeches, slogans or banners".[39]

Although in principle the time, place, and manner of demonstrating is up to the participants, this does not automatically allow them to demonstrate in private spaces[40], such as government offices[41] or privately owned malls.[42] As for the scope of private spaces, the ECtHR has considered a number of cases where protests took place on private property under Article 10 and 11 ECHR.

For example, in *Taranenko*,[43] the protest took place at the President's Administration building. The court notes that the Administration's purpose is to receive citizens and address their complaints, making its premises generally open to the public, with identity and security checks. This means it would fall under the scope of Article 10 and Article 11 of the ECHR. However, in this case the protesters failed to follow the 'established admission procedure',[44] but instead 'stormed into the building, pushed one of the guards aside, jumped over furniture and eventually locked themselves in a vacant office'.[45] Considering that the behaviour of the protestors in this case was 'frightening', and their entry into the building 'forceful', the Court found their arrest to be justified.[46] In this case the assembly would have been protected, however, had the protestors followed the established procedure for entering the building.

In *Appleby*, protesters were denied entry to a privately owned mall.[47] The protesters claimed that entry to the mall was an essential part of the demonstration, because it was the most effective way of communicating their ideas to the public.[48] In this case, the court determined that states might have a positive obligation to regulate access to private property to safeguard specific Convention rights.[49] However, the Court ruled that the applicants were not impeded from conveying their political message, as they had the opportunity (and utilised it) to exercise their rights by campaigning in alternative locations.[50] The restriction of access to private property was found not to be an

[38] ECtHR 7 February 2017 *Lashmankin and Others v. Russia,* App nos 57818/09.
[39] Para. 405.
[40] ECtHR 11 October 2018 *Tuskia v. Georgia*, App no 14237/07, para 72, and ECtHR 6 May 2003 *Appleby and Others v. the UK* App no. ECHR 44306/98, para 47.
[41] Roorda B, "Case Note: ECLI:CE:ECHR:2018:1011JUD001423707" (2019) European Human Rights Cases, p 74.
[42] ECtHR 6 May 2003 *Appleby and Others v. the UK* App no 44306/98, para 3, 47.
[43] ECtHR 15 May 2014 *Taranenko v. Russia*, App no 19554/05.
[44] ibid para 79.
[45] ibid para 79.
[46] ibid para 79.
[47] ECtHR 6 May 2003 *Appleby and Others v. the UK* App no 44306/98.
[48] ibid para 33.
[49] ibid para 39.
[50] ibid para 47.

interference in this case because the applicants were not prevented from effectively expressing their views.[51]

In both cases the Court notes the obligation of states to allow freedom of expression and peaceful assembly in private spaces. However, these cases demonstrate reasons for which the state can limit the right, in particular if there is forceful entry, if a protest fails to be peaceful, or there are alternative and effective means to convey the message.

In the case of *Navalnyy*, Aleksey Navalnyy faced a series of arrests in Russia related to his participation in various protests in different locations. On March 5, 2012, he protested in Moscow's Pushkinskaya Square.[52] Subsequent arrests occurred during an overnight walkabout on May 8, an informal meeting on May 9, a solo demonstration on October 27, and during Court proceedings on 24 February 2014. In this case, the Court interprets the scope of the right expansively, with each place Navalnyy chose to protest, including private and public meetings, static and moving protests, and individual or group demonstrations, falling under Article 11 of the ECHR.[53] This judgement shows that where a protest takes place is not limited to what we typically imagine as a protest. This is also reflected in the form of the protest, which is be discussed in the 'what' section below.

### *2.2.2. ICCPR*

General comment No. 37 addresses the extensive spatial scope of the right to protest. It delineates the specific areas where the protection of a protest is acknowledged, as simply, 'wherever they take place: outdoors, indoors and online; in public and private spaces; or a combination thereof'.[54] For example, in *Anatoly Poplavny and Leonid Sudalenko*, the HRC found a violation of Article 21 of the Covenant as municipal authorities refused permission for a picket. Stressing the fundamental nature of the right to peaceful assembly, the Committee outlined that 'organizers of an assembly generally have the right to choose a location within sight and sound of their target audience'.[55]

### *2.2.3. Dutch law*

The right to demonstrate in Article 9 of the Dutch Constitution contains the element of publicity. This element entails that the purpose of a demonstration is to have one's wishes and feelings heard. The case of *Kusters* shows that this element can be diminished by restricting a demonstration to a certain place and time.[56] However, the element of publicity does not mean that a demonstration can only take place in a public place. Expressing one's wishes and feelings can also occur in the event of a demonstration in a place other than a public place, such as in a place accessible to the public and, in exceptional situations, in places not accessible to the public and even in private spheres.[57] The Public Manifestations Act (Wom) has a separate regime for demonstrations in other than public spheres under Article 8 of the Dutch Constitution which protects the freedom of association.[58] Therefore, within the Dutch national legal framework, spreading one's wishes and feelings is possible in places other than public ones.

[51] ibid para 48-52.
[52] ECtHR 15 November 2018 *Navalnyy v. Russia*, App no 29580/1.
[53] ibid para 45.
[54] HRC, General Comment 37 (2020, CCPR/C/GC/37) para 6.
[55] HRC 24 November 2016, *Anatoly Poplavny and Leonid Sudalenko v. Belarus*, no 2139/2012 para 8.6.
[56] Rb. Arnhem 13 mei 2005 *betoging Kusters,* ECLI:NL:RBARN:2005:AT5504, AB 2005/294, para 3.
[57] N Swart & B Roord, 'De reikwijdte van het bijkans heilige demonstratierecht' *Nederlandse Tijdschrift voor de Mensenrechten* (2023) p 8.
[58] ibid.

## 2.3. What is as a peaceful assembly?

### *2.3.1. ECHR*

The ECtHR deliberately decides not to clearly delineate and exhaustively define the concept of assembly in its case law to avoid the risk of a restrictive interpretation.[59] Not only classical forms of expression like meetings, press conferences, demonstrations, and protest marches fall within the scope of the concept of assembly under Article 11 ECHR. In principle, this also applies to more intrusive and/or spontaneous forms such as sit-ins, blockades, and occupations. However, the latter actions do not constitute the core of the freedom of assembly when they purposefully disrupt activities carried out by others.[60]

In *Lashminkin,* the ECtHR stresses the importance of organisers autonomy in determining the assembly's location, time, and manner of conduct.[61] For example, whether it is static or moving or whether its message is expressed by way of speeches, slogans, banners or by other ways, are important aspects of freedom of assembly.[62] Furthermore, behaviours of protesters that are annoying or offensive, and even temporarily inconvenience or obstruct the activities of third parties, generally fall within the scope of the concept of peaceful assembly.[63] For example, blocking major traffic arteries or public buildings is a conduct that the ECtHR typically considers as peaceful.[64]

Further, it is crucial that an assembly involves 'a common purpose of its participants,' and not merely 'a random agglomeration of individuals each pursuing their own cause, such as a queue to enter a public building'.[65] An assembly can be spontaneous in certain circumstances, and still be protected.[66] The ECtHR Guideline on Article 11 states that the right to participate in spontaneous demonstrations can take precedence over the requirement for prior notice only in special circumstances, such as the need for an immediate response to a current event through a demonstration.[67] More precisely, departing from the standard notification rule may be acceptable if a delay in organising the assembly would render the response obsolete.[68] For example, in the case of *Obote v. Russia*[69], the Court decided that a 'flash mob'[70] can be a form of 'peaceful assembly'. In these circumstances, prior notification is not necessary.

### *2.3.2. ICCPR*

The wide understanding of a peaceful assembly is also the approach taken by the HRC, which states in the General Comment No. 37 that 'assemblies may take many forms, including demonstrations, protests, meetings, processions, rallies, sit-ins, candlelit vigils and flash mobs'.[71] Protests are protected under Article 21 of the ICCPR whether they are 'stationary, such as pickets, or mobile, such as processions or marches'.[72] Mirroring the ECHR's understanding of scope, within the meaning of Article

---

[59] ECtHR 15 November 2018 *Navalnyy v. Russia*, App no 29580/1.
[60] ECtHR [GC] 15 October 2015 *Kudrevičius and Others v. Lithuania*, Appl no 37553/05, para 173.
[61] ECtHR 7 February 2017 *Lashminkin v Russia*, App no 57818/09, 51169/10, 4618/11 et al.
[62] ibid para 405.
[63] Ibid para 412.
[64] ibid.
[65] N Swart & B Roorda, 'De reikwijdte van het bijkans heilige demonstratierecht' Nederlandse Tijdschrift voor de Mensenrechten (2023) p 7.
[66] Guide on Article 11 of the European Convention on Human Rights, Updated on August 31, 2022, www.echr.coe.int/documents/d/echr/guide_art_11_eng p 22.
[67] ibid.
[68] ibid.
[69] ECtHR 19 November 2019 *Obote v. Russia*, App no Application no. 58954/09.
[70] The Cambridge Dictionary defines a flash mob as "a group of people who arrange, by email or mobile phone, to come together in a place at the same time, do something funny or silly, and then leave" (https://dictionary.cambridge.org/dictionary/english/flashmob), as referenced in footnote 1 of the ECtHR 19 November 2019 *Obote v. Russia*, App no Application no. 58954/09.
[71] HRC, General Comment 37 (2020, CCPR/C/GC/37) para 6.
[72] ibid.

21 participants can make their own determination of 'whether they want to use equipment such as posters, megaphones, musical instruments or other technical means, such as projection equipment, to convey their message'.[73] Assemblies may entail the temporary erection of structures, including sound systems, to reach their audience or otherwise achieve their purpose. Thus, the form of protest under the ICCPR envisages disruption, noise, and even possible creation of temporary structures.[74]

### *2.3.3. Dutch law*

The Dutch Constitution further supports the understanding of a wide interpretation of what can constitute a demonstration. According to the District Court of The Hague, demonstrators are free to decide how they want to express their feelings and wishes.[75] Article 9 of the Constitution should be interpreted that demonstrators have the right to determine the time, place, form, and content of the demonstration.[76] Also, the means by which an opinion is spread, like flags, voice or banners, are protected through the right to demonstrate: the so-called distribution right (*verspreidingsrecht*).[77] The form of expression can vary greatly: from static to moving, from silent to noisy.[78]

### *2.3.4. When is a peaceful assembly no longer peaceful?*

The ECtHR maintains that a protest action ceases to be a peaceful assembly when: (i) There is violent behaviour; (ii) the protest action has a violent character, or (iii) the organisers or participants reject the foundations of a democratic society in some other way.[79] From the case law of the ECtHR, it is not clear what the Court specifically considers under the latter category. Regarding the first two categories, it is not necessary for actual violent behaviour to have occurred; a violent intention by the demonstrators[80] is sufficient to categorise the protest action as non-peaceful.[81]

The HRC appears to have a narrower understanding of violence. An assembly is classed as violent when participants use 'physical force against others that is likely to result in injury or death, or serious damage to property. Mere pushing and shoving or disruption of vehicular or pedestrian movement or daily activities do not amount to 'violence'[82]. According to the HRC, the line between peaceful and non-peaceful assemblies is not always clear and there should be a 'presumption in favour of considering assemblies to be peaceful'.[83] The HRC supports the understanding, that the absence of compliance with specific domestic legal requirements does not automatically exclude them from the protection of Article 21 ICCPR.[84] Similarly, the ECtHRs assessment of the States' obligations to uphold the right to peaceful assembly is independent of compliance with domestic law procedures, focusing on the determination of whether the gathering falls within the protected scope.[85] Dutch law further supports the understanding that an assembly cannot be violent. A demonstration cannot form a

[73] ibid para 58.
[74] ibid.
[75] Rb. Den Haag 27 juni 2020, ECLI:NL:RBDHA:2020:5865 para 6.
[76] ibid.
[77] Rb. Den Haag 27 juni 2020, ECLI:NL:RBDHA:2020:5865, para 6, Rb. Den Haag 23 januari 2014, ECLI:NL:RBDHA:2014:1708.
[78] *Kamerstukken* II 1985/86, 19427, nr. 3, p 15; Rb. Oost-Brabant 30 januari 2017, SHE 16/2650.
[79] N Swart & B Roorda, 'De reikwijdte van het bijkans heilige demonstratierecht' Nederlandse Tijdschrift voor de Mensenrechten (2023), p 12.
[80] ECtHR 21 November 2023 *Laurijsen and Others v. The Netherlands*, App nos 56896/17, 56910/17, 56914/17, 56917/17 and 57307/17, para 48.
[81] N Swart & B Roorda, 'De reikwijdte van het bijkans heilige demonstratierecht' Nederlandse Tijdschrift voor de Mensenrechten (2023), p 12.
[82] HRC, General Comment 37 (2020, CCPR/C/GC/37) para 15.
[83] ibid para 17.
[84] Ibid para 16.
[85] ECtHR (GC) 15 November 2018 *Navalnyy v. Russia,* App nos 29580/12, paras 98-99.

violation within provisions of criminal law, such as the criminalised incitement[86], incitement to hatred[87], and other offences such as intentional destruction of property, looting or assault.[88]

## 2.4. Scope: application to the case

In this section, we apply the findings of sections 2.1-2.3 to assess whether the protest carried out by asylum seekers at their emergency accommodation falls within the scope of the right to peaceful assembly.

### 2.4.1. Who?

The language in Article 1 and Article 11(1) of the ECHR and Article 7 of the Dutch Constitution is all-encompassing, extending rights and freedoms to everyone within the State's jurisdiction. The protesting asylum seekers are in the territory of the Netherlands and therefore under the jurisdiction of the Netherlands, thus entitled to the right to protest. It is salient to note the additional emphasis placed by the HRC on the protection of the right to assembly for marginalised groups or persons that may face challenges in accessing that right. This applies to the asylum seekers in this case, who are under the complete control (for housing, living expenses etc.) of those that they wish to protest against.

### 2.4.2. Where?

The protest of the asylum seekers took place at the emergency accommodation where they had resided for an extended period. The choice of this location, specifically on the ground floor of the emergency accommodation centre in The Hague, was deliberate. It was chosen to articulate discontent with their living conditions within that building. The significance of this location lies in the desire to protest not only the conditions, but also to ensure that the staff working there hears their message. Protesting elsewhere would not have conveyed the same impactful message.

As established in ECtHR case law, protesting within sight and sound of the target object, especially at a time when the message holds the most impact, is accepted. The ECtHR respects the right of protesters to decide the location of their protest.[89] However, this does not automatically allow the asylum seekers to demonstrate in private spaces raising the question whether the emergency shelter is a private or a public space. It is not fully open to the public like in *Taranenko*[90], but it is open to the asylum seekers that protested as it is their temporary place of residence. They did not break any rules by being present there, making this case different from *Taranenko*, where there was an element of forceful entry into a public building, in violation of an established procedure. In *Appleby*[91], there were other options for protesting where the message would still meet the same audience. In the case at hand, protesting elsewhere would defeat the purpose of the message, and would prevent the protestors from reaching their intended audience and ensuring that their views are heard. Thus, the emergency shelter as a protest location falls under the scope of Articles 10 and 11 ECHR.

The HRC's understanding of acceptable locations under Article 21 ICCPR protects the asylum seekers' right to choose the location of their protest. Protests can take place in both indoor private

[86] Article 131 Dutch Criminal Code.
[87] Article 137d Dutch Criminal Code.
[88] Hof Arnhem-Leeuwarden 31 October 2019, ECLI:NL:GHARL:2019:9292, para 14.
[89] B Roorda, 'Case Note: ECLI:CE:ECHR:2018:1011JUD001423707' [2019] European Human Rights Cases, p 74.
[90] ECtHR 15 May 2014 *Taranenko v. Russia*, App no 19554/05.
[91] ECtHR 6 May 2003, *Appleby v UK*, App no. 44306/98.

and public spaces, according to the General Comment No. 37, thus regardless of whether the COA building is understood as public or private, the location of the protest is acceptable under the ICCPR.

Further, the element of publicity inherent in Article 9 of the Dutch Constitution and the Public Manifestations Act (Wom) can also be established in other places than public places. A place that is accessible for the public, such as an emergency centre, is a place other than a public place where the element of publicity can still be established. Therefore, a protest on the ground floor of an emergency centre falls within the scope of Article 9 of the Dutch Constitution.

### 2.4.3. What?

The protest of the asylum seekers consisted of creating noise with pots and pans and voicing their concerns. This suggests the form of a spontaneous assembly, supported further by the absence of a prior notification and the impromptu nature of the protest. The frustration arising from the denial of an opportunity to speak with a manager about urgent matters of unbearable living conditions further underscores the spontaneous character of the protest, signifying an abrupt and unanticipated need for an immediate expression of time-sensitive pressing grievances.

This type of a spontaneous protest falls under the ECtHR's wide understanding of what can constitute a protest. The participants in the assembly had a 'common purpose' in expressing their dissatisfaction with the conditions experienced in the emergency housing. The ECtHR has laid down that the manner by which persons choose to protest is protected and forms an important aspect of the freedom of assembly. The form, to make noise via pots and pans, decided by the asylum seekers, is therefore protected under Article 11 of the ECHR.

The HRC's understanding of what constitutes a protest underlines the right of the protesters to determine the form of the protest. The HRC delineates this further, detailing that any equipment can be used to convey a message, and providing a non-exhaustive list of examples, including a megaphone, instrument or sound system[92]. Although not specifically stated, it is perhaps reasonable to infer from the General Comment No. 37 that protesting with pots and pans should not be restricted. The inference comes from a number of considerations. Firstly, as protesters they should be left to determine whether they want to use equipment. Secondly, musical instruments are given as an example of acceptable equipment, although perhaps more primitive, it could be argued that pots and pans are equivalent to a musical instrument such as a drum. Thirdly, megaphones and sounds systems could constitute a greater than, or at least an equivalent disturbance as, pots and pans.

Under the Dutch Constitution, the form is explicitly described as an expression of feeling and wishes, as in the case of the protesting asylum seekers. Under the so-called 'right of distribution' (*verspreidingsrecht*), the asylum seekers have the liberty to decide their form of expressing their feelings and wishes, whether this is silent or in this case with the noise of pots and pans. Therefore, by establishing the element of expression of feelings and wishes, this form of protest falls under the scope of Article 9 of the Dutch Constitution. Further, a demonstration in Dutch law cannot consist of criminal behaviour, however, the action of the asylum seekers was not seen as a criminal act by the COA, as only an administrative sanction was placed on them. It has not been disputed by the COA or Dutch courts that the demonstration was allowed to take place spontaneously under the circumstances of the case. The reason given for the sanction in COA's letter was the fact that a disturbance was created for people working and living in the building. This reason falls under the category of 'annoying' behaviour. Annoying behaviour can temporarily obstruct the activities of third parties and still be protected as a peaceful assembly.

[92] HRC, General Comment 37 (2020, CCPR/C/GC/37) para 58.

### 2.4.4. Peaceful protest

As per the criteria outlined by the ECtHR, a peaceful protest should not involve violent behaviour, either actual or an expression of intention. When the central characteristic of a protest involves the use of pots and pans and making noise, it is in line with these criteria, as it does not involve violence or physical harm. The use of noise as a means of protesting does not inherently reject the foundations of a democratic society, but instead has a long history in democratic movements. It aligns with the principles of freedom of expression and assembly, allowing individuals to voice their opinions within the framework of democratic rights. Under ICCPRs understanding of 'violence', disruption of daily activities does not amount to 'violence'. Therefore, this way of protesting falls within the right to peaceful assembly protected under Article 11 of the ECHR, as well as the ICCPRs more narrow understanding of violence (injury or death, or serious damage to property)[93].

[93] ibid para 15.

# Chapter 3. Interference

This Chapter looks at what constitutes an interference with the right to peaceful assembly and whether the sanction placed on the asylum seekers constitutes an interference.

## 3.1. Interference according to the ECHR, ICCPR and Dutch law

### *3.1.1. ECHR*

The ECtHR has a wide understanding of interference. In the case *Kudrevičius and Others*, the Court ruled that interference in the right to peaceful assembly does not need to take the form of an outright ban, legal or *de facto*.[94] It can consist of various other measures taken by the authorities,[95] and the term "restrictions" 'in Article 11 ECHR must be interpreted as including both measures taken before or during a gathering and those, such as punitive measures, taken afterwards'.[96] In particular, in *Kasparov and Others*, the Court ruled that 'penalties imposed for having taken part in a rally' also constitute an interference.[97] Thus, the ECtHR's interpretation is that interference, such as a sanction, can have an effect if introduced before, during or after a protest. It constitutes an interference when, for instance, it has a 'chilling effect'[98] on the persons who intend to participate in a rally. It thus amounts to an interference, 'even if the rally subsequently proceeds without hindrance on the part of the authorities'.[99] In the earlier mentioned case of *Obote*[100], the Court looked at whether dispersing and fining participants of a 'flash mob'[101] constituted 'interference' with a 'peaceful assembly', and found that indeed such actions formed a 'restriction'.[102] The ECtHR thus has a relatively low threshold for what constitutes an interference with the freedom of assembly. An interference can occur even when the protest is still allowed to go ahead.

### *3.1.2. ICCPR*

According to the General Comment No. 37: 'restrictions must not be discriminatory, impair the essence of the right, or be aimed at discouraging participation in assemblies or causing a chilling effect'[103]. In addition, the obligation to respect and ensure peaceful assemblies imposes a negative duty on states 'before, during and after assemblies'.[104] This negative duty entails that 'there be no unwarranted interference with peaceful assemblies' and that 'States are obliged, for example, not to prohibit, restrict, block, disperse or disrupt peaceful assemblies without compelling justification, nor to sanction participants or organizers without legitimate cause.' [105] It is important to note that the HRC views sanctions themselves as interference with peaceful assemblies, but that with a legitimate cause a sanction can be justified.

---

[94] ECtHR [GC] 15 October 2015 *Kudrevičius and Others v. Lithuania*, Appl no 37553/05 para 75.
[95] ibid para 100.
[96] ibid.
[97] ECtHR 3 October 2013 *Kasparov and Others v Russia,* App No 21613/07 para 84.
[98] ibid para 84.
[99] ibid para 84.
[100] ECtHR 19 November 2019 *Obote v. Russia*, App no Application no. 58954/09.
[101] The Cambridge Dictionary defines a flash mob as "a group of people who arrange, by email or mobile phone, to come together in a place at the same time, do something funny or silly, and then leave" (https://dictionary.cambridge.org/dictionary/english/flashmob), as referenced in footnote 1 in ECtHR 19 November 2019 *Obote v. Russia*, App no Application no. 58954/09.
[102] ECtHR 19 November 2019 *Obote v. Russia,* App no 58954/09 para 101.
[103] HRC, General Comment 37 (2020, CCPR/C/GC/37) para 36.
[104] Paragraph 23 of General Comment 37.
[105] HRC, General Comment 37 (2020, CCPR/C/GC/37) para 23.

*3.1.3. Dutch law*

According to the District Court of Arnhem, restrictions on the right to demonstrate can form an interference even if they are prescribed by law.[106] In this case, the court ruled that only allowing a demonstration to happen in the early morning hours in a remote place, forms an interference with Article 9 of the Dutch Constitution. The judge stressed that the aim of the right to demonstrate is to make one's wishes and feelings be heard.[107]

## 3.2. Interference: application to the case

A sanction placed upon the asylum seekers in this case was received six days after the protest took place. In their justification of the sanction and subsequent submissions, the COA only referred to the noise disturbance, as protesters did not heed these repeated calls to stop the noise. The COA states that as the protest could continue, this did not result in a significant curtailment of the right to demonstrate. The District Court of The Hague agreed with this reasoning and ruled that there has been no interference with the right of peaceful assembly.[108] There are two arguments that we consider to have been left out of this understanding of 'interference' by this court.

The first is that protesters had the right to choose the form and location of the protest. The noise, such as using pots and pan, was an essential part of the legitimately chosen form of protest. The noise was integral to the protest, and this form of protest, even if annoying, is protected by the right to peaceful assembly under the ECHR, ICCPR and Dutch law. Therefore, the noise the protesters made cannot be distinguished from, and sanctioned separately to, the protest. This brings us onto the second point.

We have established that if there is a sanction placed on the noise, this constitutes an interference on the protest. By sanctioning the behaviour, the COA has in fact interfered with the right to peaceful assembly. It is clear from the ECtHR case law and HRC's General Comment No. 37 that a sanction placed on protesters, even after the event, for the peaceful assembly, can constitute interference. Hence, even though the protest of the asylum seekers was able to continue, the sanction of removing an allowance constitutes an interference. Next, we turn to the consideration of whether this interference is justified.

[106] Rb. Arnhem 13 mei 2005 *betoging Kusters,* ECLI:NL:RBARN:2005:AT5504, AB 2005/294, para 3.
[107] ibid.
[108] Rb The Hague, 27 October 2023, para 4.3.2.

## Chapter 4. Justification of interference

This chapter focuses on the ECHR and follows the test of the ECtHR to establish whether the interference is justified. Article 11 (2) of the ECHR reads as follows:

> No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. (…)

To determine whether an inference is justified, the ECtHR looks at whether the interference is prescribed by law (4.1 below), has a legitimate aim (4.2) and is necessary in a democratic society (4.3).

Our analysis includes additional insights from Dutch law and the Views of the HRC supplement the analysis. In fact, Dutch courts[109] follow the ECtHR framework and the HRC also suggests a similar approach to justification. The General Comment No. 37 says that limitations should constitute suitable responses to an urgent societal requirement, aligning with one of the justifiable grounds outlined in Article 21 of the ICCPR[110]. In the case of *Yuriy Bakur*, the HRC states that 'no restrictions may be placed on the right of peaceful assembly that is guaranteed under Article 21 other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others'.[111] When a state is deciphering between the reasons for restriction and a person's right to protest, 'it should be guided by the objective of facilitating the right, rather than seeking unnecessary or disproportionate limitations to it'.[112]

### 4.1. Prescribed by law

In the case of *Kudrevičius and Others*, the ECtHR emphasises that the expressions 'prescribed by law' and 'in accordance with the law' in Article 11 of the ECHR require not only a legal basis in domestic law but refer also to the quality of the law. The quality of the law in question should be accessible to the person concerned, and foreseeable as to its effects.[113] An example of a case where the law was found not to be foreseeable was *Ecodefence and Others*.[114] In this case the ECtHR concluded that two fundamental concepts within the Foreign Agents Act, as articulated and implemented by the Russian authorities, did not meet the requirement of foreseeability. The Court held:

> 'The applicants were unable to envisage with a sufficient degree of foreseeability what funding and what sources of funding would qualify as "foreign funding" for the purposes of registration as a "foreign agent". The legal norm on foreign funding which allows for its overly broad and unpredictable interpretation in practice, as evident from the circumstances of the present cases, does not meet the "quality of law" requirement and deprives the applicants of the possibility to regulate their financial situation.[115]

The ECtHR also concluded in this case that 'judicial review failed to provide adequate and effective safeguards against the arbitrary and discriminatory exercise of the wide discretion left to the executive'.[116] Moreover, in the case of *Navalnyy*, the Court laid down that for domestic law to meet the qualitative requirements, it must afford a measure of legal protection against arbitrary

[109] Rb. Arnhem 13 mei 2005 *betoging Kusters,* ECLI:NL:RBARN:2005:AT5504, AB 2005/294, para 3.
[110] HRC, General Comment 37 (2020, CCPR/C/GC/37) para 40.
[111] HRC 7 September 2015, *Yuriy Bakur v. Belarus*, no 1902/2009 para 7.
[112] ibid.
[113] ECtHR [GC] 15 October 2015 *Kudrevičius and Others v. Lithuania*, Appl no 37553/05, para 108.
[114] ECtHR 14 June 2022 *Ecodefence and Others v. Russia,* App nos 9988/13.
[115] Para. 112.
[116] Para. 118.

interference by public authorities with the rights guaranteed by the Convention.[117] In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise.[118] Similarly, the Court points out in *Kudrevičius and Others*[119] that a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable a citizen, with appropriate advice, if necessary, to reasonably foresee the consequences of a given action.

Nevertheless, it is acknowledged that absolute precision in framing laws, especially in fields where the situation changes according to prevailing societal views, is impossible to attain. Many laws are inherently somewhat vague, and their interpretation and application are matters of practice.[120] In the case of Kudrevičius *and Others*, applicants were convicted for participating in a demonstration, based on the criminal code, that prescribed punishment for organising a gathering of people that 'seriously breach public order'. The Court acknowledges that 'by its very nature, the concept of "breach of public order" used in Article 283 § 1 of the Criminal Code is to a certain extent vague. However, as ordinary life can be disrupted in a potentially endless number of ways, it would be unrealistic to expect the national legislator to enumerate an exhaustive list of illegitimate means for achieving a particular aim. The Court therefore considers that the terms in which that national law is formulated satisfy the qualitative requirements.[121]

In *Emin Huseynov*[122], the ECtHR emphasised the importance of citing specific national laws or regulations as the legal foundation for government actions, particularly in matters affecting fundamental rights.[123] This requirement ensures that individuals are aware of the legal basis for state interference and can challenge it effectively. In this case the Court notes that the responding state did not cite any national laws that could serve as the legal foundation for the dispersal of an assembly conducted in privately owned locations.[124] Additionally, the Court notes that the sole justification presented by the Government for the police involvement, without invoking any specific national legal provisions, was the occurrence of complaints from neighbours regarding the assembly.[125]

Finally, in *Hakobyan and others*,[126] the Court found that an administrative measure imposed by the police on a protester 'relying on a legal provision which had no connection with the intended purpose of that measure' meant that the interference was not lawful.[127]

### 4.1.1. Prescribed by law: application to the case

The sanction imposed on the protesting asylum seekers was based on Article 10 of the Rva which establishes the legal framework for the COA to modify or suspend the benefits, with more detail in Article 19(1) Rva. This provision outlines the requirement that asylum seekers residing in a reception facility must adhere to the house rules prescribed in the regulations of the reception facility. In the COA's written response from 13 September 2023, they provide their House Rules and state that the sanction is based on a breach of Rule 11 reading as follows: '*You must not cause too much noise. Between 22:00 and 8:00 it must be quiet so that everyone can sleep'.* The COA's House Rules are

[117] ECtHR 15 November 2018 *Navalnyy v. Russia*, App no 29580/12, para 115.
[118] ibid.
[119] ECtHR [GC] 15 October 2015 *Kudrevičius and Others v. Lithuania*, Appl no 37553/05.
[120] ibid para 109.
[121] Para. 113.
[122] ECtHR 7 May 2015 *Emin Huseynov v. Azerbaijan,* App No 59135/09.
[123] ibid paras 120, 121.
[124] ibid para 102.
[125] ibid.
[126] ECtHR 10 April 2012 *Hakobyan and Others v Armenia,* App No 34320/04.
[127] ibid para 107.

published online,[128] but not all the rules are included in the document online. Upon arrival to the reception centre, asylum seekers are provided with a separate document that contains all the rules. Rule 11, used to justify the imposition of the sanction, contains no specific mention of protesting. The sanctions that the COA can impose are then held in another policy document, namely the COA 'Measures Policy' (*Maatregelenbeleid)*.[129]

As in *Kudrevičius and Others*[130], there is an understanding that law can be vague, subject to change and that the interpretation and practical application of the law often provide insight. In this case then, it could be argued that the Rva refers to an unpublished document which is in itself not law (the COA House Rules), but this could be acceptable because not every circumstance can be covered by a specific law. However, there are issues with COA's reliance on Rule 11 of the House Rules, which refers to noise. It is not clear nor foreseeable that this rule, which mentions only noise, would be applied and interpreted by the COA to sanction a peaceful assembly. As in *Harutyunyan and Hakobyan*[131], it could be argued that the provision being relied upon was not intended to sanction asylum seekers for a peaceful assembly.

### 4.2. Legitimate aim

The Guidelines of the ECtHR on Article 11 explain the requirement of a narrow interpretation of the legitimate aims for restricting the right to peaceful assembly. In particular, the prevention of disorder – one of the most commonly cited permissible grounds for the restrictions placed on the exercise of the right to freedom of assembly – must be interpreted narrowly.[132] Another frequently cited legitimate aim is 'the protection of the rights of others'. In fact, these two aims are closely linked, as 'restrictions on freedom of peaceful assembly in public places may serve to protect the rights of others with a view to preventing disorder', for example maintaining the flow of traffic.[133] The Court does accept that measures aimed at the prevention of disorder or the protection of the rights of others are legitimate, unless the cited aim is deemed irrelevant in the specific circumstances. For example, the Court rejected the aim of preventing disorder in events where gatherings were unintentional and caused no nuisance.[134]

In the ICCPR, Article 21(2) delineates legitimate grounds for restriction. These are national security, public safety, public order, public health or morals, and the protection of the rights and freedoms of others. General Comment No. 37 explains what each of these justifications for interference looks like in practice. Here we have included only those that could potentially be relevant for our Expert Opinion. For 'public safety' to justify restrictions, it must be established that the assembly poses a real and significant risk to the safety of individuals or serious damage to property.[135] The term 'public order' refers to rules ensuring societal functioning, respecting human rights, and should not be vaguely defined to justify overly broad restrictions.[136] 'Rights and freedoms of others' as a ground for restriction pertains to the protections under the Covenant or other human rights of those not participating in the assembly.[137]

---

[128] My COA 'Houserules', www.mycoa.nl/en/living-at-the-coa/welcome-to-this-reception-location/house-rules/house-rules accessed 2 January 2024.
[129] Centraal Orgaan Opvang Asielzoekers 'Maatregelenbeleid COA' (2022) www.coa.nl/sites/default/files/2022-03/Maatregelenbeleid%20COA.pdf.
[130] ECtHR 15 October 2015 *Kudrevičius and Others v. Lithuania*, App no 37553/05 para 108.
[131] ECtHR 14 Decemver 2023 *Harutyunyan and Hakobyan v. Armenia*, App no. 34544/21 and 3920/22.
[132] Guide on Article 11 of the European Convention on Human Rights, Updated on August 31, 2022, www.echr.coe.int/documents/d/echr/guide_art_11_eng para 59.
[133] ECtHR 15 October 2015 *Kudrevičius and Others v. Lithuania*, App no 37553/05 para 108.
[134] Guide on Article 11 of the European Convention on Human Rights, Updated on August 31, 2022, www.echr.coe.int/documents/d/echr/guide_art_11_eng.
[135] HRC, General Comment 37 (2020, CCPR/C/GC/37) para 43.
[136] ibid para 44.
[137] ibid para 47.

As to Dutch law, Article 9 (2) of the Dutch Constitution and Article 2 of the Public Manifestation Act (Wom) give legitimate grounds for restriction, namely: protection of health, the interest of traffic, and to combat or prevent disorder. 'Disorder' should be interpreted narrowly, potentially reserved for criminal behaviour.[138] Moreover, determining the presence of disorder depends on the circumstances of each case and is context-dependent.[139]

#### 4.2.1 Legitimate aim: application to the case

Given the broad scope of protected forms of protest under Article 11 of the ECHR, it becomes challenging to argue that sanctioning the protesters could be justified based on the legitimate aims of preventing disorder and protecting the rights of others. Despite COA's claim of disturbance to their workers, it has been established in previous sections that noise is an allowable element in protests, and annoyance, when expressing dissent, is protected under the ICCPR. Further, based on the Dutch Constitution, the legitimate aim of preventing disorder is mainly reserved for violence and criminal behaviour. As regards the ECHR, the Court usually accepts the aim provided by the state as being legitimate. In this case, it could be argued that the limitation on the right to assembly was based on the prevention of disorder, or the protection of rights of others, as it did cause some nuisance.

In contrast, it seems that the HRC has a somewhat stricter approach. The asylum seekers protested by making noise. No concerns about the risk to the safety of individuals or serious damage to property were raised, therefore we argue that public safety is not a legitimate aim here. Under the HRC's understanding of the aim of 'public order', this can also not be used to justify interference, as the asylum seekers actions did not impact on the functioning of society or disregard human rights. Finally, if we look at the aim of protecting the 'rights and freedoms of others', it is not immediately clear how the assembly could have impacted the rights of others, the workers or other asylum seekers in a substantial way. This is especially true if we consider that 'assemblies are a legitimate use of public and other spaces, and since they may entail by their very nature a certain level of disruption to ordinary life, such disruptions must be accommodated, unless they impose a disproportionate burden'.[140] The HRC requires a detailed justification from the state for restrictions justified by 'legitimate aim' and makes this clear in cases such as *Valentin Evrezov*[141], *Yuriy Bakur*[142] and *Anatoly Poplavny and Leonid Sudalenko*.[143]

In these cases, although not particularly detailed, the HRC finds a breach of Article 21 where the state did not provide a justification for a restriction under a legitimate aim. In our case, there is no detailed explanation from the state as to why the sanction was justified under one of the legitimate aims listed in either the ECHR or ICCPR.

### 4.3. Necessary in a democratic society

#### *4.3.1. ECHR*

According to Article 11(2) ECHR, any restriction of a right must be necessary in a democratic society. It must answer a 'pressing social need' and be 'proportionate' to the legitimate aim.[144] The reasons adduced by the state to justify interference must be 'relevant and sufficient', and national authorities

[138] *Kamerstukken* II 1976/77, 13 872, nr. 7.

[139] ABRvS 20 juli 2016 ECLI:NL:RVS:2016:2521, para 7.2.

[140] HRC, General Comment 37 (2020, CCPR/C/GC/37) para 47.

[141] HRC 17 August 2015, *Valentin Evrezov v. Belarus*, Communication No. 1988/2010, paras 7.4-7.5.

[142] HRC 7 September 2015, *Yuriy Bakur v. Belarus*, Communication No. 1902/2009.

[143] HRC 24 November 2016, *Anatoly Poplavny and Leonid Sudalenko v. Belarus*, no 2139/2012.

[144] Guide on Article 11 of the European Convention on Human Rights, Updated on 31 August 2022, www.echr.coe.int/documents/d/echr/guide_art_11_eng p 16.

must 'base their decisions on an acceptable assessment of the relevant facts'.[145] This means that in every case there is an individual assessment of whether it is necessary in a democratic society.

In *Kudrevičius and others*,[146] the ECtHR considered whether the restriction was necessary in a democratic society. In this case a group of farmers in Lithuania had been given prior authorisation to protest, but then in the course of the protest they blocked the highways. The ECtHR considered that states have a certain margin of appreciation when it comes to what can be considered 'necessary in a democratic society'.[147] The Court stated that assessing the compatibility of the restriction with the Convention must be done in the light of the case as a whole, in order to establish whether it answered a 'pressing social need' and was proportionate.[148] The Court ruled that there was a fair balance between these requirements and the requirements of freedom of assembly.[149] The Court did not see the blocking of the highway during the protest, which led to criminal sanctions, as a necessary element to the protest as it had no direct connection with their object.[150] The Court ruled that the interference was 'necessary in a democratic society' because the measure was proportionate, due to the lack of connection with their goal.[151]

In the earlier mentioned *Obote* case, where Mr. Obote and six others engaged in a flash mob in front of the Russian Government Office, the police ordered the group to disperse. When Mr Obote asked for the reason for that order, he was taken to the police station.[152] The ECtHR held that imposing criminal sanctions on a peaceful protester requires specific justification. The Court emphasised that even at the lower end of the penalty spectrum, individuals participating in unprohibited demonstrations should not face penalties, especially those involving deprivation of liberty, unless engaging in reprehensible behaviour.[153] In this case, the Court found the restrictions imposed by the State, even categorised as criminal sanctions, lacked a pressing social need, and were not deemed necessary in a democratic society. The reasons provided by the respondent State did not align with urgent societal requirements, and even if relevant, they failed to demonstrate the necessity of the interference.**[154]**

In the case of *Bumbes*[155], the applicant had handcuffed himself to the barriers blocking access to a parking lot of the government's headquarters to demonstrate against a controversial mining plan. The ECtHR stated that although the interference was lawful and pursued a legitimate aim, it was not necessary in a democratic society. The Court ruled that relevant and sufficient reasons were not provided by the national courts because they had ignored the arguments made by the applicant. The national courts had simply considered that the interference was justified because the protest did not comply with the need for prior notification.[156]

We now turn to the proportionality test, an important part of looking at whether a restriction was necessary in a democratic society. The proportionality test includes looking at the chilling effect of a measure, the nature and severity of the sanction. To answer whether the restriction was proportionate in our case, we carry out a proportionality assessment of the sanction on the protesting asylum seekers.

---

[145] ibid para 66.
[146] ECtHR 15 October 2015 *Kudrevičius and Others v. Lithuania*, Appl no 37553/05.
[147]ibid para 142.
[148] ibid para 143.
[149] ibid paras 182-183.
[150] ibid para 171.
[151] ibid para 183.
[152] ECtHR 19 November 2019 *Obote v. Russia,* App no 58954/09.
[153] ibid para 44.
[154] ibid para 45.
[155] ECtHR 3 May 2022, *Bubmes v. Romani*a, App no 18079/15.
[156] ibid par 55.

Chilling effect

The ECtHR refers to the chilling effect in their assessment of the case of *Tatár and Fáber*.[157] In this case, the ECtHR was not convinced by the Government's argument that the sanction was necessary due to the applicants' non-compliance with the prior notification rule. The ECtHR adds that the imposition of an administrative sanction, however mild, on the authors of such expressions, which qualify as both artistic and political, can have an undesirable 'chilling effect' on public speech.[158] The Court reiterates that the imposition of a sanction, administrative or otherwise, however lenient, on the author of an expression which qualifies as political can have an undesirable chilling effect on public speech.[159] The chilling effect may persist even after the protestors are acquitted, and the charges are dropped, as the mere prosecution could have deterred them from participating in similar gatherings.[160] Further, the chilling effect does not automatically dissipate if the enforcement measure is reversed, such as when fines are later annulled by the courts.[161] Such measures may have a serious potential to deter not only the fined/charged protestors, but also the wider public, from participating in demonstrations and open political discourse.

Other ECtHR's rulings demonstrate the different modes of the chilling effect. For instance, even where an assembly ultimately proceeds without hindrance, action or inaction from the state in guaranteeing the right to peaceful assembly, could have a chilling effect. In *Bączkowski and Others*, the refusal by Polish authorities to authorise marches and assemblies protesting discrimination, based on a failure to submit traffic control documents, was deemed a violation of the right to freedom of assembly.[162] The Court ruled that not only was the refusal to authorise not prescribed by law, but the lack of prior authorisation, could have a chilling effect on the right to protest.[163]

Nature and severity

The nature and severity of imposed penalties are important considerations in evaluating the proportionality of interference concerning the intended goal.[164] The *Akgol and Gol* case[165] involves the conviction of individuals for participating in an unauthorised but peaceful demonstration. The Court expresses concern about prosecuting peaceful demonstrators solely for being unauthorised, emphasising that regulations should not pose hidden obstacles to the protected right of peaceful assembly.[166] From this, a peaceful demonstration should not be subject to the threat of criminal sanctions, especially deprivation of liberty. This case shows an exploration by the Court of whether the severity of a sanction on peaceful assembly is proportionate.

Part of looking at the nature and severity of a sanction is also to consider its effects. For example, in the case of the *Biblical centre of the Chuvash Republic* the states' 'judgments put an end to the existence of a long-standing religious organisation'[167] and the ECtHR sees this as constituting 'a most severe form of interference, which cannot be regarded as proportionate to whatever legitimate aims were pursued'.[168] Thus, the impact of the sanction is taken into account when considering the nature and severity of the sanction.

[157] ECtHR 12 June 2012 *Tatár and Fáber v. Hungary*, App no 26005/08 and 26160/08.
[158] Ibid.
[159] ECtHR 3 May 2022 *Bubmes v. Romania*, App no 18079/15 para 101.
[160] ECtHR 18 December 2007 *Nurettin Aldemir and Others v. Turkey*, App No 32124/02 para 34.
[161] ECtHR 11 January 2005 *The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria*, App no. 29496/16 para 135.
[162] ECtHR 3 April 2007 *Bączkowski and Others v. Poland,* App no, 1543/06, para 83.
[163] ibid.
[164] ECtHR [GC] 15 October 2015 *Kudrevičius and Others v. Lithuania*, Appl no 37553/05, para 151.
[165]ECtHR 17 May 2005 *Akgol and Gol v. Turkey*, App no. 28495/06 and 28516/06, paras 16-24.
[166] ECtHR 19 November 2019 *Obote v. Russia*, Appl no 58954/09 para 37.
[167] ECtHR 12 June 2014 *Biblical Centre of the Chuvash Republic v. Russia*, App no. 33203/08 para 61.
[168] ibid.

*4.3.2. ICCPR*

Under Article 21 of the ICCPR, restrictions must also be necessary in a democratic society. General Comment No. 37 states that limitations must address a pressing social need, be the least intrusive option available, and undergo a proportionality assessment, balancing the negative impact on the right against the resulting benefit to justify permissibility.[169] The HRC refers to proportionality of restrictions, stating that they 'must also be the least intrusive among the measures that might serve the relevant protective function'.[170] Moreover, restrictions must be proportionate, which requires a value assessment, weighing the nature and detrimental impact of the interference on the exercise of the right against the resultant benefit to one of the grounds for interfering. If the detriment outweighs the benefit, the restriction is disproportionate and thus not permissible.[171] Where a sanction is imposed on protesters for their unlawful conduct, such sanctions must be proportionate, non-discriminatory in nature and must not be based on ambiguous or over broadly defined offences, or suppress conduct protected under the Covenant.[172] Restrictions must also not be discriminatory, impair the essence of the right, or be aimed at discouraging participation in assemblies or causing a chilling effect.[173] The ICCPR calls for a weighing of interests in order to decipher whether the restriction/sanction is proportionate.[174]

*4.3.3. Necessary in a democratic society: application to the case*

Here, we show that the interference with the right to the peaceful assembly of the asylum seekers was not based on a pressing social need and was disproportionate and, consequently, not necessary in a democratic society.

Drawing on the precedent set in *Bumves*, it is imperative that reasons adduced by national authorities to justify interference must be both 'relevant and sufficient'. In the case of COA's claim of disturbance caused by the asylum seekers' demonstration, a meticulous examination is warranted to ascertain whether these reasons meet the established standard. The principle of proportionality demands that any interference be proportionate to the legitimate aims pursued. Here, we question the appropriateness of the complete withholding of funds for four weeks as a response to the asylum seekers' peaceful protest against their living conditions, which is a legitimate use of their fundamental right to demonstrate. This inquiry revolves around the delicate balance between COA's objectives and the asylum seekers' right to express dissent.

The COA justifies its sanction, arguing that the demonstration caused disruption to its employees' work and that repeated warnings were issued during the event. COA's purported benefit is the prevention of noise disturbance within the building, claiming it as a pressing social need. However, applying the *Bumves* case raises essential questions as to whether those reasons are relevant and sufficient. In this context, the question is whether the benefit of curbing noise disruption justifies interfering with their fundamental right to protest. As shown above, the ECtHR's approach is to consistently demand strong justifications for restrictions on political speech, especially when addressing questions of public interest. The reception conditions crisis in the Netherlands has been widely reported and written about, as well as being ruled on in Dutch courts. It is a crucial part of a democratic society to be able to assemble on a topic of public interest and contribute to an ongoing debate in society. It could be strongly argued that it is necessary in a democratic society for a peaceful protest by asylum seekers who are directly affected by the issue, to be protected by the right to peaceful assembly. Moreover, the ECtHR insists on a degree of tolerance towards peaceful gatherings, stressing that the freedom of assembly should not be deprived of substance. The concept of 'least

[169] HRC, General Comment 37 (2020, CCPR/C/GC/37) para 4.
[170] ibid para 40.
[171] ibid.
[172] ibid para 67.
[173] ibid para 36.
[174] ibid para 40.

intrusive' is crucial here – removing all funds from individuals entirely reliant on them may not be the least intrusive measure.

We argue that the enforcement measures taken by COA, such as withholding funds, may have a lasting chilling effect, even if the enforcement action were to be reversed, as seen in ECtHR cases.

The sanction was placed on some asylum seekers who protested in March 2023. As we have seen from the ECtHR 's case law, the concern of chilling effect is broader than just on those actually sanctioned. In this case not only the sanctioned participants in the protest could be discouraged from using their fundamental right to freedom of assembly, but also the other participants of the protest, asylum seekers wishing to protest other matters. This extends even further, as any restriction placed on the freedom of assembly could constitute a discouragement for all persons entitled to this right - everyone in states bound by these legal frameworks. The impact of the chilling effect is extensive. The potential impact on public discourse and participation in political activities should be emphasised. Even lenient sanctions on expressions may impede free discourse. The act of withholding the limited funds that the asylum seekers have access to, even if temporary, could discourage the asylum seekers' from articulating any dissatisfaction with living conditions or other issues.

We consider that the sanction imposed on asylum seekers is disproportionately severe, especially in light of the impact of the sanction.

Asylum seekers receive the allowance weekly for clothing and any other personal items, such as hygiene products. They are reliant on this amount in order to purchase these items, which are essential to maintain human dignity and autonomy (see also chapter 6). The complete removal of the amount for a total of four weeks constitutes a severe sanction, considering the circumstances in which a person has no other means of income. Moreover, the protesting asylum seekers are completely dependent on those who have sanctioned them, meaning not only do they rely on the COA for the allowance, they are also fed and housed by COA, amongst other things. The nature of the situation that the asylum seekers are in means that the impact of any sanction by an organisation on which you are dependent is more severe, leading to concerns about this happening again, developing a poor reputation within the emergency centre and other human factors (perhaps also intensifying the chilling effect). Further, in the given situation, COA did not appear to take into consideration the peaceful nature of the demonstration when imposing the sanction. While acknowledging the existence of the demonstration, COA did not indicate during hearings or in written communication that the sanction took into account the right to engage in peaceful assembly. The impact, which needs to be considered in assessing whether the sanction was overly severe and disproportionate, should take into account all relevant factors, including the peaceful nature of the assembly.

## Chapter 5. Conclusion Part 1: has there been a violation of the right to protest?

Our analysis in the first part of this Expert Opinion has revealed that the imposed sanction on asylum seekers constitutes a violation of the right to protest.

With regard to the scope, we established that asylum seekers have the right to protest and that they have the right to choose the form and location of their protest. As to the location, we established the legitimacy of the choice of the emergency accommodation's ground floor in the reception centre as the ECtHR acknowledges the right of protesters to select impactful locations. As to the form of the protest, creating noise with pots and pans is a form of expression, rooted in dissatisfaction with living conditions, is protected under the broad understanding of the right to protest. The ECtHR and the HRC recognise the protesters' right to choose the form of their protest, including the legitimacy of spontaneous protests. The central characteristic of the protest, involving noise-making with pots and pans, aligns with the criteria of a peaceful protest outlined by the ECtHR. The use of noise as a means of expression, without involving violence or physical harm, is in line with freedom of expression and assembly.

We then examined whether there was interference with the asylum seekers' right to peaceful assembly. COA's reasoning for the sanction, and the court's agreement, centred on the negative consequences of the noise disturbance, suggesting that since the protest continued, there was no significant curtailment of the right to demonstrate. However, this understanding overlooks the fact that the noise is a fundamental and inseparable aspect of the protest, without which the protest would be rendered ineffective. Using pots and pans as a form of protest is a legitimate form of expression protected under national, European, and international law, even if it is annoying or incidentally disruptive. The making of noise cannot be separated and sanctioned independently of the protest itself. Therefore, the imposition of a sanction on the noise constitutes interference with the right to peaceful assembly. ECtHR case law and the HRC underscore that even post-event sanctions on peaceful assembly can be considered interference. The subsequent sanction removing the sole funds for clothes and personal items, adds weight to the argument that substantive interference has occurred.

Subsequently, we assessed the justification of interference. We first look at whether the sanction imposed on the asylum seekers was prescribed by law. The legal foundation of the sanction is found in Article 10 of the Rva, providing the COA with the authority to modify or suspend benefits, detailed further in Article 19(1) Rva. However, challenges arise as Article 19(1) mandates adherence to house rules specified in the regulations of the respective facility. The rule used by COA, however, refers to noise, but there is no clarity or foreseeability that this rule could be used to sanction a peaceful protest. Next, we look at whether there was a legitimate aim to justify the sanction. The broad interpretation of this element by the ECtHR arguably means that prevention of disorder or protection of rights of others could be seen as a legitimate aim for the sanctions. Under the ICCPR this could be different. Despite claims of disturbance, the noise-based protest by asylum seekers is considered a permissible expression of dissent. Unlike cases involving violence, the peaceful nature of the protest does not meet the threshold for interference justification based on preventing disorder. The ICCPR's legitimate aims for restriction, such as public safety and public order, are not convincingly applicable, given the absence of risks to safety or disruption to society. The lack of a detailed justification for the sanction, raises concerns, as seen in analogous cases where breaches of Article 21 ICCPR were found in the absence of a comprehensive explanation for restrictions under legitimate aims.

Finally, we assessed whether the interference was necessary in a democratic society. We argue that COA's justification, centring on noise disruption and employee disturbance during the asylum seekers' demonstration, does not, in a democratic society, override the objective of protection of a peaceful protest. Consideration is paid to the fact that the potential chilling effect of COA's measures extends beyond the directly sanctioned asylum seekers and the severity of the sanction, given that the removal

of an allowance for clothes and personal hygiene products, on which the asylum seekers are completely reliant, may deter any future attempts at a peaceful protest within this marginalised group. We therefore found that the response by COA is not proportionate.

In sum, the analysis in Part I of this Expert Opinion stresses the necessity for a re-evaluation of the imposed sanctions on the asylum seekers. Based on our assessment, we believe that the sanctions constitute a violation of the right to protest under the ECHR, ICCPR and Dutch law. We suggest a renewed judicial evaluation as to whether the imposed sanctions violate the right to peaceful assembly under applicable European and international standards, in order for the affected individuals to be compensated appropriately, and in order to remove the chilling effects and obstacles on the right to protest of a marginalised group, in line with the HRC Guidelines.

In the second part of this Expert Opinion, we argue that even in a hypothetical situation where noise would not be an integral part of the protest, and would breach the COA house rules, the sanction imposed is disproportionately severe and thereby inconsistent with the EU Reception Conditions Directive.

# Part II: Sanctions under the EU Reception Conditions Directive

## Chapter 6. Reception Conditions Directive

The Reception Conditions Directive establishes the minimum standards for reception conditions in EU Member States, binding the Netherlands to European-wide norms for the reception of international protection applicants.[175] Member States are required to provide certain material reception conditions to asylum seekers according.[176] Material receptions are 'housing, food, and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance'.[177] Member States can provide these material receptions in kind, through an allowance, in vouchers, or through a combination of these three. Member States are allowed to choose in which form they decide to provide these material reception conditions, but they have an obligation to ensure that material reception conditions provide an adequate standard of living and protect their physical and mental health.

### 6.1. Scope of the Directive

The scope of the Directive is laid down in Article 3 of the Directive: 'This Directive shall apply to all third-country nationals and stateless persons who make an application for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State, as long as they are allowed to remain on the territory as applicants, as well as to family members, if they are covered by such application for international protection according to national law.'

A few requirements, for the Directive to apply, can be identified, i.e. (i) third-country nationals and stateless persons, (ii) who applied for international protection and (iii) as long as they are allowed to remain on the territory. A third-country national is someone without a nationality from a EU Member State. The meaning of an application for international protection is, as laid down in Article 2(b) of the Directive, a request made by a third- country national or a stateless person for protection from a Member State in order to seek refugee status or subsidiary protection status. The Court of Justice of the EU (CJEU) has indicated that from the moment an applicant expresses a wish to apply for international protection, (s)he falls under the scope of the Directive, no formal lodging or registration is necessary.[178]

Asylum seekers in an accommodation centre provided by the COA are third-country nationals or stateless persons present on Dutch territory. They have expressed their wish to apply for international protection and have been registered as such. They, therefore, clearly fall under the scope of the Reception Conditions Directive.

### 6.2 Reducing and withdrawing material reception conditions

Based on Article 20 of the Directive, Member States can reduce or withdraw reception conditions. This provision includes the grounds for the reduction or withdrawal of material reception conditions. Paragraph 4 of this provision is specifically relevant because it deals with circumstances where house rules have been breached. It reads as follows: 'Member States may determine sanctions applicable to serious breaches of the rules of the accommodation centres as well as to seriously violent behaviour'.

[175] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180, 29.6.2013, p 96–116.
[176] Recital 24 and Article 17 of the Directive.
[177] Article 2(g) of the Directive.
[178] CJEU 25 June 2020, case C-36/20 PPU (VL).

However, the definition of a 'serious breach' of accommodation rules remains ambiguous.[179] Baldlaccini et al[180] have criticised this phrasing, as it is unclear what constitutes a serious breach of accommodation centre rules. It is therefore unclear whether making noise as part of a demonstration can constitute a serious breach of the accommodation rules, such as the COA house rules. As we established in the first section of this expert opinion, protests, and demonstrations are recognised as fundamental expressions of freedom of speech under Article 10 ECHR, and assembly under Article 11 ECHR. Everyone has the right to voice their opinions and concerns peacefully. Sanctioning the noise made as part of a protest constitutes an interference of these fundamental rights, as we concluded in Part I of this Expert Opinion. Therefore, it could be argued that non-violent expressions of dissent, like making noise during a demonstration, should not constitute a serious breach of house rules unless the noise escalates to seriously violent behaviour or poses a direct threat to the safety and well-being of others in the accommodation centre.

The case of *Haqbin*[181] is relevant here as it concerns Article 20(4) of the Directive. The applicant claimed compensation against the 'Belgian Federal agency for the reception of asylum seekers' after he was temporarily excluded from receiving material reception conditions for 15 days because he had been involved in a brawl involving other residents. The CJEU ruled that a sanction, even if it is of temporary nature, imposed because of serious breaches of the rules of the accommodation centre, cannot consist of the withdrawal of the full set of material reception conditions relating to housing, food, or clothing, as it would not be in line with the requirement to ensure a dignified living standard or the principle of proportionality since it would not allow an asylum seeker to meet their most basic needs.[182] This means Member States can withdraw or reduce material reception conditions, like the daily allowance as long as a dignified living standard and the principle of proportionality are ensured.[183]

### 6.3. Right to human dignity

In *Haqbin,* the CJEU refers to Article 1 of the Charter of Fundamental Rights which concerns Human dignity: 'Human dignity is inviolable. It must be respected and protected.' This concept is explained in more detail in the Explanations relating to the Charter.[184]. According to Article 52(7) of the Charter these explanations are 'drawn up as a way of providing guidance in the interpretation of this Charter' and 'shall be given due regard by the courts of the Union and of the Member States'. The Explanations outline that human dignity is deemed both a fundamental right and the cornerstone of all other rights. Even in cases where rights are constrained, the Explanations assert that the dignity of the human person must be unwaveringly respected, signifying its non-negotiable status as an integral part of the substance of the rights laid down in the Charter. The CJEU ruled that respect for human dignity requires that the application of Article 20(4) of the Directive does not bring the person concerned in a situation of extreme material poverty that does not allow that person to meet his or her most basic needs such as a place to live, food, clothing and personal hygiene, that undermines his or her physical or mental health or puts that person in a state of degradation incompatible with human dignity.[185]

---

[179] AIDA, 'Withdrawal of Reception Conditions for Asylum Seekers: An Appropriate, Effective or Legal Sanction?' (2018)
[180] Anneliese Baldaccini and others, Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy (Bloomsbury Publishing 2007) p 220.
[181] Case C-233/18 *Zubair Haqbin v Federaal Agentschap voor de opvang van asielzoekers* [2019], para 18, 19.
[182] ibid para 47-48, 56.
[183] Lieneke Slingenberg, 'Hof van Justitie: overlastgevende asielzoekers mogen niet uit de opvang worden gezet, ook niet tijdelijk' (*Verblijfblog | Actueel Migratierecht Toegelicht*, November 15, 2019) //verblijfblog.nl/hof-van-justitie-overlastgevende-asielzoekers-mogen-niet-uit-de-opvang-worden-gezet-ook-niet-tijdelijk%EF%BB%BF/ accessed 7 December 2023.
[184] 'Charter of Fundamental Rights of the European Union C303/01 Notices from European Union Institutions and Bodies' (14 December 2004) Volume 50 Official Journal of the European Union //eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2007:303:FULL&from=EN accessed 11 January 2023 p 18.
[185] Case C-233/18 *Zubair Haqbin v Federaal Agentschap voor de opvang van asielzoekers* [2019], para 46.

Taking away the allowance intended for clothing and personal hygiene products for a full month, when asylum seekers are completely reliant on that allowance for buying clothes and other necessary items, would not allow them to meet their most basic needs. This indicates that it could be argued that the sanction violates the right to human dignity.

### 6.4. Principle of proportionality

The principle of proportionality is laid down in Article 20(5) of the Reception Directive. It reads as follows:

> Decisions for reduction or withdrawal of material reception conditions or sanctions referred to in paragraphs 1, 2, 3 and 4 of this Article shall be taken individually, objectively and impartially and reasons shall be given. Decisions shall be based on the particular situation of the person concerned, especially with regard to persons covered by Article 21, taking into account the principle of proportionality. Member States shall under all circumstances ensure access to health care in accordance with Article 19 and shall ensure a dignified standard of living for all applicants.

Any sanctions imposed for rule violations should be proportionate to the gravity of the offence. Making noise, in the absence of violence or severe disruption, as part of a peaceful protest is a common and expected aspect of such demonstrations. Therefore, such a severe sanction as withdrawing weekly allowances for a month is not proportionate given the nature of the situation. Moreover, it is necessary to consider whether less severe measures can be implemented. In *Haqbin*, the CJEU addressed this and emphasised that the applicant could have been housed in a separate section of the accommodation centre to safeguard the well-being of staff and other residents. When addressing disruptive behaviour, such as noise during a protest, opting for alternative measures, like addressing the disturbance directly through mediation, may be a more proportionate response compared to revoking the daily allowance intended for clothing and personal hygiene.

While safeguarding the safety of staff and residents may be a legitimate concern, it does not excuse the obligation to uphold the right to human dignity. Withholding funds for clothing and personal hygiene, as seen in *Haqbin*, denies residents the means to meet their basic needs, contradicting the principle of human dignity. Even if the accommodation rules are breached, completely depriving applicants of funds for clothing undermines their ability to fulfil essential needs and, consequently, compromises their human dignity. Residents depend entirely on these funds for clothing and personal hygiene, making it imperative to ensure a more balanced and dignified approach.

### 6.5 Conclusion: is the sanction in line with the Reception Conditions Directive?

The Directive applies to the protesting asylum seekers. The Directive gives the mandate to Member States to ensure material reception conditions, providing housing, food, clothing and daily expenses allowance. Although the flexibility in providing these conditions is acknowledged, an adequate standard of living and protection of physical and mental health is obligated. Member States can reduce or withdraw material reception conditions based on serious breaches of house rules and violent behaviour. However, there is ambiguity of the phrase ‘serious breach’.

We argue that making noise as part of a peaceful protest should not form a serious breach, unless it constitutes violence or poses a direct threat to safety. The case of *Haqbin* shows that when imposing such sanctions, the circumstances need to comply with the principle of proportionality, respect for human dignity and a minimal standard of living must be ensured. Withholding the monthly allowance for clothing and personal hygiene products, upon which asylum seekers depend entirely, for a full month would jeopardise their ability to fulfil basic needs. Thus, the imposed sanction violates the right to human dignity. The principle of proportionality shows the need for sanction based on an

assessment of individual circumstances and taking into account the least severe measure before resorting to withdrawing the material reception conditions. As shown in the *Haqbin* case, other and less severe measures may be more proportionate.

In sum, Part II of this Expert Opinion shows that the sanction imposed on the asylum seekers may not be in line with the Reception Conditions Directive. Our recommendation is to clarify the phrasing 'serious breach'. Making noise as part of a peaceful protest should not fall under the scope of a serious breach. We further recommend that the sanction should be examined under the proportionality principle and the right to human dignity.

## Chapter 7. Conclusion: Expert Opinion

This Expert Opinion addressed the legality of the sanction imposed on asylum seekers who used pots and spoons to generate noise during their protest against their living conditions in a reception centre in the Netherlands. The imposed sanction consisted in the withdrawal of their weekly allowance (€12.95/week) during a period of four weeks. This Opinion focuses on the legality of this sanction in the light of the human right to protest and the EU Reception Conditions Directive.

The Opinion concludes that by sanctioning the noise, the state interfered with the right to protest. The first part of this Opinion lays out that the sanction is disproportionate and unjustified, notably due to its severity and chilling effect. The legal analysis was anchored in national, European, and international law, which firmly established that the right of asylum seekers to engage in a peaceful protest, including through the use of noise, is protected under the ECHR, ICCPR and Dutch law. One substantial finding is the indivisibility of the noise and the protest, as the creation of noise was essential to the protest and the chosen form is protected.

As to the conformity with the EU Reception Conditions Directive, it is argued that the sanction is not in line with the Directive as it is overly severe, disproportionate and violates human dignity as included in the EU Charter. The examination in the second part of this Opinion highlights the ambiguity surrounding the term 'serious breach' of house rules, as mentioned in the Directive, particularly in cases where noise is part of a peaceful protest. This Opinion argues that non-violent expressions of dissent, like making noise during a demonstration, should not constitute a serious breach of house rules unless the noise escalates to seriously violent behaviour or poses a direct threat to the safety and well-being of others in the accommodation centre.

This Expert Opinion calls for a re-evaluation of sanctions such as those imposed on the asylum seekers for their protest against the living conditions.