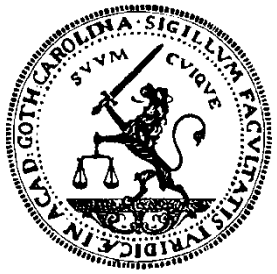

FACULTY OF LAW
Lund University

Lina Wallenberg

Return to Socio-Economic Deprivation

A Critical Analysis of the Scope of Complementary Protection under European Law

LAGM01 Master Thesis

International Human Rights Law
30 higher education credits

Supervisor: Vladislava Stoyanova

Term: Spring 2016

Contents

Summary

Migration caused by deprivation of socio-economic human rights is a topical issue that gives rise to complex questions of legal, moral and ethical nature. From a legal perspective, seeking international protection from socio-economic deprivation is often associated with conceptual challenges. The purpose of this thesis is to examine how the regime of complementary protection under European asylum law relates to migrants basing their claims for protection on socio-economic deprivation. More specifically, it examines the scope of protection provided under Article 3 ECHR and Article 15(b) QD in relation to this category of claims and critically scrutinizes the reasoning of the ECtHR and the CJEU in their respective approaches on this matter.

In respect of Article 3 ECHR, a thorough analysis of the jurisprudence of the ECtHR provides that socio-economic deprivations claims, in principle, can be encompassed by its scope of protection. However, by subjecting these cases to a *threshold of exceptionality*, the ECtHR has effectively circumscribed their possibilities of triggering the *non-refoulement* obligations enshrined in Article 3. The core argument for subjecting socio-economic harm cases to a threshold of exceptionality relates to the *source* of their feared harm. In addition, it has been supported by a need for a balancing of interests between those of the applicant and those of the state, and the fact that the ECHR essentially is directed at the protection of civil-political rights. It is submitted in this thesis that none of these arguments stand up to scrutiny, as they are conceptually incoherent, inconsistent with fundamental principles stipulated in previous case law and underpinned by evident political concerns.

In its formation of subsidiary protection under the QD, the CJEU has applied an even stricter approach than the ECtHR to claims based on socio-economic deprivation. While the ECtHR has acknowledged that such claims in *exceptional* cases can engage the protection of Article 3 ECHR, the CJEU has ruled out such a possibility for the purpose of Article 15(b) QD. Despite the inter-normative connection between these provisions, the CJEU has thus distanced itself from the jurisprudence of the ECtHR on this matter. In reaching this conclusion, the CJEU interpreted the scope of Article 15(b) QD in the light of Article 6 QD, which requires there to be an *actor* of serious harm. It is argued in this thesis that the approach of the CJEU can be problematized in many aspects, particularly from the perspective of the EU Charter and principles stipulated in previous case law.

Sammanfattning

Migration som uppstår till följd av att socioekonomiska mänskliga rättigheter eftersatts är ett högaktuellt ämne som ger upphov till komplexa frågor av rättslig, moralisk och etisk natur. Från ett rättsligt perspektiv är det ofta förknippat med konceptuella utmaningar att söka internationellt skydd från socioekonomisk utsatthet. Syftet med denna uppsats är att undersöka hur det komplementära skyddssystemet inom Europeisk asyllagstiftning förhåller sig till migranter som baserar sina skyddsanspråk på socioekonomisk utsatthet. I synnerhet undersöks hur skyddet under Artikel 3 EKMR[1] och Artikel 15(b) SGD[2] relaterar till denna typ av anspråk. Vidare granskas hur Europadomstolen och EU-domstolen rättfärdigar sina respektive förhållningssätt i detta avseende ur ett kritiskt perspektiv.

Gällande Artikel 3 EKMR så ger en grundlig analys av Europadomstolens praxis vid handen att skyddsanspråk baserade på socioekonomisk utsatthet, i princip, kan omfattas av dess skyddsomfång. Genom att kräva att dessa fall skall uppvisa *exceptionella omständigheter* har Europadomstolen dock, i stor utsträckning, kringskurit deras möjligheter att åtnjuta det skydd mot *refoulement* som finns under Artikel 3. Det huvudsakliga argumentet för att legitimera detta förhållningssätt grundar sig på *källan* till deras befarade skada. Vidare har behovet av en intresseavvägning mellan statens och individens intressen samt det faktum att EKMR företrädesvis är avsedd att skydda civil-politiska rättigheter anförts till stöd för detta förhållningssätt. Det argumenteras i denna uppsats för att ingen av dessa argument är hållbara då de karaktäriseras av konceptuell inkonsekvens, strider mot grundläggande principer i tidigare praxis samt har en tydlig politisk underton.

I sitt utformande av subsidiärt skydd under SGD har EU-domstolen tillämpat ett ännu striktare förhållningssätt än Europadomstolen i relation till skyddsanspråk som baseras på socioekonomisk utsatthet. Till skillnad från Europadomstolen, vilken medger att sådana fall under *exceptionella* omständigheter kan aktualisera skyddet under Artikel 3 EKMR, har EU-domstolen helt uteslutit en sådan möjlighet i förhållande till Artikel 15(b) SGD. Trots det internormativa förhållande som finns mellan dessa bestämmelser har EU-domstolen sålunda tagit avstånd från Europadomstolens praxis i detta avseende. För att nå fram till denna slutsats

[1] Europeiska konventionen till skydd för de mänskliga rättigheterna och grundläggande friheterna (ECHR) Se not 9.
[2] Skyddsgrundsdirektivet (QD) Se not 11.

tolkade EU-domstolen Artkel 15(b) SGD i ljuset av Artikel 6 SGD, som kräver att det finns en *aktör* som åsamkar allvarlig skada (serious harm). Det argumenteras i denna framställning för att EU-domstolens förhållningssätt i detta avseende kan problematiseras ur många synvinklar, inte minst med utgångspunkt i EU-stadgan[3] och principer etablerade i tidigare praxis.

[3] Europeiska Unionens stadga om de grundläggande rättigheterna (EU Charter) se not 84.

Preface

With the submission of this thesis, five and a half years of law studies have come to an end. First of all, I would like to thank my family for the endless love and support you have provided me with throughout these years. I would also like to thank my Filip, whose encouragement and belief in me has been my constant source of energy.

I would further like to thank my supervisor Vladislava Stoyanova for her helpful comments and support in the formation of this thesis.

Lastly, I want to thank all of the fantastic people who have contributed to making these years such a memorable journey – you know who you are.

Lina Wallenberg
Lund
23 May 2016

"Refugees, migrants and foreign nationals are the first to be singled out in a dehumanised and selfish society. Their situation is even worse when they are seriously ill. They become pariahs whom Governments want to get rid of as quickly as possible. […] I cannot desert those sons of a lesser God who, on their forced path to death, have no one to plead for them."

- Judge Pinto de Albuquerque[4]

To *N*.

[4] Dissenting opinion of Judge Pinto de Albuquerque, SJ v. Belgium, Judgement of 19 March 2015 (70055/10) para 12.

Abbreviations

CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
CoE	Council of Europe
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
QD/Qualification Directive	Directive (2011/95/EU) of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or persons eligible for subsidiary protection, and for the content of the protection granted (recast)
RD/Returns Directive	Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals
Refugee Convention	Convention Relating to the Status of Refugees
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human rights
UNHCR	United Nations High Commissioner for Refugees

Introduction

1.1 Background

It is estimated that 836 million people around the world are living in extreme poverty.[5] Severe destitution is often found in places where poor health and lack of education deprive people of productive employment, where environmental resources have been depleted or spoiled, or where corruption and conflict has squandered public resources.[6] People living under such circumstances often find themselves exposed to various forms of poverty related phenomena. In example, starvation, homelessness and lack of adequate healthcare continue to pose a threat to the survival of many individuals around the world.[7] Needless to say, the desperation experienced by those affected by such adversities may trigger a need to leave the intolerable conditions and seek refuge elsewhere.

This backdrop triggers the question of what obligations states owe individuals who seek *international protection* from poverty related phenomena. Are these obligations of purely moral and ethical nature, or are there also *legal obligations* in place, which circumscribe states' discretion in responding to the claims of such individuals?[8] Under the European regime of complementary protection, there are legal instruments operating to restrain the discretion of states in responding to claims for international protection. In this regard, the European Convention on Human rights[9] (ECHR) prohibits repatriation of individuals under specific circumstances.[10] In addition, the Qualification Directive[11] (QD) of the European Union (EU) obliges the Member States to grant subsidiary protection to individuals in certain situations.[12] The question then emerges how these instruments relate to individuals basing their claims for

[5] United Nations, *The Millennium Development Goals Report 2015* p. 4. "Extreme poverty" is defined as living on less than 1.25 USD/day.
[6] United Nations, *The Millennium Development Goals Report 2013* p. 7.
[7] Cf. United Nations, *The Millennium Development Goals Report 2015* p. 8-9.
[8] Cf. Foster, Michelle: *International Refugee Law and Socio-economic Rights: Refuge from Deprivation* 2009, p. 1. (Foster 2009)
[9] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4 November 1950 in force 3 September 1953. (CETS 005).
[10] See chapter 3 for a thorough analysis on this matter.
[11] Directive (2011/95/EU) of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (OJ 2011 L 337/9) (Qualification Directive/QD).
[12] See chapter 4 for a thorough analysis on this matter.

protection on socio-economic deprivation. Is there scope for encompassing such claims within the relevant provisions of these instruments? This issue is further examined in this thesis.

1.2 Purpose and research questions

The purpose of this thesis is to examine how the regime of complementary protection under European asylum law relates to migrants basing their claims for protection on socio-economic deprivation. In particular, it aims at examining the scope of protection provided under Article 3 of the ECHR and Article 15 (b) of the QD in relation to this category of claims. It also aims at comparing the sphere of protection provided under the respective instruments and exposing potential frictions and discrepancies. Furthermore, it aims at investigating how the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) justify their legal approaches in relation to this specific category of claims. For these purposes, the following research questions are asked:

- What is the scope of protection under Article 3 of the ECHR and Article 15(b) of the Qualification Directive in relation to claims based on socio-economic deprivation?

- How do the ECtHR and the CJEU justify their respective legal approaches in relation to this category of claims and what critique can be directed against their reasoning?

1.3 Delimitations

The scope of this thesis is limited in several aspects. First, it is limited in its *spatial scope* by having a regional focus on Europe. The relevant states, whose obligations are under scrutiny, are the Contracting States of the ECHR and the Member States of the EU that are bound by the QD.[13] The thesis is further limited in its *material scope* by focusing on the European complementary system of protection from the perspective of Article 3 ECHR and Article 15(b) QD. Although other Articles in the ECHR in principle can provide protection from *refoulement*, Article 3 continues to be the most developed and utilized basis for protection under the Convention.[14] Furthermore, the constituent elements of Article 3 ECHR correspond to those of Article 15(b) QD, which makes it particularly interesting to compare the scopes of

[13] See more about this issue under section 2.3.1.
[14] In example, Article 6 ECHR (right to a fair trial) may be triggered in the context of expulsion if the applicant is at risk of suffering flagrant denial of justice in the receiving State, see *inter alia* Abu Qatada v. the United Kingdom, Judgement of 17 January 2012 (8139/09) para. 258.

protection of these provisions. In this regard, it should also be mentioned that the thesis does not address questions concerning access to the territory and asylum procedure of the state in question. Lastly, the study is limited in its *personal scope* by focusing on one specific category of migrants, namely those basing their claims for protection on socio-economic deprivation.

1.4 Methodology and material

The first research question aims at establishing the scope of Article 3 ECHR and Article 15(b) QD in relation to a specific category of claims. As such, it seeks to understand and define the current state of law approached from a *de lege lata* perspective. In this regard, a legal dogmatic method has been applied, through which the current state of law is defined by the valid sources of the legal regime in question.[15] For the purpose of the ECHR and the QD, this means that significant weight is to be given to the rulings of the ECtHR and CJEU, which have the formal mandate of interpreting the ECHR and the QD.[16] Consequently, focus has been centred on the jurisprudence of the Courts, complemented by relevant literature. Particular attention has been directed at the landmark rulings of the respective Courts, in which the key principles in how to approach socio-economic deprivation claims have been established. In this regard, the quantity of case law has motivated an approach where the jurisprudence is analyzed continuously throughout the thesis. It should however be mentioned that the case law of the CJEU under Article 15(b) QD is not as abundant as that of the ECtHR under Article 3 ECHR, why more space has been devoted to the jurisprudence of the ECtHR.

The second research question aims at critically scrutinizing the legal reasoning of the ECtHR and the CJEU in their approaches to socio-economic deprivations claims. In answering this question, the operative arguments of the respective Courts have been *identified* and *analyzed*. In the formation of critique, the reasoning of the ECtHR and CJEU has been juxtaposed against certain standards. In this regard, both Courts are expected to uphold a certain degree of *internal consistency* and *conceptual coherency* in their approaches. As such, their approaches are expected to be compatible with principles and concepts stipulated in previous case law. Furthermore, their reasoning is expected to be based on solid legal argumentation, characterized by logical persuasiveness. By virtue of the ECHR's nature as a human rights

[15] Cf. Sandgren, Claes: *Är rättsdogmatiken dogmatisk?* Tidsskrift för Rettsvitenskap 2005, p. 649.
[16] See Article 267 of the Treaty on the Functioning of the European Union (2012/C 326/01) for a definition of the jurisdiction of the CJEU and Article 32 of the ECHR for the jurisdiction of the ECtHR.

instrument, the reasoning of the ECtHR is also expected to be compatible with the *principle of effectiveness*[17] and Article 3's character as an absolute human right. In respect of Article 15(b) QD, the CJEU is presumed to have due regard to the subordination of secondary legislation to primary Union law.[18]

In dissecting the arguments of the Courts, scholarly work of several authors have been used. However, academic literature commenting on the relevant jurisprudence of the CJEU is sparse, why electronic sources of more informal character have been used in this regard.

1.5 Status of research and my contribution

The topic in focus for this thesis has been subject to limited legal research. While there is scholarship addressing the issue of socio-economic deprivation in relation to the Refugee Convention[19], there is less comprehensive research on the complementary regime of protection is this regard. However, some books and journals address the landmark cases of the ECtHR on this matter.[20] My contribution in this regard is a thorough and systematic analysis of the scope of Article 3 ECHR in relation to socio-economic deprivation claims, which includes the most recent case law of the ECtHR and is approached from a critical perspective. Moreover, the elaborate examination of the Qualification Directive in relation to these types of claims, viewed in light of the recent rulings of the CJEU on this matter, sheds light on an issue that has not been extensively addressed in the academic literature.

[17] This principle requires that the norms of the ECHR are interpreted in a way as to best protect the individual. Cf. Akandji-Kombe, Jean-François: *Positive Obligations under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights.* Human Rights Handbooks No. 7 January 2007.

[18] See more about the legal structures of European Union law under section 2.3.1.

[19] Convention Relating to the Status of Refugees, Geneva 28 July 1951 in force 22 April 1954. Resolution 2198 (XXI). See Foster, Michelle: *International Refugee Law and Socio-economic Rights: Refuge from Deprivation* 2009, in which the author explores the legal challenges created by the phenomenon of migration caused by deprivation of economic and social rights in relation to the Refugee Convention.

[20] Cf. e.g. McAdam, Jane: *Complementary Protection in International Refugee Law* 2007; Costello, Cathryn; *The Human Rights of Migrants and Refugees in European Law* 2016; Foster, Michelle: *Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law,* New Zealand Law Review, Vol. 2009, Issue 2 2009 (M. Foster); Scott, Matthew: *Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights,* International Journal of Refugee Law, Vol. 26, No. 3 2014; Greenman, Kathryn: *A Castle Built on Sand? Article 3 ECHR and the Source of Risk in Non-Refoulement Obligations in International Law,* International Journal of Refugee Law, Vol. 27, No. 2 2015; Mantouvalou, Virginia: *N v UK: No Duty to Rescue the Nearby Needy?* The Modern Law Review, Vol. 72, issue 5 2009.

1.6 Structure

Chapter *two* aims at providing a theoretical introduction to the regime of international protection and how it relates to claims based on socio-economic deprivation. It conceptualizes the notion of "socio-economic harm" and illustrates the challenges associated with the refugee regime in this regard. After demonstrating the necessity of turning to the complementary regime of protection, focus is shifted to this system. Following an introduction to the concept of complementary protection, specific attention is given to the ECHR and the QD. Lastly, the conceptual challenges connected with characterizing socio-economic harm as "inhuman or degrading treatment" is addressed, and the potential significance of the permeability doctrine in this regard is explored.

Chapter *three* engages with the question of encompassing socio-economic deprivation claims within the scope of Article 3 ECHR more practically. The theoretical foundation for the implied *non-refoulement* obligation is investigated, followed by a thorough analysis of the *non-refoulmenet* jurisprudence of the ECtHR under Article 3 ECHR.

Chapter *four* is dedicated to examining the scope of Article 15(b) QD in relation to socio-economic deprivation claims. The inter-normative connection between Article 3 ECHR and Article 15(b) QD is explored and different doctrinal positions concerning its scope for encompassing socio-economic deprivation claims are outlined. Lastly, two cases from CJEU are presented and analyzed.

All chapters end with *concluding comments*, where the main observations from each chapter are discussed. As mentioned above, the jurisprudence of the Courts and the research questions are analyzed throughout the thesis. The main findings are then presented and discussed under the final conclusion.

2 Socio-economic deprivation and the regime of international protection

2.1 Conceptualizing socio-economic harm

In recent decades, the phenomenon of migration has assumed unprecedented proportions.[21] While some of the demographic movements take place on a voluntary basis, other is the result of individuals fleeing from various forms of intolerable conditions. Although the distinction between voluntary and forced migration is not always as sharp as it may seem, the concept of forced migration can be explained as a "migratory movement in which an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes".[22] As such, it refers to movement of persons who are *compelled* to flee an adverse situation in their home country and to seek protection in a new country.[23] Every year, a vast number of migrants cross international boarders in an attempt of gaining a better life elsewhere.[24] It has been asserted that irregular migration is one of the most telling signs of the socio-economic disparities between countries, aggravated by economic globalization and the rapid impoverishment of underdeveloped countries.[25] Moreover, it has been said to reflect the misery of populations finding themselves in situations of extreme poverty that is sometimes being compounded by armed conflict and political intolerance.[26] There may thus be many converging factors, which contribute to displacing individuals in our contemporary society.

The focus of this thesis is on the socio-economic dimension of forced migration, meaning the migration caused by *deprivation of economic and social rights*.[27] The group in focus for this research is thus migrants who wish to avoid repatriation to a country where they risk being subject to severe deprivation of socio-economic human rights. This phenomenon can be referred to as a form of *involuntary economic migration*, to use the words of Michelle

[21] Cf. International Law Commission, *Second report on the expulsion of aliens*, Special Rapporteur Maurice Kamto 20 July 2006, p. 225.
[22] International Organization for Migration, *Key migration terms.* Available at: https://www.iom.int/key-migration-terms. Accessed on 2016-03-10.
[23] Boeles, den Heijer, Lodder and Wouters: *European Migration Law* 2014, p. 3.
[24] Hesselman, Marlies: *Sharing international responsibility for poor migrants? An analysis of extra-territorial socio-economic human rights law*, European Journal of Social Security, Vol. 15, No. 2 2013, p. 188.
[25] International Law Commission, *Second report on the expulsion of aliens*, Special Rapporteur Maurice Kamto 20 July 2006, p. 225-26. See also ibid.
[26] International Law Commission, *Second report on the expulsion of aliens*, Special Rapporteur Maurice Kamto 20 July 2006, p. 26.
[27] This concept is used by Foster in her book *International Refugee Law and Socio-economic Rights: Refuge from Deprivation* 2009 (cf. note 19).

Foster.[28] What characterizes these situations is that the feared harm does not, immediately, emanate from deliberate infliction of physical violence, but rather from different forms of socio-economic vulnerability. As such, the concept of *socio-economic harm,* for the purpose of this thesis, referrers the harm caused by severe deprivation of what is traditionally regarded as socio-economic human rights.

The conceptual definition outlined above inevitable leads one to question: who is the socio-economic protection seeker? On reflection, though, it is not difficult to imagine a scenario where deprivation of what is traditionally regarded as socio-economic rights would compel an individual to seek protection in another country. Homelessness, starvation, lack of medical treatment or education could all be such factors. The key aspect is that the source of the feared harm relates to the deprivation of a right, which is traditionally regarded as belonging to the socio-economic category of human rights.

A central notion to this thesis is the concept of socio-economic human rights, which thereby motivates some closer attention. Anyone concerned with human rights is likely to have encountered the phrase that human rights are "indivisible, interdependent and interrelated, to be treated on the same footing with the same emphasis". This idea, which is codified in the Vienna Declaration and Programme of Action[29], seems to represent the official position of the international community concerning the status of and relationship between human rights. It reflects the view that human rights neither logically nor practically can be separated in watertight compartments.[30] However, it should be equally clear to anyone involved with human rights that they are, for a fact, not treated as indivisible, interdependent or interrelated, and certainly not on the same footing or with the same emphasis.[31] In fact, it has been argued that this phrase has become something more akin to a rhetorical slogan to be repeated for the sake of "good order", rather than having any substantial significance in itself.[32] Because despite this widespread perception of indivisibility, human rights law has had a long-standing tradition of making a sharp distinction between two sets of rights: civil-political and socio-economic.

[28] Ibid. p. 2.
[29] Vienna Declaration and Programme of Action, Vienna 25 June 1993, section 1 para 5.
[30] Alston, Philip and Goodman, Ryan: *International Human Rights* 2012, p. 285.
[31] Koch, Ida Elisabeth: *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Right* 2009, p. 3.
[32] Ibid.

This division was ultimately manifested in the 1960's by the separation of the two categories of rights into two different legal instruments. Although the rights appeared side by side in the Universal Declaration of Human Rights[33] (UDHR), the prevailing political climate at the time did not allow for a binding legal instrument which dealt will all human rights equally, in one single instrument. Instead, the socio-economic rights were placed in the International Covenant on Economic Social and Cultural rights[34] (ICESCR) and the civil and political rights in the International Covenant on Civil and Political rights[35] (ICCPR).

A bearing idea for separating the two sets of rights was the traditional view that they are so fundamentally different in their normative characters that they simply cannot, by their very nature, be treated on the same footing with the same emphasis.[36] According to this traditional approach, civil and political rights are viewed as negative, cost-free and subject to immediate implementation whereas socio-economic rights are regarded as positive, vague, resource demanding and subject to progressive implementation.[37] This perception of the character of socio-economic rights can, to a certain extent, be said to be reflected in the normative construction of instruments protecting such rights. A clear example is the ICESCR, which stipulates that the obligations therein are subject to the Contracting States' availability of resources and have the character of progressive realization. This is in contrast with the legal obligations stemming from its civil-political counter-part, the ICCPR, which are not circumscribed by any similar concepts.[38]

The separation of the two categories of rights has likewise taken place on the regional level.[39] It has led to a compartmentalized perception of human rights, which is associated with a certain hierarchy. In this regard, civil-political rights have generally enjoyed a stronger legal protection than socio-economic rights, which traditionally have been treated more as political aspirations than readily enforceable (legal) rights. Consequently, denials of civil-political

[33] Paris 10 December 1948. General Assembly Resolution (A/RES/3/217).
[34] New York 16 December 1966 in force 23 March 1976. General Assembly resolution 2200A (XXI).
[35] New York 16 December 1966 in force 3 January 1976. General Assembly resolution 2200A (XXI).
[36] Koch 2009, p. 5.
[37] Ibid. p. 7.
[38] Alston and Goodman 2012, p. 284. Cf. Article 2 ICESCR and Article 2 ICCPR.
[39] Cf. e.g. the ECHR and the European Social Charter (revised), Strasbourg 3 May 1996 in force 1 July 1999. (CETS No. 163).

rights have often been viewed as *violations*, whereas denials of socio-economic rights have been viewed as *injustice*.[40]

For individuals seeking protection from socio-economic deprivation, an important question is if the traditional compartmentalized perception of human rights has any implications for the regime of international protection. In other words, does the traditional perception of socio-economic rights constitute an obstacle for those individuals who wish to seek international protection from deprivation of such rights? Under the following section, it will be examined how the Refugee Convention relates to claims based on socio-economic deprivation and the conceptual challenges associated with this issue.

2.2 Socio-economic harm and the Refugee Convention: conceptual challenges

A cornerstone in the regime of international protection is the possibility of being recognized as a refugee. The 1951 Refugee Convention, together with its 1961 additional protocol[41], constitutes the core instrument in the legal regime of refugee protection. The Convention is binding for 145 State Parties, which are legally obliged to comply with its powerful catalogue of refugee rights.[42] The rights enshrined in the Convention include several fundamental protections, which relate to the most basic aspects of the refugee experience, including the need to escape, to be accepted and to be sheltered.[43] One of the most prominent aspects of the refugee protection is the right not to be returned to a country where one will be subject to serious harm. Article 33(1) of the Convention stipulates a prohibition against returning a refugee to a state where his life or freedom would be threatened, a right commonly referred to as the principle of *non-refoulement*. It is the operation of this principle that effectively gives rise to international protection.[44] The portal for accessing the rights set forth in the Refugee Convention is the definition of a refugee laid down in Article 1(A)(2). According to this definition, a refugee is someone who:

[40] Foster 2009, p. 10 quoting a passage from Human Rights Watch, International Catholic Migration Committee and the World Council of Churches: *NGO Background Paper on the Refugee and Migration Interface* 29 June 2001.
[41] Protocol Relating to the Status of Refugees, New York 16 December 1966 in force 4 October 1967. General Assembly resolution 2198 (XXI).
[42] Hathaway, James C. and Foster, Michelle: *The Law of Refugee Status* 2014, p. 1.
[43] Hathaway, James C: *The Rights of Refugees under International Law* 2005, p. 94.
[44] McAdam 2007, p. 9.

> "[…] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion […] is outside the country of his nationality and […] is unwilling to return to it."

As the definition suggests, there are a number of criteria that have to be fulfilled in order for an individual to qualify as a refugee and thereby trigger the application of the rights in the Convention. How then, do these prerequisites relate to individuals fearing return to socio-economic deprivation?

First of all, it must be established that the feared harm of an individual amounts to persecution in the sense of the Article. Although this requirement is very much at the heart of the concept of a refugee, there is no universally accepted definition of the term persecution. However, it is held by the UNHCR in its Guidelines for Determining Refugee Status to be understood as various forms of *serious human rights violations*.[45] In academic writing, this understanding of the term persecution has been referred to as the concept of *serious harm*.[46] In the case of an individual basing her claim for protection on socio-economic deprivation, it must thus be established that the feared harm amounts to serious harm i.e. constitutes a serious human right violation. As pointed out by Hathaway and Foster, contemporary refugee jurisprudence does recognize that the risk of socio-economic rights violations may amount to serious harm, for instance in situations where someone is denied critical forms of healthcare or is subject to deliberate deprivation of food, housing, employment or other essentials to life.[47]

Secondly, the feared harm must be linked to one of the five Convention grounds i.e. race, religion, nationality, membership in a particular social group or political opinion. As such, there must be a causal link between the feared persecution and one of the Convention grounds. Refugee protection is thus delimited to those who are being persecuted *for reasons of* a Convention ground, and does not apply not to all of those who fear serious human rights violations.[48] Arguably, this requirement of nexus can be said to constitute one of the biggest obstacles for socio-economic protection seekers, since the Convention grounds primarily have a civil-political focus and are thus not designed to encompass such claims per se.

[45] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* 1992, para. 51.
[46] Cf. Hathaway and Foster 2014, p. 182-183.
[47] Ibid. p. 228-236.
[48] Foster 2009, p. 237.

The following example may be used to illustrate this challenge. A terminally ill person who does not have access to medical treatment in her country of origin may be able to establish that her feared harm amounts to a serious human right violation (e.g. the right to health[49]). But if she is unable to provide that the medical care is withheld from her or that she is being discriminated on account of one of the five Convention grounds, e.g. for political reasons, her claim is likely to fall outside the scope of the Refugee Convention. In this regard, Foster argues that there has been a global tendency among decision-makers to dismiss claims involving deprivation of socio-economic human rights on the basis that their feared harm lack connection with the Convention. Instead, their claims for protection have been explained with reference to the search for a "better life" or labelled as purely economic and therefore deemed to go beyond the scope of the Refugee Convention.[50]

It has been argued by some scholars that the conceptual challenges faced by migrants basing their claims for refugee status on socio-economic deprivation, relate to the longstanding tradition of upholding a dichotomy between *economic migrants* and *political refugees*. In this dichotomy, the latter category represents the "real" and "genuine" refugees who are worthy of international protection, whilst the former fall outside of its scope.[51] Inherent in this distinction is the implicit assumption that economic migrants are not truly forced to leave their countries in order to seek protection elsewhere, but are doing so out of their own volition in the search for a better life.[52]As their movement is voluntary and driven by economic motives, they are not truly in need of international protection, but are simply attempting to improve their quality of life.

In this way, migrants basing their claims for protection on socio-economic deprivation risk being "group labelled" as unworthy of protection without due regard to the particularity of their individual situation and the shifting severity of harm that they might face. Indeed, an engineer that settles abroad in an attempt to increase her salary may not be in need of international protection. But is the case as simple in the situation of, for instance, a terminally ill migrant who does not have access to medical treatment in her country of origin and will

[49] Cf. Article 12 ICESCR.
[50] Foster 2009, p. 237.
[51] Ibid. p. 2-5.
[52] Ibid. p. 6-7.

face death if she is sent back? Can it truly be said that she, likewise, is merely trying to improve her quality of life? [53]

Although one might criticize the dichotomy between economic migrants and political refugees for being over-simplistic and failing to address the complexities of human lives, it continues to permeate the regime of refugee protection. As a result, migrants leaving their countries for reasons relating to socio-economic deprivation risk being excluded from the scope of the Refugee Convention unless they can establish an underlying civil-political rights-basis for their feared (socio-economic) harm.[54]

2.3 The complementary system of protection: a human rights-based principle of *non-refoulement*

As evident from the previous section, the conceptual challenges connected with the Refugee Convention generally makes it a difficult instrument to apply in relation to claims based on socio-economic deprivation. However, it is now a well-established principle of international law that human rights treaties impose obligations on states to protect individuals from *refoulement* beyond the terms of the Refugee Convention.[55] Recent developments in international law has made it possible for migrants who fall outside the scope of the Refugee Convention, but still face a real risk of serious harm upon return, to base their claims for protection on an alternative regime, namely the regime of *complementary protection*.

The concept of complementary protection refers to protection granted by states on the basis of an international protection need outside the Refugee Convention. Commonly, the legal basis for this protection is found in human rights instruments, which are interpreted as precluding removal of individuals under specific circumstances.[56] This development has led to a human rights based principle of *non-refoulement*, which is complementary to Article 33 of the Refugee Convention. As such, the "complementary" aspect of the concept refers to the *source* of the additional protection, which by its nature is relative to the Refugee Convention.[57] However, the complementary protection operates autonomously in relation to the Refugee

[53] Cf. ibid. p. 7.
[54] Klinck, Jennifer A: *Recognizing Socio-Economic Refugees in South Africa: a Principled and Rights-Based Approach to Section 3(b) of the Refugees Act*, International Journal of Refugee Law, Vol. 21, Issue 4 2009, p. 654.
[55] M. Foster 2009, p. 257.
[56] McAdam 2007, p. 21.
[57] Ibid. p. 23.

Convention and can form an independent basis for non-removal. It can therefore be said that international law on asylum rests on two primary pillars: the *refugee regime* under the Refugee Convention and the *complementary protection* derived from the standards of human rights treaties.[58] Unlike the Refugee Convention, though, the human rights instruments only provide a trigger for protection and do not elaborate a resultant legal status.[59]

One express example of complementary protection is Article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[60], which prohibits State Parties from expelling, returning or extraditing a person to a state "where there are substantial grounds for believing that he would be in danger of being subjected to torture". In other cases, monitoring bodies to various human rights instruments have interpreted existing primary norms as *implying* an obligation of *non-refoulement*, even though this is not explicit from the wording of the Article.[61] Primarily, such interpretations have been made in relation to the right to life and the prohibition of torture, inhuman or degrading treatment or punishment within the scope of civil-political rights instruments.[62] One example is Article 7 of the ICCPR, which has been interpreted by the Human Rights Committee (HRC) as precluding removal of an individual to a state where he will be subject to torture or cruel, inhuman or degrading treatment or punishment.[63]

Similarly, obligations of *non-refoulement* have been interpreted into human rights instruments at the regional level. In Europe, the region under scrutiny in this thesis, the ECtHR has been the inevitable driving force behind the creation of a human rights-based principle of *non-refoulement*.[64] Ever since the landmark case of *Soering v. the United Kingdom*[65], the ECtHR has interpreted Article 3 of the ECHR, which prohibits torture, inhuman or degrading treatment or punishment, as precluding removal in situations where it would expose an individual to a real risk of being subject to severe forms of ill-treatment.

[58] Boeles, den Heijer, Lodder and Wouters 2014, p. 245.
[59] McAdam 2007, p. 32.
[60] New York 10 December 1984 in force 26 June 1987. General Assembly resolution 39/46.
[61] M. Foster 2009, p. 265.
[62] McAdam, Jane: *Climate Change, Forced Migration and International Law* 2012, p. 53.
[63] See HRC, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994) para. 9.
[64] Boeles, den Heijer, Lodder and Wouters 2014, p. 341.
[65] Judgement of 7 July 1989 [GC] (14038/88).

The interpretative position of the ECtHR has extended the applicability of the prohibition of torture, inhuman or degrading treatment or punishment from the traditional "domestic" cases to also encompassing "foreign" ones. By virtue of this position, Contracting States of the ECHR are not only required to safeguard the rights stemming from Article 3 within their *own jurisdictions*, but are also prohibited from *sending a person back* to a country where there is a real risk of him being subject to treatment contrary to the Article. As such, Article 3 can be said to have *extraterritorial effects*, since circumstances appertaining beyond the Contracting States' own territories can trigger the protection of the Article.[66]

The regime of complementary protection widens the scope of international protection by shifting the triggering mechanism from the narrow definition of a refugee to the concept of torture, inhuman or degrading treatment or punishment.[67] Under this regime, the crucial point is to establish that removing an individual would put him at a real risk of being subject to the proscribed treatment, as opposed to fitting into the definitional frame of a refugee. In this regard, there is no requirement of providing a nexus with any particular Convention ground since the harm threatened, per se, is sufficient to preclude removal.[68] Another crucial feature of the complementary protection is its *absoluteness*. Whereas Article 33(2) of the Refugee Convention allows for derogation from the principle of *non-refoulement* in relation to those who pose a serious security threat to the host state, the protection under human rights law is absolute.[69]

A key question for this thesis is what the regime of complementary protection can bring to the protection of individuals fearing return to socio-economic deprivation. Is it possible to argue that violations of socio-economic human rights constitute inhuman or degrading treatment and thereby trigger the *non-refoulement* mechanism enshrined in Article 3 ECHR? In this regard, it is important to note that the prohibition of inhuman or degrading treatment is commonly viewed as a civil-political rights concept. In order for a migrant who fears return to socio-economic deprivation to benefit from its protection, she must thus be able to establish that violations of socio-economic human rights can amount to inhuman or degrading treatment

[66] Cf. Scott 2014, p. 412.
[67] By international protection, in this regard, I am referring to the principle of *non-refoulement* i.e. the right not to be removed to a country where one will be subject to serious harm.
[68] Costello 2016, p. 176.
[69] McAdam 2007, p. 22. See Article 33(2) of the Refugee Convention which permits derogation from the principle of *non-refoulement* in situations where a refugee is regarded as a "danger to the community of the country in which he is" or has been "convicted by a final judgement of a particularly serious crime, [and] constitutes a danger to the community of that country."

within the meaning of the concept. Under section 2.4, I will address the conceptual challenges associated with this issue and explore a particular theory that has been used to overcome them.

2.3.1 The European Convention on Human Rights and the Qualification Directive of the European Union

In addition to the protection developed under the norms of the ECHR, a codified form of complementary protection has emerged within the legal framework of the European Union.[70] As a part of the Common European Asylum System (CEAS), the EU has adopted the Qualification Directive, which has introduced a new status of protection on the regional arena of asylum law: *subsidiary protection*. This section introduces the respective legal regimes in which the European Convention on Human Rights and the Qualification Directive appear and examines the positions, functions and interfaces of the instruments within the field of European asylum law.

The ECHR was adopted in 1950 by the Council of Europe (CoE). The CoE was formed in the aftermath of the Second World War in an attempt to promote the rule of law, democracy, human rights and social development. For this purpose, the ECHR was adopted.[71] Ratification of the Convention is a precondition for membership in the CoE , which currently comprises 47 states.[72] All 28 EU Member States have ratified the ECHR.[73]

The implementation of the ECHR is supervised by the ECtHR. The Court exercises its supervision through a complaint mechanism, whereby individuals can allege violations of the Convention.[74] Importantly, applicants before the ECtHR are not required to be citizens or lawful residents of the state they wish to bring proceeding against.[75] However, the implementation machinery of the Convention only comes into play after domestic remedies have been exhausted.[76]

[70] McAdam 2007, p. 22.
[71] European Union Agency for Fundamental Rights, *Handbook on European Law relating to asylum, borders and immigration* 2014, p. 15.
[72] Cf. Article 3 of the Statute of the Council of Europe, London 5 May 1949 in force 3 August 1949. (CETS No. 001).
[73] Bernitz, Ulf and Kjellgren, Anders: *Europarättens Grunder* 2014, p. 147.
[74] See Article 34 ECHR for an exhaustive definition of who is eligible for brining a complaint under the individual applications mechanism.
[75] European Union Agency for Fundamental Rights, *Handbook on European Law relating to asylum, borders and immigration* 2014, p. 15.
[76] Article 35 ECHR. Alston and Goodman 2012, p. 897.

The rights enshrined in the ECHR are usually recognized as belonging to the civil-political category of human rights. In fact, the drafters of the ECHR defined the rights of the Convention in terms similar to the early version of the ICCPR.[77] In the present context, however, it is important to note that the ECHR is not an asylum instrument. It does not contain a right to asylum or residence permit to aliens. Neither does it expressly safeguard the principle of *non-refoulement*.[78] However, migration issues have generated a vast body of case law from the ECtHR, which has interpreted specific norms of the ECHR as providing protection to individuals who fail to meet to formal definition of a refugee but still face a real risk of serious harm upon removal.[79]

As mentioned under the previous section, Article 3 of the ECHR has been interpreted as precluding removal in situations where it would subject an individual to torture, inhuman or degrading treatment or punishment. Over the years, the ECtHR has developed an extensive body of case law under Article 3, turning it into an elaborate and highly effective human rights based principle of *non-refoulement* within the region of Europe. As we will see below, the ECHR has been a source of inspiration in the development of European Union law, not least within the field of asylum law.

European Union law has come into play after the ECHR, bringing its own legislative standards, human rights norms and supervising court.[80] EU law is composed of treaties and secondary legislation. The Treaty on European Union[81] and the Treaty on the Functioning of the European Union[82] (TFEU) are approved by all Member States and constitute *primary EU law*. The regulations, directives and decisions adopted by the EU institutions are commonly referred to as *secondary EU law*.[83]

In 2000, the Charter of Fundamental Rights of the European Union[84] (EU Charter) was proclaimed by the EU. The Charter contains an extensive list of human rights, which became

[77] Alston and Goodman 2012, p. 896.
[78] McAdam 2007, p. 136-137.
[79] European Union Agency for Fundamental Rights, *Handbook on European Law relating to asylum, borders and immigration* 2014, p. 15-16.
[80] Costello 2016, p. 41.
[81] (OJ 2012/C 326/01).
[82] (OJ 2012/C 326/01).
[83] European Union Agency for Fundamental Rights, *Handbook on European Law relating to asylum, borders and immigration* 2014, p. 17.
[84] (OJ 2000/C 364/01).

legally binding on all EU institutions and Member States through the entry into force of the Lisbon Treaty[85] in 2009. Elevated to the status of primary Union law, all EU institutions, as well as EU Member States, are legally obliged to comply with the Charter when "implementing EU-law".[86] The rights enshrined in the Charter correspond, in many aspects, to those found in the ECHR. This inter-instrumental connection is formally recognized in Article 52(3) of the Charter which stipulates that the "meaning and scope" of rights in the Charter, which correspond to rights in the ECHR, shall be the same as those laid down by the ECHR. However, the Charter is not prevented from providing more extensive protection.

Under the treaties, the EU has established its own court: the Court of Justice of the European Union. The role of the CJEU is to ensure that Union law is interpreted and applied uniformly in all Member States as well as to ensure that EU institutions and Member States abide by EU law.[87] The CJEU is entrusted with the competence of deciding over the validity of EU acts and to decide over infringements of EU law by Member States.[88] A mechanism for securing proper application of EU law is the concept of *preliminary rulings*, in which national courts in doubt about the interpretation or validity of EU law can turn to the CJEU for clarification.[89] Unlike the ECtHR, however, the CJEU does not provide an individual complaint mechanism.

In an attempt to harmonize legal standards among the Member States within the field of asylum law, the EU has adopted a series of directives and regulations which together make up the Common European Asylum System.[90] One of these instruments is the 2011 Qualification Directive, which establishes common minimum standards for the qualification of individuals in need of international protection.[91] It also elaborates on the rights accorded to beneficiaries

[85] Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community, Lisbon 13 December 2007 in force 1 December 2009 (OJ 2007 C 306/01).
[86] Article 51 EU Charter; European Union Agency for Fundamental Rights, *Handbook on European Law relating to asylum, borders and immigration* 2014, p. 20-21.
[87] European Union: *Court of Justice of the European Union (CJEU)*. Available at: http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm. Accessed on 2016-03-07.
[88] European Union Agency for Fundamental Rights, *Handbook on European Law relating to asylum, borders and immigration* 2014, p. 19.
[89] European Union: *Court of Justice of the European Union (CJEU)*. Available at: http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm. Accessed on 2016-03-07.
[90] Boeles, den Heijer, Lodder and Wouters 2014, p. 245. The current legal basis for developing a common policy on asylum is found in Article 78 TFEU.
[91] The first version of the Qualification Directive was adopted in 2004 (2004/83/EC). In 2011, a recast version was adopted (see note 11), in which several substantive changes were made. However, these changes did not affect the relevant Articles for this thesis. If nothing else is provided, references to the "Qualification Directive/QD" aims at the 2011 recast Directive. This applies to all Member States of the EU except the United Kingdom, Ireland and Denmark (cf. preamble 50 and 51 of the QD). However, the United Kingdom and Ireland continue to be bound by the 2004 QD.

of protection. As such, the Qualification Directive addresses the issue of *eligibility* for international protection and the *content* of such protection.[92]

In addition to stipulating common standards for the qualification of refugees, the Qualification Directive introduces a harmonized legal basis for complementary protection through the concept of *subsidiary protection*.[93] Persons eligible for subsidiary protection are accorded a specific status, to which a catalogue of rights is attached. Among these are the right to a residence permit and a range of socio-economic rights.[94]

The Qualification Directive uses the concept of *serious harm* as the qualification criteria for who is eligible for protection.[95] Individuals who face a real risk of suffering serious harm, as defined by the Directive, are thus qualified for subsidiary protection.[96] According to Article 15(b) serious harm consists of: "torture or inhuman or degrading treatment or punishment of an applicant in the country of origin". Unmistakably, the wording of Article 15(b) mirrors the constitutive elements of Article 3 ECHR.[97] The connection between the instruments was recognized already in the preparatory work (explanatory memorandum) of the 2004 Qualification Directive, in which the Commission affirmed that Article 15(b) reflects the content of Article 3 ECHR.[98] As such, the meaning and scope of the terms of Article 15(b) was to be determined by the jurisprudence of the ECtHR, which had already developed an extensive case law on the basis of Article 3 ECHR.[99] Subsequently, the CJEU has confirmed this position in its case law by declaring that Article 15(b) of the Qualification Directive, in essence, corresponds to Article 3 ECHR.[100]

Through the concept of subsidiary protection, EU asylum law can be said to have complemented the human rights based principle of *non-refoulement* enshrined in Article 3

[92] Boeles, den Heijer, Lodder and Wouters 2014, p. 253.
[93] Cf. McAdam 2007, p. 136-137.
[94] Boeles, den Heijer, Lodder and Wouters 2014, p. 341. See chapter VII QD for the content of subsidiary protection.
[95] See Article 2(f) QD.
[96] It should however be mentioned that Article 17 QD lists exclusion grounds for when subsidiary protection should not be granted. The protection provided under the QD is thus not absolute.
[97] Tidemann, Paul: *Subsidiary protection and the function of Article 15(c) of the Qualification Directive*, Refugee Survey Quarterly, Vol. 31, No. 1 2012, p. 127.
[98] European Commission, *Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*, COM(2001) 510(final), 12 September 2001, at 26.
[99] Cf. Tidemann 2012, p. 128.
[100] Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie, Judgement of 17 February 2009, C-465/07, ECLI:EU:C:2009:94 (*Elgafaji)* para 28. For a thorough inter-normative analysis of Article 3 ECHR and Article 15(b) QD, see chapter 4.

ECHR with a legal status comparable to the one provided to refugees under the Refugee Convention.[101] Although the motives and rationales behind the instruments are very different, their dynamic interplay has thus extended the protection for irremovable migrants within the EU. This implicit relationship between the instruments may lead one to conclude that migrants encompassed by the protection of Article 3 ECHR are *always* entitled to subsidiary protection under the Qualification Directive. However, as this thesis will demonstrate, the case of socio-economic protection seekers reveals an interesting area of friction between the instruments where their scopes of protection seem to diverge. This issue is explored in detail under chapter 3 and 4 where the jurisprudence of the Courts is carefully scrutinized.

2.4 The permeability and indivisibility of human rights

Before turning to the practical chapters of this thesis, I wish resume the discussion initiated in the end of section 2.2. Encompassing socio-economic claims within the scope of Article 3 of the ECHR is associated with conceptual challenges. As previously mentioned, the concept of inhuman or degrading treatment is commonly viewed as belonging to the civil-political category of human rights. It was initially formulated in the UDHR and ultimately aimed at preventing future occurrences such as the atrocities committed by the Nazis during the Second World War.[102] Against this backdrop, it can be questioned what the theoretical basis would be for arguing that deprivation of a socio-economic human right could amount to inhuman or degrading treatment within the meaning of Article 3 ECHR?

On the face of it, such an approach may seem peculiar. Why would a migrant fearing socio-economic deprivation plead her case within the scope of a civil-political human right such as Article 3 ECHR? Would it not be more logical and advantageous to base her claim for protection directly on the socio-economic right, which she claims to be deprived of? The answer to this question is rather simple. Whereas obligations of *non-refoulement* have been interpreted into provisions in civil-political rights treaties, a similar development has not taken place in relation to instruments protecting socio-economic rights.[103] A migrant fearing socio-economic deprivation can thus not (yet) base her claim for protection directly on, for instance, a provision in the ICESCR.[104] Consequently, a claim for complementary protection has to be

[101] Boeles, den Heijer, Lodder and Wouters 2014, p. 341.
[102] McAdam 2007, p. 140.
[103] M. Foster 2009, p. 279.
[104] Foster addresses the challenges and possibilities of applying the concept *non-refoulement* in relation to the ICESCR in her article *Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of*

made on the basis of a civil-political human right which contains an obligation of *non-refouelment*. This raises the question of how one could argue in support of such a claim. Is it possible that contemporary understandings of the concept of indivisibility or permeability of human rights could be used to substantiate such an approach?

As mentioned under section 2.1, the idea of human rights as "indivisible, interdependent and interrelated" is frequently emphasised by the international community but has yet been far from a practical reality. In an attempt to give practical legal effect to the abstract doctrine of indivisibility, Craig Scott introduced the idea of *permeability of human rights* in 1989.[105] By *permeability* he means:

> "the openness of a treaty dealing with one category of human rights to having its norms used as vehicles for the direct or indirect protection of norms from another treaty dealing with another category of human rights".[106]

Scott's research centred on the interdependence of the two Covenants, and to what extent the norms of the ICESCR could *permeate* the norms of the ICCPR. In this respect, he argued that the Covenants should be forged by a partial normative unity, which would permit socio-economic rights to be subject to the supervisory jurisdiction of the ICCPR's HRC.[107] Such normative interdependence could be constructed by an *organic* relationship, according to which one norm form an integral part of another. Protecting one (civil-political) right would thus be tantamount to directly protecting another (socio-economic) right.[108] It could also be constructed by an *indirect* relationship in cases where one right applies to another (as opposed to being an integral part of it).[109]

Complementary Protection in International Human Rights Law 2009, p. 279. However, a closer analysis of this issue is beyond the scope of this thesis.

[105] Scott, Craig: *The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, Osgoode Hall Law Journal, Vol. 27, No. 4 1989. On this issue, see also Koch 2009, p. 33.

[106] Scott 1989, p. 771.

[107] Ibid. The three notions indivisibility, interdependence and interrelationship are grouped under the single designation "independence". Koch 2009, p. 33.

[108] Scott 1989, p. 779-781. He exemplifies organic interdependence with the relationship between the right to life (Article 6 ICCPR) and the right to an adequate standard of living (Article 11 ICESCR), and claims that aspects of the right to an adequate standard of living are incorporated into the right to life. Protecting the right to life is therefore tantamount to directly protecting some aspects of the right to an adequate standard of living.

[109] Scott 1989, p. 782-783. In this relationship the rights are mutually reinforcing or mutually interdependent, but yet distinct. Scott exemplifies this category with reference to any socio-economic right protected within the scope of the right to a fair hearing (Article 14.1 ICCPR).

The essence of the concept of permeability of human rights seems to reflect the view that rights belonging to one category of human rights may contain elements of rights belonging to another category. It is thus not always possible to neatly compartmentalize a certain action as being *either* a violation of a socio-economic right *or* a civil-political right. Instead, one single action can give rise to a violation of both categories of rights.[110] Accordingly, the categorization of a certain action as being a violation of a socio-economic right does not preclude it from *simultaneously* constituting a violation of a civil-political right and vice versa. The permeability doctrine thus challenges the traditional compartmentalized perception of human rights by underscoring their inseparable nature. Scott emphasizes this point by asserting that "[t]he separation of the two Covenants does not mean that the human rights norms contained therein are separable."[111]

The idea of permeability of human rights has been used by courts, monitoring bodies and petitioners to support the argument that rights traditionally thought to fall within the civil-political realm may, in various ways, have socio-economic implications.[112] On the international level, the HRC has interpreted the right to life under the ICCPR as involving an obligation to reduce infant mortality and to increase life expectancy, especially through adopting measures to reduce malnutrition and epidemics.[113] A violation of the right to life may thus be construed by a failure to adopt adequate positive measures to reduce malnutrition. This approach is in line with Scott's conception of the relationship between the right to life and the right to an adequate standard of living (which includes the right to food), which he argues is characterized by organic interdependence.[114] The HRC has further consolidated this permeability-approach in its jurisprudence; *inter alia* by finding that failure to take adequate steps to address the situation of homelessness may compromise the right to life.[115] Furthermore, it has found that the prohibition on cruel, inhuman or degrading treatment may extend to situations in detention when a person is subjected to conditions that violate basic minimum standards including *inter alia* "provision of food of nutritional value adequate for health and strength."[116]

[110] Foster 2009, p. 182.
[111] Scott 1989, p. 772.
[112] M. Foster 2009, p. 266.
[113] See HRC Comment 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994) para. 5.
[114] See note 108.
[115] Foster 2009, p. 185.
[116] Ibid. referring to HRC Communication No 458/1991, UN Doc. CCPR/C/51/D/458/1991 (1994) para. 9.3.

At the European level, the permeability doctrine can be discerned from the jurisprudence of the ECtHR. In this regard, the early landmark case *Airey v. Ireland*[117] is often cited. In this case, the ECtHR held that:

> "[…] the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention."[118]

The case concerned the applicant's right to legal aid under Article 6 of the ECHR (right to a fair trial), as she was separating from her spouse and could not afford her own lawyer. By ruling in favour of the applicant, the ECtHR interpreted the right to a fair trial under the ECHR as entailing an obligation to provide legal aid to persons under specific circumstances (Cf. para. 28).

The ECtHR's approach of recognizing that the rights in the ECHR may have socio-economic implications has been referred to in academic writing as the *integrated approach*. The term aims at the interpretative method used by the ECtHR, whereby it integrates socio-economic rights into the scope of the ECHR.[119] As a result of this method, several rights in the ECHR have been interpreted as containing socio-economic aspects. By way of example, forced evictions have given rise to violations of the right to privacy (Article 8)[120] and poor living conditions in prisons have been found to trigger the prohibition on inhuman or degrading treatment (Article 3).[121]

For the purpose of this thesis, the latter judgement *(Kalashnikov v. Russia)* is of particular importance since it demonstrates that socio-economic adversities, in this case squalid prison conditions, could give rise to a violation of Article 3. Importantly, the ECtHR rejected Russia's argument that lack of financial resources could justify the destitute living conditions in the prison.[122] Inhuman or degrading treatment was thus construed by the inability of Russia

[117] Judgement of 9 October 1979 (6289/73).
[118] Ibid. para. 26.
[119] Cf. Mantouvalou, Virginia: *Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation*, Human Rights Law Review, Vol. 13, issue 3 2013, p. 536.
[120] Cf. Connors v. the United Kingdom, Judgement of 27 May 2004 (66746/01).
[121] Cf. Kalashnikov v. Russia, Judgement of 15 July 2002 (47095/99).
[122] M. Foster 2009, p. 286.

to provide the applicant with basic sanitary necessities. Similar jurisprudential developments have taken place concerning health related issues. In the 2014 Grand Chamber judgement *Center of Legal Resources on behalf of Valentin Câmpeanu v. Romania*[123], the ECtHR ruled that the failure of Romania to provide the applicant with adequate healthcare, which resulted in his premature death, had violated his right to life under Article 2 ECHR. The applicant suffered from severe mental disability and was diagnosed with HIV. At the age of 18, he died in a psychiatric hospital under distressful circumstances. The ECtHR found that the placement of the applicant in a medical institution, which was not equipped to provide adequate care for him and the *failure to ensure appropriate antiretroviral treatment for his HIV* amounted to a violation of his right to life.[124] A violation of the right to life was also found in the case *Panaitescu v Romania*[125], in which Romania had failed to provide the applicant with life-saving treatment for his cancer.

2.5 Concluding comments

Under this chapter, it has been demonstrated how both the Refugee Convention and the regime of complementary protection are associated with conceptual challenges in relation to protection claims based on socio-economic deprivation. However, we have also seen how the permeability doctrine/integrated approach has been used as a theoretical basis for integrating socio-economic claims within the scope of civil-political human rights treaties.

From the case law presented above, it is clear that the ECtHR has been willing to adopt an integrated approach to the rights stemming from Article 2 and 3 of the ECHR, thereby integrating claims *inter alia* relating to the right to health and the right to an adequate standard of living. However, it should be noted that all of the cases relate to treatment of nationals within the States' own jurisdictions. The question thus emerges if the permeability doctrine/integrated approach equally apply in a *non-refoulement* context? In other words, is the ECtHR inclined to integrate socio-economic rights within the scope of the ECHR when the treatment concerns a non-national and the circumstances giving rise to the plausible violation occur (at least partially) beyond the territory of the Contracting State? And if not, how does the Court justify the distinction between domestic and foreign cases in this

[123] Judgement of 17 July 2014 [GC] (47848/08). The Court did not find that a separate issue arouse under Article 3 ECHR, why this Article was not examined separately.
[124] Ibid. para. 143-144. The violation arouse out of Romania's positive obligation to protect the right to life under the Convention.
[125] Judgement of 10 April 2012 (30909/06).

respect?[126] These questions will be addressed under the following chapter, in which the *non-refoulement* jurisprudence of the ECtHR is presented and analyzed.

[126] Cf. M. Foster 2009, p. 287.

3 Protection under the European Convention on Human Rights

3.1 Article 3 – the prohibition on torture, inhuman or degrading treatment or punishment

Article 3 of the ECHR stipulates that:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment"

Article 3 is frequently held by the ECtHR to enshrine one of the most fundamental values of democratic societies, a characteristic affirmed by the non-derogable nature of the right. Not even in times of war or public emergency are the Contracting States allowed to derogate from it.[127] In contrast to other rights in the Convention, the protection under Article 3 is *absolute*, meaning that a violation of the Article can never be justified with reference to other interests. The ECtHR has ruled on the absolute nature of Article 3 on several occasions, including cases of expulsion. In this regard, it has repeatedly held that the protection afforded under Article 3 is absolute, irrespective of the conduct of the applicant.[128] If a certain activity is deemed to fall within the scope of the Article 3, it is thus prohibited in absolute terms.

In order for conduct to fall within the material scope of Article 3, it must meet a certain threshold of severity. In this regard, the ECtHR commonly refers to *ill-treatment attaining a minimum-level of severity*. Activities that do not cause sufficiently serious suffering or humiliation will not meet the required threshold and thus fall outside the scope of Article 3.[129] According to the ECtHR's long-standing case law, the assessment of whether the threshold of severity is met is *relative* and depends on all circumstances of the case "such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim […]."[130] The prohibition stipulated in Article 3 relates to the concepts of torture, inhuman or degrading treatment or punishment. For the purpose of this thesis, the

[127] Cf. Article 15 ECHR.
[128] Cf. Saadi v. Italy Judgement of 13 May 2008 [GC] (37201/06). See more about this issue under section 3.2.1.
[129] Cf. Jacobs, Francis Geoffery; White, Robin C. A. and Ovey, Clare: *The European convention on human rights* 2010, p. 168.
[130] Soering v. the United Kingdom para. 100.

constituent elements of inhuman or degrading treatment are of most relevance, why focus will be directed on the definition and application of these.

Inhuman treatment is the most capacious notion under Article 3.[131] It is characterized by causing either bodily injury or intense physical or mental suffering.[132] The harm caused must thus not encompass actual physical injury, but can be construed, *inter alia*, by intense mental distress.[133] Importantly, inhuman treatment must not be deliberately inflicted.[134] Treatment may further be regarded as *degrading* if it "humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance […]."[135] The categorization of conduct as being either inhuman or degrading is, however, not paramount since all constituent elements of Article 3 give rise to equal protection. The important aspect is that the impugned conduct is characterized as ill-treatment, which attains a minimum-level of severity.

How, then, does the protection under Article 3 relate to the situation of expulsion, extradition or removal?[136] On the face of it, nothing in the wording of the Article seems to suggest that it would circumscribe the Contracting States' discretion to remove unwanted individuals from their territories. By means of judicial innovation, however, the ECtHR has extended the scope of Article 3 to being highly relevant in the context of repatriation.[137]

In the case *Soering v. the United Kingdom*[138] *(Soering)*, the Court was called upon to rule on the applicability of Article 3 in the context of extradition. The case concerned Mr. Soering, who faced capital charges in the United States, following the murder of his girlfriend's parents. What distinguished this case from previous complaints under Article 3 was that the alleged ill-treatment would not be inflicted within the territory of the respondent State, but

[131] Costello 2016, p. 183.
[132] Cf. Pretty v. the United Kingdom, Judgement of 29 April 2002 (2346/02) para. 52.
[133] McAdam 2007, p. 141-142.
[134] Jacobs, White and Ovey 2010, p. 172. See also Labita v. Italy Judgement of 6 April 2000 [GC] (26772/95) para. 120.
[135] Pretty v. the United Kingdom para. 53.
[136] For the purpose of this thesis, the concepts of expulsion, removal and extradition are used interchangeably since the protection provided under Article 3 applies equally to all forms of repatriation.
[137] Costello 2016, p. 180.
[138] See note 65.

take place in a foreign jurisdiction (i.e. the country of destination).[139] The crux of the case was thus whether Article 3 prohibited Contracting States from returning a person to another state where he would suffer treatment contrary to the Article. The ECtHR found that extraditing Mr. Soering to the United States would be a violation of Article 3, since it would expose him to a real risk of being subjected to treatment contrary to the Article. The ECtHR thus interpreted Article 3 as not only prohibiting the Contracting States from inflicting the proscribed treatment themselves, within their own jurisdictions, but also to send a person back to a state where there is a real risk of him being subjected to such treatment. Consequently, Article 3 was interpreted as containing a principle of *non-refoulement*, in situations where repatriation would subject an individual to the proscribed forms of ill-treatment.

The interpretative position of the ECtHR inevitable leads one to question how the Court reasoned when interpreting Article 3 as implying an obligation of *non-refoulement*. What was the conceptual basis and principled explanation for this position?[140] In seeking the answers to these questions, I turn to the reasoning of the ECtHR in *Soering*.

In reaching the conclusion that Article 3 contains a principle of *non-refoulement*, the ECtHR seems to have applied a teleological interpretative approach, with the main argument relating to the principle of *effectiveness*. However, it first brought up two arguments pointing *against* applicability of the ECHR in these situations.[141] The first argument relates to the concept of *state sovereignty* and the legitimate interest of states to exercise immigration control. This notion is usually taken as a starting point for the Court in all matters concerning migration control under the Convention and it has repeatedly held that "as a matter of well-established international law and subject to its treaty obligations, States have the right to control the entry, residence and expulsion of aliens".[142] Having affirmed this right, it went on to address the second argument in favour of the Government, namely the issue of *jurisdiction*. It noted that Article 1 ECHR stipulates an obligation on the Contracting States to secure to everyone within their jurisdictions the rights and freedoms in the Convention, which suggests a

[139] In the case of Soering, the ill-treatment consisted of the possibility of him being subject to the "death row-phenomenon" and the mental distress associated with it. Cf. Soering v. the United Kingdom para. 81.
[140] Cf. M. Foster 2009, p. 267.
[141] den Heijer, Marteen: *Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights,* European Journal of Migration and Law, Vol. 10, issue 3 2008, p. 286.
[142] Ibid. referring to *inter alia* Abdulaziz and others v. the United Kingdom, Judgement of 28 May 1985 (9214/80, 9473/81 and 9474/81).

territorial limitation of the Convention.[143] Although the engagement undertaken by the state is confined to securing the rights in the Convention within its *own jurisdiction*, the Court held that this does not absolve a Contracting State "from responsibility under Article 3 […] for all and any foreseeable consequences of extradition suffered outside their jurisdiction."[144] These extraterritorial effects of Article 3 were motivated with the following passage:

> "In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms […]. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards *practical and effective* [author's emphasis] […]. In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society' […]."[145]

Against this interpretative background, and with reference to the fundamental values enshrined in Article 3, the Court concluded that it contains an obligation of *non-refoulement* in situations where extradition would expose an individual to a real risk of being subjected to treatment contrary to the Article. To justify this position, the Court thus relied on the interpretative principle of *practical effectiveness* in light of the special *object and purpose* of the ECHR. Regrettably, however, it failed to explain precisely how the telos referred to give rise to this formulation of the *non-refoulement* principle.[146] While reliance on the object and purpose of the ECHR may be justified as a matter of treaty interpretation under international law[147], the Court's references to the vague object and purpose of the ECHR, such as "enforcement of human rights" and "promoting democratic values", does not explain *how* the principle of *non-refoulement* is deduced from these. It has therefore been asserted that the teleological argument advanced by the Court is "indeterminate, rather than self-evidently conclusive" [148], as treated by the ECtHR.

[143] den Heijer 2008, p. 287.
[144] Soering v. the United Kingdom para. 86.
[145] Ibid. para 87.
[146] Greenman 2015, p. 9.
[147] Cf. Article 31 Vienna Convention on the Law of Treaties, Vienna 23 may 1969 in force 27 January 1980.
[148] Greenman 2015, p. 9 referring to Noll, Gregor: *Negotiating Asylum*: *The EU aquis, extraterritorial protection and the common market of deflection* 2000, p. 412-13.

Nevertheless, the logic of the teleological argument advanced by the ECtHR seems to reflect the view that the obligations imposed by Article 3 could be completely undermined if states were free to send individuals off to another jurisdiction where it is foreseeable that they would suffer ill-treatment prohibited by the Article.[149] If the Contracting States are prohibited from subjecting individuals to the proscribed treatment within their own jurisdictions, they should be equally prohibited from expelling a person to a country where they would face such treatment, since this measure would be a crucial link in the causal chain that would make the ill-treatment possible.[150] Effective safeguarding of the rights stemming from Article 3 thus necessitated an interpretation of its obligations as having extraterritorial effects, especially "in view of the serious and irreparable nature of the alleged suffering risked"[151]. Still, the rational of these arguments do little to explain the precise formulation of the *non-refoulement* obligation stipulated by the Court.

In a concluding paragraph, the Court attempts to clarify the legal basis for establishing state responsibility under Article 3 on a *before events basis*[152] for acts committed outside its jurisdiction and performed by another state. Although the responsibility of the Contracting State is inferred from the ill-treatment occurring in the third state, it underscored that establishing responsibility under Article 3, is not a matter of *attributing* state responsibility for the ill-treatment occurring in the foreign state. Instead, the prohibited act, giving rise to accountability under the Convention, is the *removal*.[153] Consequently, it is the act of removal that amounts to inhuman or degrading treatment, although caused by circumstances in the country of destination.[154]

Identifying the theoretical foundation for the implied *non-refoulement* concept is crucial for being able to determine the extent and limitations of its scope.[155] After a careful review of the arguments advanced by the Court in *Soering*, it can be persuasively asserted that the implied obligation of *non-refoulement* under Article 3 does not rest on a solid theoretical foundation. Instead, it emerged as a result of a teleological interpretative approach with vague references to the object and purpose of the Convention and inadequate explanations as to how these

[149] M. Foster 2009, p. 269. See also Soering v. the United Kingdom para. 88.
[150] Cf. M. Foster 2009, p. 271 referring to a decision of the HRC (Communication No 470/1991, UN Doc CCPR/C/48/D/470/1991,1993 para. 10.6) in which this reasoning is explicit.
[151] Soering v. the United Kingdom para. 90.
[152] This term is used by Greenman 2015 cf. p. 9.
[153] M. Foster 2009, p. 267.
[154] Soering v. the United Kingdom para. 91.
[155] Cf. Greenman 2015, p. 33.

interests deduce an obligation of *non-refoulement*. It follows from this indeterminacy that the scope of the *non-refoulement* obligation under Article 3 is bound to be obscure. In absence of a solid theoretical foundation up on which to base the prohibition of *refoulement*, the ECtHR is left without any meaningful guidelines to be used to determine its proper scope.[156] Under the following section, we will see how this uncertainty is reflected in the jurisprudence of the ECtHR and its implications for the scope of protection under Article 3, especially in cases concerning socio-economic deprivation.

3.2 The principle of *non-refoulement* in the jurisprudence of the ECtHR: the significance of source of the harm

When viewing the post-*Soering* case law under Article 3, it is clear that the ECtHR has developed an interpretative approach by which it uses the *source* of the feared harm as the determinant factor for establishing the scope of the implied *non-refoulement* obligation in different situations. According to this approach, the level of ill-treatment that an applicant must demonstrate in order to trigger the protection of the Article will vary depending on the source of her feared harm. In this regard, the following categorization can be discerned from the Court's case law. First, harm that emanates from *direct and deliberate infliction* by state or non-state actors in the receiving State. Second, harm that emanates from *purely naturally occurring phenomena and the lack of sufficient resources to deal with it in the receiving State* and third, *predominant cause cases* where the harm is deemed to be caused predominantly by state or non-state actors in the receiving State.[157] In the following, the jurisprudence of the Court will be presented and analyzed according to the structure of this typology.

3.2.1 Direct and deliberate infliction of harm by state or non-state actors

The first category that can be identified is that where the feared harm of an applicant is the result of direct and deliberate infliction by state or non-state actors in the receiving State. This category of cases is subject to the lowest threshold applicable in a *non-refoulemet* context and the ECtHR has held that it is these types of cases, to which Article 3 principally applies.[158] It can be exemplified by the case of *Soering* presented above, in which the feared harm of the applicant emanated from the direct conduct of the state authorities. In subsequent case law,

[156] Ibid. p. 12.
[157] On this categorization, see Scott 2014, p. 412.
[158] N v. the United Kingdom, Judgement of 27 May 2008 [GC] (26565/05) para. 31.

the ECtHR has extended the protection formulated in *Soering* to also encompassing conduct of non-state actors.[159]

In the case of *Soering*, the ECtHR formulated the principle of *non-refoulement* under Article 3 to applying whenever there are substantial grounds for believing that extradition would expose an individual to a real risk of being subject to treatment contrary to Article 3.[160] It should however be noted that the level of ill-treatment required in order to trigger the protection of the Article in a situation of removal is higher than in a purely domestic context. The Court has thus chosen to distinguish between *domestic* and *extraterritorial* application of Article 3 when defining its scope of protection. Treatment that may be regarded as inhuman or degrading in a domestic context may thus not be considered as such in the context of removal. In the case of *Babar Ahmad and others v. the United Kingdom*[161], the Court affirmed this position by explicitly stating that:

> "[…] treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case."[162]

Although this category of applicants is subject to the lowest threshold applicable in the context of *non-refoulement*, the scope of protection is thus narrower than in a purely domestic context.[163]

As indicated under the previous section, the character of Article 3 as an *absolute* right in the context of *non-refoulement* has been a frequent matter of contention before the ECtHR. While it is widely accepted that the negative dimension of Article 3 is absolute (i.e. the duty not to subject individuals to the proscribed treatment), the notion that the *non-refoulement* obligations are similarly absolute have been disputed by several Governments.[164] In the case of *Saadi v. Italy*[165] *(Saadi)*, the UK Government (intervenor) argued that Article 3, in cases

[159] Greenman 2015, p. 3.
[160] Cf. Soering v. the United Kingdom para. 91.
[161] Judgement of 10 April 2012 (24027/07, 11949/08, 36742/08, 66911/09 and 67354/09).
[162] Ibid. para. 177.
[163] In justifying this approach, the Court made reference to its often reiterated position that the ECHR does not purport to be a means of requiring the Contracting States to impose its standards on other states (para. 177).
[164] Costello 2016, p. 190. The duty of *non-refoulement* is sometimes argued to be characterized as a positive obligation under Article 3, which has led governments to argue that the character of this obligation is different from that stemming from its negative dimension.
[165] See note 128.

concerning expulsion, allows for an approach where the interests of the applicant are weighed against the interests of the community as a whole. The legitimacy of this approach was derived from the fact that the proscribed treatment would not be inflicted by the Signatory State itself, but by the authorities of another state.[166] The Grand Chamber responded to this argument by affirming its previous position assumed in *Chalal v. the United Kingdom*[167], according to which there is no scope for a State Party to balance its own (national security) interests against the interests of the applicant (not to be subject to torture) when determining whether the threshold of ill-treatment is met.[168] Such an approach would, according to the Court, undermine the absolute nature of Article 3 and thus be incompatible with the fundamental values it enshrines. Although the applicant in *Saadi* was an alleged terrorist whom Italy deemed to be a threat to national security, his potentially wrongful conduct could not be held against him under an Article 3 assessment. If the threshold of ill-treatment is met, the protection afforded under Article 3 is thus *absolute*.[169]

3.2.2 Purely naturally occuring phenomena: the socio-economic harm cases

Over the years, the ECtHR has been faced with a variety of claims concerning Article 3 and its enshrined *non-refoulement* obligations. In addition to the cases outlined above, another type of claims have emerged, in which the feared harm of the applicants do not emanate from deliberate infliction but rather from various forms of socio-economic deprivation. These cases have challenged the traditional conception of the *non-refoluement* obligation as stipulated by the Court and given rise to complex questions of a legal, moral and ethical nature.

The case of *D v. the United Kingdom*[170] *(D)* is often viewed as a landmark ruling on the applicability of Article 3 in relation to socio-economic deprivation. In this case, the Court was faced with the task of ruling on the applicability of Article 3 in relation to an AIDS patient who was to be removed from the United Kingdom in the advance stages of his terminal illness. The applicant argued that removing him to St. Kitts would violate Article 3 since he would not have access to medical treatment there and would have to end his life alone in conditions of squalor and destitution.[171]

[166] Cf. Greenman 2015, p. 10.
[167] Judgement of 15 November 1996 [GC] (22414/93).
[168] Cf. Scott 2014, p. 413.
[169] Greenman 2015, p. 10.
[170] Judgement of 2 May 1997 (30240/96).
[171] Cf. ibid. para. 40-41.

The reasoning of the Court in *D* represents a significant conceptual development since the Court there acknowledged the fact that circumstances of socio-economic deprivation, in principle, could engage the protection of Article 3 in the context of removal. The applicant in *D* was not at risk of suffering deliberate infliction of harm upon removal. Instead, the source of his feared harm related to the *inability* of St. Kitts to provide him with the basic facilities needed in his condition. Although his situation did not entail potential exposure to deliberate infliction of harm, the ECtHR articulated an intention to:

> "[…] reserve to itself sufficient flexibility to address the application of that Article (art. 3) in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 (art. 3) where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article (art. 3)."[172]

To justify this position, the ECtHR held that excluding certain types of harm, *per se*, would be incompatible with the absolute character of Article 3.[173] In relation to *D*, the Court ruled that removing him to St. Kitts would amount to inhuman treatment since it would expose him to a real risk of dying under the most distressful circumstances.[174] While acknowledging that a situation of socio-economic deprivation in the country of destination could trigger the protection of Article 3, the Court however emphasised that this is so only when *exceptional circumstances* are at hand and the situation of the applicant is characterized by *compelling humanitarian considerations*.[175]

In *D*, the crucial legal innovation was the interpretation of Article 3 as applying to scenarios where the suffering emanated from a state of affairs that could not itself be construed as "treatment or punishment". Instead, the *act of removal* was the relevant state conduct and if the consequent suffering would be severe enough, Article 3 would bar removal *notwithstanding* that the source of the proscribed treatment did not stem from factors that

[172] Ibid. para. 49.
[173] Ibid. para. 49.
[174] Ibid. para. 53.
[175] Cf. ibid. para. 54.

could (either directly or indirectly) engage the responsibility of the receiving State or, taken alone, did not infringe the standards of Article 3.[176]

Although the ECtHR in *D* did recognize that harm emanating from socio-economic deprivation could engage the protection of Article 3, it underscored that these cases would be subject to a test of exceptionality. Consequently, the threshold of ill-treatment required in order to trigger the protection of the Article would be higher than in cases concerning deliberate infliction of harm. In the years following *D*, the determination of the Court to maintain the high threshold set in *D* became evident as it deemed all subsequent cases concerning removal of sick individuals inadmissible due to lack of exceptionality.[177] An example is the case of *Bensaid v. the United Kingdom*[178], in which the ECtHR ruled that expelling an individual suffering from psychotic illness would not violate the standards of Article 3, despite the seriousness of his medical condition and the uncertainty surrounding his access to treatment in the country of destination (Algeria).[179]

Eleven years after *D*, in 2008, the Grand Chamber was asked to revisit the issue of *non-refoulement* in relation to socio-economic deprivation in the seminal case of *N v. the United Kingdom*[180] *(N)*. The applicant in *N* was an HIV-positive woman from Uganda, claiming that returning her would amount to a violation of Article 3 since she would not have access to medical treatment there. During her asylum procedures in the United Kingdom, *N* had been diagnosed with HIV and had thereafter been provided with antiretroviral treatment. Her condition had therefore not reached a terminal stage. However, *N* argued that deporting her to Uganda would expose her to a real risk of extreme suffering and death due to the lack of adequate medical treatment there, and would therefore violate the standards of Article 3.[181]

[176] Costello 2016, p. 185. See also D v. the United Kingdom para. 49 quoted above.
[177] Costello 2016, p. 185. Cf. e.g. SCC v. Sweden, Judgement of 15 February 2000 (46553/99), Amegnigan v. the Netherlands, Judgement of 25 November 2004 (25629/04). For an elaborate summary of the cases following D v. the United Kingdom, see N. v. the United Kingdom para. 34-41. In the case of BB v. France, Reports 1998-IV (39030/96), the European Commission opined that removing the applicant to the Democratic Republic of Congo would amount to a violation of Article 3 since he would not have access adequate medical care for his AIDS there. However, the case was struck out from the list of the ECtHR due to a settlement between the parties, why no judgement by the Court was delivered.
[178] Judgement of 6 February 2001 (44599/98).
[179] Ibid. para. 36-40.
[180] See note 158.
[181] Costello 2016, p. 186. Cf. N v. the United Kingdom para. 26-27.

The Government, on the other hand, argued that the claim of the applicant was not encompassed by the scope of Article 3. It submitted that the case was distinguishable from *D* since the applicant had not reached the advance stages of her illness. Furthermore, it underscored that the ECHR primarily is directed at the protection of civil-political rights and that an interpretation in favour of the applicant would enable her to claim healthcare through the "back door". In this regard, the Government expressed its concerns as to the practical implications of such an approach, which would "grant her and countless others afflicted with AIDS and other fatal diseases, a right to remain and to continue to benefit from medical treatment within a Contracting State."[182]

By fourteen votes to three, the Grand Chamber rejected the claim of *N* and ruled that deporting her would not be a violation of Article 3. In its assessment, the Court began by stipulating the general principles applicable to cases like the present. Initially, it held that aliens subject to expulsion could not, in principle, claim entitlement to remain on the territory of a Contracting State in order to continue to benefit from medical, social or other forms assistances. It further stated that the fact that an applicant's life expectancy would be significantly reduced if he were to be removed is not sufficient to trigger the protection of Article 3.[183] Instead, it articulated an intention to maintain the high threshold introduced in *D*

> "[…] given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a *naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.* [Author's emphasis]"[184]

As such, the Court distinguished between harm that emanates from *deliberate (human) infliction* and harm that stems from *a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving State*. Furthermore, it went on to state that although many provisions in the ECHR have implications of a socio-economic nature "the Convention is essentially directed at the protection of civil and political rights."[185] In this regard, it further added that "inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of

[182] N v. the United Kingdom para. 24.
[183] Ibid. para. 42.
[184] Ibid. para. 43.
[185] Ibid. para. 44.

the individual's fundamental rights."[186] Advances in medical science, together with socio-economic differences between countries, provide that the medical treatment available may vary considerably between an expelling and a receiving state. However,

> "Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. *A finding to the contrary would place too great a burden on the Contracting States*. [Author's emphasis]"[187]

When applying the above principles to the case of *N*, the Court found that her situation did not reach the required threshold of exceptionality. It pointed out that the situation of *D* was exceptional due to the fact that he was "critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support."[188] In contrast, *N* was not critically ill at the time of the proceedings. Due to the medical care received in the United Kingdom, she was deemed "fit to travel". Nevertheless, it was clear to the Court that if she was to be deprived of this medication, her condition would rapidly deteriorate and she would suffer severe pain and ultimately death. Although it was highly uncertain whether *N* would have access to adequate treatment in Uganda, the Court pointed out that she would at least have some relatives to care for her as she faced the consequences of her fatal disease.[189] Against this backdrop, the ECtHR concluded that removing *N* would not be a violation of Article 3.

The interpretative position of the Court in *N* requires some further analysis. Based on the reasoning of the Court, Article 3 entails two separate thresholds when applied in an extraterritorial context. The lower threshold applies to harm emanating from deliberate infliction by state or non-state actors and the higher applies to harm emanating from a naturally occurring illness and the lack of sufficient recourses to deal with it in the receiving country. In relation to the latter, the harm awaiting the applicant upon expulsion must be of an *exceptional* character and the "mere" fact that the persons in question is expected to die does not seem to suffice. It appears from the reasoning of the Court that the person must already have reached an advanced stage of her illness and practically be dying at the time of the

[186] N v. the United Kingdom para 44.
[187] Ibid.
[188] Ibid.
[189] Cf. Mantouvalou 2009, p. 818. See also N v. the United Kingdom para. 47-51.

removal in order to trigger the protection of Article 3. As such, the Court can be said to have formulated a protection under Article 3, which is more concerned with the *right to a dignified death* rather than a right to stay and live in dignity.

The key consideration in justifying this "different threshold-approach" seems to relate to the *source* of the different types of harm.[190] Upon scrutiny, however, it is evident that this approach is at odds with the conceptual principles laid down in previous case law. In *D*, the Court emphasised that the relevant state conduct, giving rise to a breach of Article 3, is the *act of removal* and its foreseeable consequences for the applicant. Also in *Soering*, the Court emphasised that although the establishment of responsibility under Article 3 involves an assessment of the conditions in the receiving State, the liability incurred upon the Contracting State is "by reason of its having taken action which has as a *direct consequence* [author's emphasis] the exposure of an individual to proscribed ill-treatment."[191] Moreover, in the particular context of illness, the Court held in the case of *Pretty v. the United Kingdom*[192] (*Pretty*) that

> "[t]he suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible […]."[193]

Against this background, it can be questioned how the placement of attention on the source of the suffering *following* the applicant's removal can be justified when the relevant state conduct is the act of removal and its foreseeable consequences?[194] In a joint dissenting opinion, judges Tulkens, Bonello and Speilmann criticized this approach and argued that the principles expressed in *Pretty* should apply equally in a situation where the suffering flows from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving State, if the threshold of severity is met.[195]

[190] Mantouvalou 2009, p. 819.
[191] Soering v. the United Kingdom para 91.
[192] See note 132.
[193] Ibid. para. 52.
[194] Mantouvalou 2009, p. 819; Costello 2016, p. 187.
[195] N v. the United Kingdom dissenting opinion para. 5.

A second argument advanced in favour of the restrictive approach is the ECHR as an instrument primarily directed at the protection of civil-political rights. The minority likewise took issue with this argument, which they deemed contradictory to the Court's integrated approach.[196] As elaborated upon under section 2.4, the Court has developed an interpretative approach by which it integrates socio-economic aspects into the scope of the ECHR on the conceptual basis that there is no watertight division separating socio-economic rights form the (civil-political) rights enshrined in the Convention.[197] As evident form the case law presented under section 2.4 (cf. e.g. *Kalashnikov v. Russia*) the Court has also adopted this approach when interpreting Article 3 in relation to ill-treatment occurring in a domestic context. However, when interpreting the same Article in a situation of expulsion, the Court instead chose to consolidate the civil-political nature of the ECHR. As pointed out by Mantouvalou, this marks a retrograde step in the protection of the socio-economic aspects of the rights enshrined in the Convention and reinforces the artificial dichotomy between civil-political and socio-economic rights.[198] Moreover, it begs the question what the principled justification would be for distinguishing between a "foreign" and a "domestic" case in this regard?[199]

Regrettably, the Court did not address the above question explicitly in the judgement. Instead, it went on to referring to the need for a *balancing of interests* between those of the applicant and those of the community as a whole. In his regard, it appears as if the Court is aiming at the legitimate interest of states to balance their *economic interests* against the interest of the applicant. This line of reasoning suggests that the integrated approach could not be applied in relation to these types of claims due to the need for a fair balance between the interests of the applicant and the economic interests of the state. The fact that an assessment under Article 3 implies a balancing of interests is highly controversial, especially against the backdrop of the Court's previous case law on this matter.[200] Only a few months earlier, in *Saadi,* the Grand Chamber sharply rejected the idea that Article 3 allows for a balancing of interest when determining whether the threshold of ill-treatment is met, since such an approach would undermine the absolute character of the Article.[201] The reference to the concept of balancing in *N* therefore seems misplaced. A counter-argument in this regard could be that the position of the Court in *Saadi* and *Chalal* is confined to the particular context of those applicants,

[196] Ibid. dissenting opinion para. 6.
[197] Cf. Airey v. Ireland (note 117 above).
[198] Mantouvalou 2009, p. 820.
[199] Cf. M. Foster 2009, p. 287.
[200] This is underscored by the minority in *N*, dissenting opinion para. 7.
[201] See section 3.2.1.

namely balancing against interests of *national security*. Perhaps it can be argued that balancing against economic interests is somehow different from balancing against interests of national security? However, the Court's condemnation of balancing of interests in *Chalal* and *Saadi* appears to be universal rather than casuistic, suggesting that it would encompass also economic interests.[202]

Instead, the reference to the balancing exercise in *N* appears to be a way of concealing the true reasons of the Court for subjecting cases involving socio-economic harm to a threshold of exceptionality. These considerations are, however, well encapsulated in the passage where the Court states that Article 3 does not place an obligation on the Contracting States to alleviate disparities in medical treatment between countries since "[a] fining on the contrary would place too great a burden on the Contracting States".[203] This line of reasoning suggests that it was the predicable consequences of a ruling in favour of the applicant that led the Court to conclude that Article 3 could not be interpreted as encompassing such claims. This "consequentialist" approach was criticized by the minority in *N*, which argued that the true motive of the majority, which led it to dismiss the applicant's claim, was the implied "floodgate concern" and its adverse economic implications. This concern is based on the logic that a ruling in favour of the applicant "would open up the floodgates to medical immigration and make Europe vulnerable to becoming the sick-bay of the world."[204] To avoid this scenario, which would be too (economically) burdensome for the Contracting States, Article 3 had to be interpreted as to exclude such claims. This approach can be seen as an implicit affirmation of the concerns expressed by the United Kingdom in its submission, concerning the practical implications of a ruling in favour of the applicant (see page 40).

Although the reasoning of the majority in *N* has been subject to severe criticism (both externally and internally), the principles laid down in this judgement have been maintained in subsequent case law.[205] In the case of *Yoh-Ekale Mwanje v. Belgium*[206], the Chamber noted that the circumstances of the case were very similar to those in *N*. It therefore felt bound to follow the principles stipulated by the Grand Chamber, and dismissed the applicant's claim.

[202] Greenman 2015, p. 11. In *Saadi*, the Court rejected the argument of the United Kingdom, supported by Italy, that balancing against the "interests of the community as a whole" would be legitimate in the context of Article 3 (para. 138).
[203] See note 187.
[204] N v. the United Kingdom, dissenting opinion para. 8.
[205] See e.g. Mantouvalou 2009 for external critique of N v. the United Kingdom and SJ v. Belgium, Judgement of 19 March 2015 [GC] (70055/10) dissenting opinion of Judge Pinto De Albuquerque for internal critique.
[206] Judgement of 20 December 2011 (10486/10).

However, six out of seven judges issued a joint partly concurring opinion, in which they noted the extremity of the exceptionality-threshold and called upon the Grand Chamber to revisit its judgement on this matter.[207]

In the later judgement *SJ v. Belgium*[208], the Chamber likewise ruled that deporting the applicant would not amount to a violation of Article 3. The applicant was an HIV-positive woman from Nigeria, claiming that returning her and her three small children would amount to inhuman and degrading treatment since she would not have access to adequate antiretroviral treatment there. In its judgement, the Chamber held that even if the accessibility and availability of antiretroviral treatment in Nigeria is haphazard and could not be guaranteed, and despite the fact that her situation was surrounded by weighty humanitarian considerations, removing her would not violate Article 3 since she was not "critically ill" and was "fit to travel".[209] The case was referred to the Grand Chamber, but was eventually struck out from its list following a friendly settlement between the parties, according to which Belgium granted the applicant leave to remain on humanitarian grounds.

In a dissenting opinion, Judge Pinto De Albuquerque directed sharp criticism against the majority for deciding to strike the case out.[210] In his opinion, the case presented a good opportunity to depart from the unfortunate principles set in *N*, which he deemed incorrect for a number of reasons. He also argued that "casuistic humanitarian considerations" do not provide a reliable legal basis for addressing the situation of this category of applicants and underscored the urgency for adopting a rights-based approach to dealing with their claims.[211]

As to the principles set in *N*, he argued that the majority did not provide any rational legal reasoning for the lesser protection provided to migrants like *N*. Instead, legal reasoning was abandoned in favour of political concerns. Furthermore, he argued that *N* lacks any legal criteria for determining when a seriously ill person is removable and criticized the approach of the majority in focusing on "fitness to travel" as the ultimate practical criterion in this regard. He pointed out that "[i]t is indeed sad to compare" the Grand Chamber's portrayal of *N*:s situation (i.e. being fit to travel) with the cruel reality that she died soon after arriving in

[207] Costello 2016, p. 188. See concurring opinion of Judges Tulkens, Jočienė, Popović, Karakaş, Raimondi and Pinto de Albuquerque in Yoh-Ekale Mwanje v. Belgium.
[208] Judgement of 27 February 2014 (70005/10).
[209] SJ v. Belgium para. 123-125.
[210] SJ v. Belgium, Judgement of 19 March 2015 (70055/10) dissenting opinion of Judge Pinto De Albuquerque.
[211] Ibid. note 3.

the receiving State.[212] Another point raised by Pinto De Albuquerque is the implicit reversal of burden of proof that the *N* judgement suggests. Ever since *Soering*, mere uncertainty about possible ill-treatment bars removal, and it is up o the Contracting State to ensure that removal would not violate the standards of Article 3, if necessary by obtaining international assurances.[213] However, the Court seems to have abandoned this principle in relation to this specific category of migrants since the uncertainty surrounding *N*:s access to treatment was used to her disadvantage. Finally, he argued that by introducing considerations of "compassion" or "sympathy", in place of rights-based arguments, the Court leaves "unfettered discretion to Governments to do as they please with costly and undesirable sick people."[214] According to this approach, the right to physical integrity enshrined in Article 3 is no longer the subject of a state obligation, but of an "obscure policy of mercy", which may vary among the Contracting States. Against this backdrop, he passionately concluded:

> "[…] When confronted with situations similar to that of N., the Court has reaffirmed its implacable position, feigning to ignore the fact that the Grand Chamber sent N. to her death. Too much time has elapsed since N.'s unnecessary premature death and the Court has not yet remedied the wrong done. I wonder how many N.s have been sent to death all over Europe during this period of time and how many more will have to endure the same fate until the 'conscience of Europe' wakes up to this brutal reality and decides to change course."[215]

One month before the Grand Chamber's decision to strike *SJ v. Belgium* out from its list, in February 2015, the Chamber delivered another judgement concerning expulsion of a seriously ill individual in the case of *M.T v. Sweden*[216]*(M.T)*. The applicant was a man who suffered from a chronic kidney failure and was in need of dialysis three times a week in order to stay alive. He argued that expelling him to Kyrgyzstan would amount to a violation of Article 3 since he would not receive blood dialysis within the required time there. In this regard, he submitted that the waiting time for receiving dialysis in Kyrgyzstan was two to three years.

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[212] Ibid. note 5.
[213] Ibid. para. 9.
[214] Ibid. para. 10.
[215] "[…] Refugees, migrants and foreign nationals are the first to be singled out in a dehumanised and selfish society. Their situation is even worse when they are seriously ill. They become pariahs whom Governments want to get rid of as quickly as possible. It is a sad coincidence that in the present case the Grand Chamber decided, on the World Day of the Sick, to abandon these women and men to a certain, early and painful death alone and far away. I cannot desert those sons of a lesser God who, on their forced path to death, have no one to plead for them." Ibid. para 12.
[216] Judgement of 26 February 2015 (1412/12).

By six votes to one, the Chamber ruled that expelling the applicant would not violate Article 3. In principle, it was undisputed that the applicant would have, at the very most, three weeks to live if his present treatment was terminated and that access to dialysis in Kyrgyzstan was subject to a waiting list. However, the Court found that he had failed to substantiate that the treatment would not be provided to him within the required time. In this regard, it relied on an assumption that the applicant had "moved up" the waiting list during his five years in Sweden and that he would therefore be provided with treatment within due time.[217] Moreover, it attached "significant importance" to the statement of the Government that it would assist the applicant in making the necessary preparations and make "every effort" to see to that the he would not have a pause in his treatment.[218]

Despite the Swedish Government's declaration of its intention to facilitate the continuation of the applicant's treatment, the fact remains that no guarantees was obtained from Kyrgyz authorities that dialysis actually would be provided to him upon return. The Court's assessment of the applicant's access to medical treatment must therefore be said to be based on a certain degree of speculations. In a dissenting opinion, Judge De Gaetano criticized the majority's reliance on "general (an unsubstantiated) assumptions" that treatment would be provided to the applicant within the required time.[219] In this regard, he made reference to the case of *Aswat v. the United Kingdom*[220], in which the Court found a unanimous violation of Article 3 in relation to the extradition of an alleged terrorist to the United States due to the *uncertainty* surrounding the conditions in detention and his access to medical treatment for his mental disorder. Furthermore, he failed to see why the majority did not adopt the approach of the Grand Chamber in *Tarakhel v. Switzerland*[221], in which it found that a violation of Article 3 would be at hand unless the Swiss authorities obtained certain *guarantees* from the receiving State (Italy) concerning the living conditions awaiting the applicants.[222]

The request for referral of *M.T* to the Grand Chamber is still pending.[223] However, another case raising issues of a similar nature is currently pending before the Grand Chamber. The

[217] Cf. M.T v. Sweden para. 53-54. See also dissenting opinion of Judge De Gaetano para. 4.
[218] Ibid. para. 56.
[219] Ibid. dissenting opinion of Judge De Gaetano para. 4.
[220] Judgement of 16 April 2013 (17299/12).
[221] Judgement of 4 November 2014 (29217/12).
[222] M.T v. Sweden dissenting opinion of Judge De Gaetano para. 5. The case concerned a transfer of a family under the Dublin Regulation of the European Union.
[223] The request for referral to the Grand Chamber was adjourned on 6 July 2015. See Grand Chamber Panel's decision ECHR 239 (2015) 07-07-2015.

case of *Paposhvili v. Belgium*[224] *(Paposhvili)* concerns the expulsion of an applicant who suffers from numerous diseases including leukaemia and hepatitis C. Mr. Paposhvili has lived in Belgium with his family for over 17 years, but has been denied residence permit due to criminal convictions. Instead, the Belgian authorities have issued him with a deportation order and a ten-year entry-ban. Mr. Paposhvili alleged before the Chamber that the enforcement of his deportation order would violate Article 3, as he would not have access to medical treatment in Georgia. In this regard, he submitted that although treatment for leukaemia was available there, it was *inaccessible* to him on account of its high cost and he would therefore not be able to continue the treatment that is currently keeping him alive.[225]

The Chamber unanimously rejected the claim of the applicant and ruled that enforcing the deportation order would not violate the standards of Article 3. In reaching this conclusion, it made reference to the reasoning of the Court in *N* and the importance attached to the criteria of not being "critically ill" at the time for the removal and being "fit to travel". In relation to the applicant, the Court found that his life was not in "imminent danger" due to the treatment received in Belgium and that he was therefore able to travel. As to the applicant's prospects of obtaining treatment in Georgia, it held that treatment for leukemia is "available" in the receiving State, although not to everyone in need of it due to shortage of resources. However, since it appeared that the applicant had a brother in Georgia and owned a plot of land there, the Court deemed it "unlikely" that he would be left without any resources and ruled that the threshold of exceptionality was not attained.[226]

Following many years of a strict application of the approach stipulated in *N*, the Grand Chamber is now presented with a renewed opportunity to revisit the principles set in this judgement. In a third party intervention, the Human Rights Centre of Ghent University call upon the Grand Chamber to depart from the "unduly restrictive threshold" applied in relation to expulsion of seriously ill individuals and to develop an alternative approach compatible with the absolute nature of Article 3.[227] The alternative test proposed by the intervention centres on the following aspects. First, an assessment of the *adequacy* of available treatment. While some difference in treatment is expected to be compatible with Article 3, the medical

[224] Judgement of 17 April 2014 (41738/10).
[225] Ibid. para. 111.
[226] Cf. ibid. para. 119-124.
[227] Third Party Intervention of Human Rights Centre of Ghent University in case of Paposhvili v. Belgium (41738/10) 17 July 2015.

assistance in the receiving State should, as a bottom line, be "respectful of human dignity". The assessment of the adequacy of treatment will be dependent on the specific circumstances of each case and in this regard, the intervention invites the Court to take into considerations aspects of *quality* and *promptness*.[228] Second, an assessment of the applicant's *real access* to treatment in the receiving State. In this respect, it urges the Court not settle for knowledge of general availability of treatment in the receiving country but to carefully scrutinizing the individual's true possibilities of obtaining such treatment.[229] Finally, it invites the court to impose *procedural duties* on the Contracting States to obtain assurances from the receiving States concerning the applicant's access to adequate medical treatment upon return.[230]

In my opinion, the alternative test proposed by the intervention entails an approach more compatible with the absolute nature of Article 3 and the fundamental values it enshrines. Especially, I affirm the shift in focus from *theoretical availability* of medical treatment in the receiving country to an assessment of the applicant's *true prospects* of obtaining adequate treatment. As the intervention suggests, knowledge about availability of treatment in the receiving State does not suffice unless it can be established that such treatment will be accessible to the applicant upon expulsion. In this respect, I also believe that the concept of international assurances can be used as a practical means of ensuring such accessibility. However, this will only be an option in situations where adequate treatment is available in the receiving State but the question turns on the applicant's *access* to such treatment. An example of this could be the case of *M.T*, in which the Government of Sweden could have been required to obtain assurance from the Kyrgyz Government that dialysis would be provided to the applicant within due time.[231] In this regard, it can also be mentioned that the concept of assurances was recently embraced by the CJEU in the joined cases *Pál Aranyosi and Robert Căldăraru*[232], concerning issues relating to execution of European arrest warrants. The CJEU held that in situations where there is a real risk of a person being subjected to inhuman or degrading detention conditions in the receiving State, the execution of the arrest warrant is dependent upon convincing information from the receiving State that such a risk does not exist.[233]

[228] Ibid. p. 6-7.
[229] Ibid. p. 7-9. Under this assessment, the intervention highlights issues of affordability, family support, geographical distance and safety and vulnerabilities as aspects to be taken into account.
[230] Ibid. p. 9-10.
[231] Cf. M.T v. Sweden dissenting opinion of Judge de Gaetano who argued in favour of such an approach para. 5.
[232] Judgement of 5 April 2016, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198.
[233] Ibid. para. 105.

3.2.3 Predominant cause cases

In some cases where applicants have argued that issues of socio-economic deprivation in the receiving State would violate Article 3, the Court has chosen to apply a less restrictive approach than the one described under the previous section. In the case of *Sufi and Elmi v. the United Kingdom*[234] *(Sufi and Elmi),* the Court distinguished the circumstances of the case from those prevailing in *N*, and on this basis applied a different set of principles under the Article 3 assessment. The applicants in this case challenged their deportation orders to Somalia, *inter alia* on the basis that the destitute living conditions awaiting them there would violate the standards of Article 3. In distinguishing the humanitarian situation at hand from the situation prevailing in *N*, the Court held[235]

> "If the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the State's lack of resources to deal with a naturally occurring phenomenon, such as a drought, the test in *N. v. the United Kingdom* may well have been considered to be the appropriate one. However, it is clear that while drought has contributed to the humanitarian crisis, that crisis is *predominantly due to the direct and indirect actions of the parties to the conflict*. [Author's emphasis]"[236]

On this basis, the Court decided that the test elaborated in another case, *M.S.S v. Belgium and Greece*[237] *(M.S.S),* would apply more accurately. The case of *M.S.S* concerned an applicant who had been transferred from Belgium to Greece under the Dublin Regulation of the European Union. The Court found that Belgium had violated Article 3 by transferring the applicant to Greece, thereby knowingly exposed him to living conditions that amounted to degrading treatment.[238] The assessment introduced in *M.S.S* requires the Court to have regard to an applicant's "ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame"[239] when deciding whether the threshold of ill-treatment is met. Instead of applying the exceptionality-threshold stipulated in *N*, the test under Article 3 is thus replaced by this fact-specific assessment of the harm awaiting the applicant upon expulsion.[240]

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[234] Judgement of 28 June 2011 (8319/07) and (11449/07).
[235] Scott 2014, p. 415.
[236] Sufi and Elmi v. the United Kingdom para. 282.
[237] Judgement of 21 January 2011 [GC] (30696/09).
[238] Ibid. para. 367.
[239] Sufi and Elmi v. the United Kingdom para. 283. See. M.S.S v Belgium and Greece para. 254.
[240] Scott, Matthew: *Refuge from Climate Change-Related Harm: Evaluating the Scope of International Protection within the Common European Asylum System.* In: *Seeking Asylum in the European Union. Selected*

The reasoning of the Court in *Sufi and Elmi* suggests that it distinguishes between socio-economic harm that is the result of *naturally occurring phenomena* (such as illnesses and droughts) and harm that is *predominantly* due to the direct or indirect conduct of state or non-state actors. If the harm awaiting the applicant upon expulsion relates to the latter category, the threshold for triggering the protection of Article 3 is the test introduced in *M.S.S* and not the exceptionality-threshold stipulated in *N*.[241] However, the Court failed to elaborate on *why* the test in *M.S.S* would apply more accurately to the situation of *Sufi and Elmi*. After all, the circumstances providing the backdrop in *Sufi and Elmi*, (return to a situation of armed conflict in the non-Contracting State Somalia) is very different from those prevailing in *M.S.S*. In this regard, the latter is not a typical *non-refoulement* case since it concerned the return of a person from one European state to another, both of which are bound by the same obligations under CoE law and EU law. It can thus be questioned on what basis the Court found the *M.S.S* principles to be applicable to the case of *Sufi and Elmi*.

Nevertheless, the introduction of a third category of *non-refoulement* cases inevitably leads one to question how the ECtHR reasons when distinguishing between a *predominant cause case* and a *naturally occurring harm case*. In this regard, subsequent case law provides that the Court has been reluctant to find that socio-economic harm relates to the former category. In example, it ruled in *S.H.H v. the United Kingdom*[242] that the return of a severely disabled man to Afghanistan would be subject to the exceptionality test in *N*, and not the *M.S.S* principles. In this respect, the Court held that although the applicant's disability could not be regarded as a "naturally occurring illness" the source of his feared harm emanated from the lack of sufficient resources to provide him with medical care and welfare rather than intentional acts or omissions of the Afghan authorities.[243] As such, the conditions awaiting the applicant in Afghanistan were deemed to be attributable to *natural misfortune* rather than direct or indirect conduct of a responsible actor.[244]

Protection Issues Raised by the Second Phase of the Common European Asylum System. Edited by Bauloz, Céline; Ineli-Ciger, Meltem; Singer, Sarah and Stoyanova, Vladislava 2015, p. 21.
[241] Boeles, den Heijer, Lodder and Wouters 2014, p. 357.
[242] Judgement of 29 January 2013 (60367/10).
[243] Ibid. para. 89.
[244] Cf. Costello 2016, p. 189.

3.3 Concluding comments: challenging the source of the feared harm

As has been demonstrated under the preceding sections, the ECtHR has developed an approach where it uses the *source* of the feared harm as the distinguishing factor for determining the scope of Article 3 in the context of removal. According to this approach, the threshold that must be reached in order to trigger the protection of Article 3 increases along a continuum with the lowest threshold applicable to harm that is the result of *deliberate infliction*, a somewhat higher threshold for harm that is viewed as *predominantly caused* by state or non-state actors and a threshold of exceptionality in relation to harm that is deemed to be *purely naturally occurring*.[245] In determining whether the threshold of exceptionality is met, the Court uses "fitness to travel" as central concept.

As has been argued above, this approach does not stand up to scrutiny, as it is conceptually incoherent and underpinned by evident political concerns. None of the arguments provided by the Court constitute a solid legal justification for focusing on the source of the applicant's harm *following* expulsion and on this basis subject individuals fearing a particular type of harm to a threshold of exceptionality. In this respect, it has been argued that focusing on the source of the feared harm following removal, instead of the act of removal which exposes the individual to the harm, is "[…] akin to saying it is the fault of the hard ground for injury suffered by a person pushed from a cliff rather than the hand that pushed him."[246] In this way, focusing on the source of the harm following expulsion becomes a way of *detaching* the responsibility of the expelling State from the harm occurring in the receiving State.

Regarding the Court's legitimatization of the different-threshold approach, I subscribe to the position of many dissenters that the only way to rationalize this approach is with reference to political motives. As pointed out above, these political considerations appeared in the Court's reasoning in *N*, framed in terms of a need for a balancing of interests between those of the applicant and those of the state. In light of the Court's previous condemnation of the balancing exercise in the particular context of Article 3, one might question what the conceptual justification would be for applying such an approach in relation to one specific

[245] Scott 2014, p. 413.
[246] Julian, Anthony: *Exceptional Circumstances: Too Exceptional?* King's College Student Law Review 31 May 2012. Available at: https://blogs.kcl.ac.uk/kslr/?m=201205. Accessed on 2016-05-21. Quoted by Judge Power-Forde in his dissenting opinion in SJ v. Belgium (Chamber Judgement).

category of migrants. In other words, what is it that makes the balancing exercise relevant in the context of *N* but completely unthinkable in the context of *Saadi*? In my opinion, the only way to understand this apparent inconsistency is viewed from a political perspective. While *Saadi* was deemed to pose a threat to national security, the interests at stake in *N* was something very different. *N* was thought to represent a resource intense group of seriously ill migrants and encompassing those claims within the scope of Article 3 was thought to have severe economic implications for the Contracting States. A finding in her favour would possibly open up the floodgates to medical immigration, which would be too burdensome for the States. Therefore, Article 3 could not be interpreted as to include such claims.

In this regard, however, one might question whether economic implications, in fact, are not legitimate considerations when ruling on the scope of Article 3. Could Europe really cope with caring for all seriously ill individuals in the world, who cannot obtain proper treatment in their home countries? Notwithstanding the fact that this question builds on the presumption that "medical tourism" is a large-scale reality and that encompassing health-claims within the scope of Article 3 would urge such individuals to take refuge in Europe, such considerations cannot be accepted as *legal* arguments in the context of an absolute Article. While they may be appropriate political concerns, it remains highly questionable whether budgetary concerns shall be able to impact on an absolute Article's scope of protection.

As the legitimacy for subjecting *N* to a threshold of exceptionality was derived from the source of her feared harm, the ECtHR can be said to have created an approach where it uses the concept of the source of the harm as a tool for favouring political outcomes. In this respect, Greenman argues that justifying the principle of *non-refoulement* on the basis of teleological interpretation facilitates such a result-based approach and functions as a cover for the Court's implicit balancing of policy concerns.[247] If the implied *non-refouelement* obligation rested on a solid theoretical foundation, instead of vague teleological references, the Court would be equipped with meaningful guidelines that would enable it to develop the principle in a conceptually consistent and coherent manner. But instead, the prevailing indeterminacy surrounding the conceptual justification of the principle undermines legal certainty and facilitates a politicized (consequentialist) approach to legal interpretation as demonstrated in *N*.

[247] Greenman 2015, p. 15.

As we have now been acquainted with the approach of the ECtHR concerning Article 3 and claims based on socio-economic deprivation, it is time to move on the to EU regime. Under the following chapter, it will be examined how Article 15(b) of the Qualification Directive relates to this category of claims and how the CJEU has chosen to position itself in relation to the approach of the ECtHR on this matter.

4 Protection under the law of the European Union

4.1 Subsidiary protection under the Qualification Directive: the scope of Article 15(b)

Section 2.3.1 provided a brief introduction to the Qualification Directive and the system of European Union law in which it appears. It established that the instrument forms a part of the Common European Asylum System and has the explicit aim of creating minimum standards within the EU for persons in need of international protection.[248] It also elucidated the inter-normative relationship between Article 15(b) of the Directive and Article 3 of the ECHR and highlighted the value added by the concept of subsidiary protection to the European law of complementary protection (i.e. the granting of a legal status with a range of rights attached to it). This section continues to explore the legal construction of subsidiary protection under the Directive and elaborates further on the scope of Article 15(b).

As previously mentioned, qualifying for subsidiary protection centres on the concept of *serious harm*. In this respect, Article 2(f) of the QD defines persons eligible for subsidiary protection in the following terms:

> "[…] a third- country national […] who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, […] would face a real risk of suffering serious harm as defined in Article 15 […]"

Article 15 completes this definition by referring to three types of "serious harm", one of which is described in limb (b) as "torture or inhuman or degrading treatment or punishment of an applicant in the country of origin".[249] Persons at risk of suffering such treatment are thus eligible for a legal status of subsidiary protection.[250] The question then emerges how one is to understand the concept of inhuman or degrading treatment for the purpose of the QD? And, more specifically, how does it relate to claims based on socio-economic deprivation?

[248] Cf. preamble 12 QD.
[249] Boeles, den Heijer, Lodder and Wouters 2014, p. 347.
[250] See Article 18 QD.

Under section 2.3.1, it was observed that the overarching intention of Article 15(b) QD was to mirror the content of Article 3 ECHR. Hence, the status of subsidiary protection was to be modelled on the criteria stipulated by the ECtHR in its *non-refoulement* jurisprudence under Article 3 ECHR. This was expressly stated in the preparatory documents to the 2004 QD and later confirmed by the CJEU in its *Elgafaji* ruling.[251] Does this implicit relationship mean that *all* individuals who are irremovable under Article 3 ECHR are accorded with subsidiary protection status under the QD?

While it is widely accepted that the starting point for interpreting the scope of Article 15(b) QD is Article 3 ECHR, it has been argued that subsidiary protection, in some aspects, is narrower in its scope.[252] Under the previous chapter, we have seen how the ECtHR has grappled with interpreting the concept of "inhuman or degrading treatment" in cases concerning socio-economic deprivation in the receiving States. Even if it has not been willing to extend the same level of protection to this category of migrants, it has nevertheless acknowledged that such cases, in principle, can engage the protection of Article 3 ECHR. It now remains to see how the EU regime has chosen to position itself in relation to this approach.

4.2 Subsidiary protection on the basis of socio-economic deprivation?

Although the wording of Article 15(b) QD echoes the content of Article 3 ECHR, it does so with one exception. Contrary to Article 3 ECHR, Article 15(b) QD requires that the treatment or punishment take place *in the country of origin*. Some scholars have argued that this geographical reference effectively distances the scope of Article 15(b) from the jurisprudence of the ECtHR under Article 3 concerning the socio-economic harm cases.[253] In this respect, Battjes argues that the requirement that the serious harm takes place *in* the country of origin excludes what he defines as "humanitarian ground" cases from Article 15(b)'s scope of

[251] Cf. European Commission, *Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*, COM(2001) 510(final), 12 September 2001, at 26; Note from the Presidency of the Council of the European Union to the Strategic Committee on Immigration, Frontiers and Asylum of 25 September 2002 Doc 12148/02 ASILE 43 p. 5; Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie para 28.

[252] On this issue, see *inter alia* Storey, Hugo: *EU Refugee Qualification Directive: a Brave New World?* International Journal of Refugee Law, Vol. 20, Issue 1 2008.

[253] See section 3.2.2 for an elaborate discussion on the ECtHR's jurisprudence in this regard.

protection.[254] In support of this position, he makes reference to the reasoning of the ECtHR in *D*, arguing that the violation of Article 3 consisted of the *combined effects* of the conditions in the receiving State and the termination of the applicant's treatment in the United Kingdom. As such, the inability of St Kitts to provide *D* with medical treatment did not, *alone*, amount to inhuman treatment. Furthermore, he points out that the legislative history of the QD suggests that the exclusion of "health cases" was precisely the purpose of including the second part of Article 15(b).[255] One of the preparatory documents to the 2004 QD expresses the following view on this matter:

> "Sub-paragraph (b) […] is based on the obligations of Member States laid down in Article 3 of the ECHR and the jurisprudence of the ECtHR. However, if sub-paragraph (b) was to fully include the jurisprudence of the ECtHR relating to Article 3 EHCR [sic!], cases based purely on compassionate grounds as was the case in D versus UK […] would have to be included. […] Consequently, to avoid the inclusion of such compassionate grounds cases under a subsidiary protection regime, which was never the intention of this Directive, the Presidency is suggesting to limit the scope of sub-paragraph (b) by stating that the real risk of torture or inhuman or degrading treatment or punishment must prevail in his or her country of origin."[256]

Moreover, Battjes argues that preamble 9 of the QD, stating that "[…] third country nationals or stateless persons who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds fall outside the scope of this Directive" was included to support this reading.[257]

On the other hand, one could argue that it was indeed the adverse conditions in the receiving State (i.e. lack of medical treatment and social support) that made the removal impermissible in *D*. As such, the inhuman treatment was construed by the conditions prevailing in the receiving State. This point is raised by Costello, who argues that the question of encompassing socio-economic harm claims within the scope of Article 15(b) is more likely to turn on the notion of "treatment", rather than the reference to "in the country of origin".[258] In

[254] Battjes, Hemme: *European Asylum Law and International Law* 2006, p. 236-237.
[255] Ibid. p. 237.
[256] Note from the Presidency of the Council of the European Union to the Strategic Committee on Immigration, Frontiers and Asylum of 25 September 2002 Doc 12148/02 ASILE 43 p. 5-6.
[257] Battjes 2006, p. 237. The same wording was transferred into preamble 15 of the 2011 recast Directive.
[258] Costello 2016, p. 217.

this regard, Boeles, den Heijer, Lodder and Wouters raise the issue of the potential obstacle posed by the requirement in Article 6 QD that there is an *actor* of serious harm. In their opinion, such an actor is difficult to identify in the event of illness or disaster. Consequently, they find it "doubtful" whether subsidiary protection can be extended to individuals whose suffering flows from naturally occurring phenomena, even if the exceptionality-threshold set by the ECtHR is met. [259]

While many of the answers concerning the proper interpretation of Article 15(b) indeed is to find in the Directive itself, I find relevant to mention the possible impact of the EU Charter in this respect. By virtue of its status as primary EU law, all EU secondary legislation, including the QD, is required to be compatible with its standards.[260] This is noted in preamble 16 of the QD, which makes explicit reference the Directive's observance of the Charter. For the specific purpose of Article 15(b) QD, the EU Charter contains two relevant provisions. First, Article 4 of the EU Charter, which is identical to Article 3 ECHR in its wording. As mentioned under section 2.3.1, Article 52(3) of the EU Charter provides that those rights in the Charter, which correspond to rights in the ECHR, should have "the same meaning and scope" as those laid down by the Convention. The Explanatory Notes to the EU Charter affirms this position by stating that Article 4 of the EU Charter has the same meaning and scope as Article 3 ECHR.[261] Interestingly, the commentary to the EU Charter makes explicit reference to the case *D v. the United Kingdom* and the jurisprudence of the ECtHR concerning expulsion of the seriously ill, when elaborating on the scope of Article 3 ECHR.[262]

Second, regard must be had to Article 19(2) of the EU Charter, which stipulates that "[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to […] torture or other inhuman or degrading treatment or punishment." The Explanatory Notes makes clear that this provision incorporates the relevant jurisprudence of the ECtHR under Article 3 ECHR.[263] It can thus be seen as an express codification of the

[259] Boeles, den Heijer, Lodder and Wouters 2014, p. 358. Article 6 QD defines actors of persecution or serious harm as "(a) the State; (b) parties or organisations controlling the State or a substantial part of the territory of the State; (c) non-State actors, if it can be demonstrated that the actors mentioned in points (a) and (b), including international organisations, are unable to or unwilling to provide protection […]".
[260] Cf. Article 51(1) EU Charter.
[261] Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02) 14 December 2007, *Explanation on Article 4 – Prohibition of torture and inhuman or degrading treatment or punishment*.
[262] EU Network of Independent Experts on Fundamental Rights: *Commentary of the Charter of Fundamental Rights of the European Union* June 2006, p. 46 note 131.
[263] Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02) 14 December 2007, *Explanation on Article 19 – Protection in the event of removal, expulsion or extradition*.

implied *non-refoulement* obligation established in the jurisprudence of the ECtHR under Article 3. Although this jurisprudence already applies to the Member States by virtue of Article 4 of the Charter, Article 19(2) explicitly confirms the principle of *non-refoulement*, thereby making it *lex spexials* to Article 4 in respect of removals.[264]

Against this background, it can be established that both the general prohibition of torture, inhuman or degrading treatment or punishment in Article 4 and the explicit prohibition of returning people to such circumstances in Article 19(2) are linked, in their "meaning and scope", to Article 3 ECHR. In respect of Article 19(2), the Explanatory Notes expressly states that the "relevant jurisprudence" of the ECtHR under Article 3 ECHR is incorporated into the scope of the provision. In relation to Article 4, the Commentary makes explicit reference to *D v. the UK* when elaborating on the scope of Article 3 ECHR (which Article 4 of the Charter is to correspond to).[265] This indicates that the concept of inhuman or degrading treatment, for the purpose of the Charter, is to be understood in accordance with the ECtHR's interpretation of the concept. This leads me to question if the Charter's understanding of the concept of inhuman or degrading treatment (which is derived from the jurisprudence of the ECtHR) will have any implications on the interpretation of the concept when it appears in secondary EU legislation. In other words, is it possible to develop an autonomous understanding of the concept for the purpose of an instrument forming a part of secondary Union law (such as the QD) or will such legislation, by virtue of its subordination to primary Union law, have to be in accordance with the Charter's understanding of it? Under the following section, we will see how the CJEU has chosen to approach the interpretation of the concept for the purpose of Article 15(b) QD and its implications for claims based on socio-economic deprivation.

4.2.1 The approach of the CJEU

As mentioned under the introduction, the jurisprudence of the CJEU relating to Article 15(b) QD is not as abundant as that of the ECtHR concerning Article 3 ECHR. However, in December 2014, the CJEU delivered two judgements in which it clarified the scope of protection under Union law for claims based on ill health and the lack of medical care in the

[264] Cf. Guild, Elspeth: *Protection in the Event of Removal, Extradition or Expulsion*. In: *The EU Charter of Fundamental rights. A Commentary.* Edited by Peers, Steve; Hervey, Tamara; Kenner, Jeff and Ward, Angela 2014, p. 545. The commentary issued by the EU Network of Independent Experts on Fundamental Rights referred to above (note 262) has not been used in relation to Article 19(2) since this part has not been translated into English.
[265] See note 262 and 263.

receiving State.[266] These cases ought to be read in conjunction with each other, in the order presented below, in order to disclose a complete picture of the protection under the Union law in relation to these types of claims.[267]

The first case, *Mohamed M'Bodj v. État belge*[268] *(M'Bodj),* stemmed from a request of the Belgian Constitutional Court for a preliminary ruling on issues relating to subsidiary protection under the QD.[269] The case concerned Mr. M'Bodj, a Mauritanian national who had been granted leave to reside in Belgium on medical grounds. During his asylum procedures in Belgium, he had been the victim of an assault, causing him severe visual impairment.[270] He was then granted leave to reside, but was subsequently denied loss of income allowance and income support. Pursuant to Belgian legislation, access to such benefits was dependent on *M'Bodj* being eligible for a status of subsidiary protection, which was not granted to him on procedural grounds.[271]

Article 28 and 29 of the QD[272] stipulate an entitlement to social assistance and healthcare. The question posed by the Belgian Court to the CJEU concerned the applicability of those provisions in relation to migrants like *M'Bodj*, who had been granted leave to reside on the basis of national legalisation "which allows a foreign national who suffers from an illness occasioning a real risk to his life or physical integrity or a real risk of inhuman or degrading treatment to reside in the Member State, where there is no appropriate treatment in that foreign national's country of origin […]."[273] In other words, does the protection provided under the QD apply to individuals suffering from a serious illness, where adequate treatment cannot be obtained in the country of origin?[274]

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[266] Wibault, Tristan: *Is there a space for Humanitarian Protection within Subsidiary Protection? A reading of M'Bodj,* European Database of Asylum Law 5 February 2015. Available at: http://www.asylumlawdatabase.eu/en/journal/there-space-humanitarian-protection-within-subsidiary-protection-reading-m%E2%80%99bodj. Accessed on 2016-04-27.

[267] Cf. Peers, Steve: *Could EU law save Paddington Bear? The CJEU develops a new type of protection.* EU Law Analysis 21 December 2014. Available at: http://eulawanalysis.blogspot.se/2014/12/could-eu-law-save-paddington-bear-cjeu.html. Accessed on 2016-04-27.

[268] Judgement of 18 December 2014, C-542/13, ECLI:EU:C:2014:2452.

[269] It should be observed that the case concerned the 2004 QD. However, as no substantive changes have been made to the pertinent Articles, it remains highly relevant also in relation to the 2011 recast QD.

[270] Van der Mei, Anne Pieter: *Overview of Recent Cases before the Court of Justice of the European Union (October-December 2014),* European Journal of Social Security, 2015:1, p. 109.

[271] Cf. Peers, Steve: *Could EU law save Paddington Bear? The CJEU develops a new type of protection.* EU Law Analysis 21 December 2014. Available at: http://eulawanalysis.blogspot.se/2014/12/could-eu-law-save-paddington-bear-cjeu.html. Accessed on 2016-04-27.

[272] In the 2011 Recast QD, these provisions are placed in Article 29 and 30.

[273] Mohamed M'Bodj v. État belge para. 25.

[274] Cf. Van der Mei 2015, p. 109.

In answering this question, the CJEU began by noting that the substantive rights in question, Article 28 and 29 QD, only apply to beneficiaries of refugee status or subsidiary protection (cf. Article 20(2) QD). Hence, the crucial issue was whether seriously ill migrants, who cannot obtain adequate treatment in their home countries, qualify for either of these statuses. In the present case, the question came to revolve around the applicability of Article 15(b) in relation to this category of migrants. Could it be said that migrants like *M'Bodj* are at a real risk of suffering inhuman or degrading treatment in their countries of origin?

In approaching this issue, the CJEU initially referred to the intention of the EU legislature that the ill-treatment should occur *in the country of origin*. It then went on to interpret the scope of Article 15(b) in light of Article 6 of the QD, which sets out a list of actors of serious harm (see note 259 above).[275] The requirement in Article 6 QD of there being someone *responsible* for the infliction of serious harm, led the CJEU to find that:

> "such harm must take the form of conduct on the part of a third party and […] cannot therefore simply be the result of general shortcomings in the health system of the country of origin."[276]

Moreover, the CJEU found that this interpretation of Article 15(b) was bolstered by preamble 26, which states that "risks to which the population of a country or a section of the population is generally exposed do not normally in themselves create an individual threat which would qualify as serious harm."[277] This led the CJEU to conclude that seriously ill migrants that risk facing deterioration in their health due to the absence of appropriate treatment in their home countries will not qualify for subsidiary protection, unless they are *intentionally* deprived of the treatment.[278]

Having reached this conclusion, the CJEU went on to address the compatibility of this position with the EU Charter and Article 3 ECHR. In this respect, it held that:

[275] Costello 2016, p. 217; Mohamed M'Bodj v. État belge para. 35.
[276] Mohamed M'Bodj v. État belge para. 35.
[277] Preamble 35 in the 2011 QD. Cf. Peers, Steve: *Could EU law save Paddington Bear? The CJEU develops a new type of protection.* EU Law Analysis 21 December 2014. Available at: http://eulawanalysis.blogspot.se/2014/12/could-eu-law-save-paddington-bear-cjeu.html. Accessed on 2016-04-27. It also made reference to preamble 9 (see quotation above) concerning the exclusion of the compassionate ground cases from the scope of the Directive.
[278] Mohamed M'Bodj v. État belge para. 36.

> "The requirement to interpret Article 15(b) […] in a manner consistent with Article 19(2) of the Charter […] to the effect that no person may be returned to a State in which there is a serious risk that that person will be subjected to inhuman and degrading treatment, and having due regard for Article 3 of the ECHR, to which Article 15(b), in essence, corresponds (judgment in *Elgafaji*, […] paragraph 28), *is not such as to call that interpretation into question*. [Author's emphasis]"[279]

It then referred to the ECtHR's jurisprudence on expulsion of the seriously ill, and held that although such claims can be encompassed by the scope of Article 3 ECHR, this does not mean that such individuals should be granted subsidiary protection. Lastly, it pointed out that although the QD provides the Member States with a possibility of introducing "more favourable standards" concerning qualification for subsidiary protection (Article 3 QD), they were nevertheless prohibited from doing so in relation to this category of migrants. In support of this position, the CJEU held that it would be contrary to the objectives of the QD to grant international protection in relation to these types of claims, which "have no connection with the rational of international protection."[280]

By virtue of this judgement, the CJEU thus distanced the scope of Article 15(b) QD from the scope of Article 3 ECHR in relation to seriously ill migrants that do not have access to adequate treatment in their countries of origin. Such individuals will not be encompassed by the scope of Article 15(b), unless the medication is intentionally withheld from them. Although the CJEU in *Elgafaji* established that Article 15(b) QD, in essence corresponds to Article 3 ECHR, it chose to deviate from this approach in relation to this category of migrants. Instead, it interpreted Article 15(b) in the light of Article 6 QD, which requires the serious harm to be the "conduct" of a third party. Although the case concerned a specific category of claims, the approach adopted by the CJEU may well have implications on other groups of migrants, in relation to whom a listed "actor of harm" cannot be identified. While the CJEU did not engage in a thorough assessment of the listed actors of harm, it appears from the logic of the reasoning that "non-state actors", for the purpose of Article 6, have to be human.[281] In this respect, it also seems like the causation of serious harm must be direct.[282] For instance, the CJEU did not make reference to the ECtHR's jurisprudence concerning the

[279] Mohamed M'Bodj v. État belge para. 38.
[280] Ibid. para. 44.
[281] Peers, Steve: *Could EU law save Paddington Bear? The CJEU develops a new type of protection*. EU Law Analysis 21 December 2014. Available at: http://eulawanalysis.blogspot.se/2014/12/could-eu-law-save-paddington-bear-cjeu.html. Accessed on 2016-05-02.
[282] Ibid.

"predominant cause cases" (cf. *Sufi and Elmi*), where the socio-economic harm was deemed to be predominantly attributable to non-state actors. It can therefore be said to be doubtful whether indirect causation of serious harm by a third party is sufficient under Article 6 QD.[283]

In respect of the requirement to interpret Article 15(b) QD in a manner consistent with Article 19(2) of the EU Charter, the CJEU simply stated that this did not call its interpretation into question (see full quotation above). In my opinion, it remains highly unclear what the CJEU based this position on. It appears from the formulation of the CJEU that it does acknowledge that Article 19(2) of the Charter has a bearing on the interpretation of Article 15(b), but that this requirement, somehow, is compatible with its interpretation in the judgement. In my view, the only way to rationalize this position is by seeing Article 19(2) of the Charter and Article 15(b) QD as two distinct concepts by virtue of their different objectives. Although their constituent elements overlap, one could argue that the purpose of Article 19(2) (prohibiting *refoulement*) is different from that of Article 15(b) (granting of a legal status) and that a narrow interpretation of the latter is thus not incompatible with the Charter.[284] After all, exclusion from subsidiary protection under the QD is not tantamount to *refouling* a person to his country of origin. However, one might still question the suitability of developing an autonomous understanding of the concept, which is distinct from Article 19(2) of the EU Charter and Article 3 ECHR, for the specific purpose of the QD. Especially against the backdrop of the CJEU's previous position in *Ejgafaji*, according to which Article 15(b) mirrors the content of Article 3 ECHR.

On the same day, the CJEU delivered another judgement concerning the rights of seriously ill third-country nationals. The case of *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida*[285] *(Abdida)* concerned the expulsion of Mr. Abdida, a Nigerian national suffering from AIDS.[286] The Belgian authorities had rejected his application for asylum on medical grounds, a decision against which he appealed. While the appeal was

[283] Ibid.
[284] Cf. Tidemann 2012, p. 127 who argues that the purpose of the prohibition of *refoulement* set out in the Charter is different from the purpose of Article 15(b) QD, why the interpretation of the two provisions not necessarily needs to concur. However, he still arrives in the conclusion that the QD, itself, requires an interpretation in accordance with Article 3 ECHR.
[285] Judgement of 18 December 2014, C-562/13, ECLI:EU:C:2014:2453.
[286] European Database of Asylum law: *CJEU - Case C-562/13 Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida, 18 December 2014*. Available at: http://www.asylumlawdatabase.eu/en/content/cjeu-case-c-56213-centre-public-d%E2%80%99action-sociale-d%E2%80%99ottignies-louvain-la-neuve-v-moussa. Accessed on 2016-05-02.

pending, Mr. Abdida was denied social assistance and emergency medical assistance owing to the fact that his appeal did not have "suspensive effects".[287] The national Court asked the CJEU to rule on the lawfulness, under EU asylum law, of denying migrants like Mr. Abdida the said assistance and not providing him with a remedy of suspensive effects.[288]

Initially, the CJEU made reference to its findings in *M'Bodj* and held that the QD did not apply in relation to claims like that of Mr. Abdida's. Furthermore, it found that the other Union law instruments referred to by the national court were inapplicable to the present situation.[289] Although the CJEU could have stopped at this point, it chose to proceed and conduct an ex officio examination of the case in relation to an instrument, which the national court had not referred to – the Returns Directive[290] (RD). This Directive aims at establishing common standards and procedures for the treatment of third-country nationals who do not have a legal right to stay in a Member State.[291] The CJEU reasoned that the Returns Directive applied in relation to Mr. Abdida, since he had been issued with a decision declaring his stay illegal and stating an obligation to return.[292]

When elaborating on whether the denial of a remedy with suspensive effects was in conflict with the Returns Directive, the CJEU underlined the importance of Article 5 RD in cases like the present. Article 5 RD provides, *inter alia*, that Member States shall "respect the principle of non-refoulement" when implementing the Directive. The CJEU made reference to the jurisprudence of the ECtHR concerning expulsion of the seriously ill (quoting *N v. the United Kingdom*), which had to be respected by the Member States by virtue of Article 19(2) of the EU Charter. It held that in situations where the exceptionality-threshold set by the ECtHR was met, and expulsion would expose an individual to a serious risk of grave and irreversible deterioration of his health, Article 5 RD would render removal impermissible. In order for an

[287] Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Moussa Abdida para. 25.
[288] It is particularly interesting to note that national Belgian legislation provided that subsidiary protection status should be granted to an individual who "suffers from an illness occasioning a real risk to his life or physical integrity or a real risk of inhuman or degrading treatment where there is no appropriate treatment in his country of origin" Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa para. 30(1).
[289] Ibid. para. 32-36.
[290] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348:98) (Returns Directive/RD).
[291] Boeles, den Heijer, Lodder and Wouters 2014, p. 426.
[292] Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Moussa Abdida para. 39. See also Article 3(4) of the Returns Directive.

appeal to be effective in such a situation, where an individual alleges a breach of Article 5 RD on the said grounds, the CJEU held that it must have suspensive effects. [293]

Concerning the obligations owed to individuals like Mr. Abdida, who could not be removed for as long as his appeal was pending and suspensive effect was granted (Cf. Article 9(1)(b) RD), the CJEU made reference to the requirements stipulated in Article 14 RD. These obligations apply in all situations where removal is required to be postponed in accordance with Article 9 RD, in example where it would violate the principle of *non-refoulement*. Among these is the obligation of ensuring "emergency health care and treatment of illness".[294] In addition, the CJEU observed that this obligation would be meaningless if there were not a concomitant requirement of providing for the "basic needs" of the individual concerned. However, it stressed that it was for the Member State to decide the form, in which it would realize these obligations.[295]

In *Abdida*, the CJEU thus established that although seriously ill individuals who cannot obtain adequate treatment in their home countries are not encompassed by the scope of the QD, Article 5 RD, read in conjunction with Article 19(2) of the EU Charter, precludes removal of such in individuals in cases where the exceptionality-threshold set by the ECtHR is met. For as long as such individuals are irremovable under the RD, the Member States are also under an obligation to provide them with the entitlements stipulated under Article 14 RD and required to cater for their "basic needs". However, the precise nature of these obligations remains unclear and appears to be subject to the discretion of each Member State.

4.3 Concluding comments: irremovable but not protected

Under the previous section, we have seen how the CJEU has chosen to approach the issue of socio-economic deprivation claims in relation to subsidiary protection under the Qualification Directive. The legislative history of the QD clearly indicates that such claims, already from the outset, were intended to be excluded from Article 15(b)'s scope of protection. When the CJEU was faced with the task of ruling on this matter in *M'Bodj*, it upheld this position, but justified it with reference to the requirement of a third party being responsible for the infliction of serious harm. The CJEU thus disassociated itself from the exceptionality-

[293] Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Moussa Abdida para. 48-50.
[294] Article 14(1)(b) RD.
[295] Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Moussa Abdida para. 60-61.

approach introduced by ECtHR and ruled out the possibility of granting subsidiary protection in such situations.[296] In light of the CJEU's reasoning in *M'Bodj*, it appears that only the first category of cases in the *non-refoulement* typology of the ECtHR (direct and deliberate infliction of harm) could be encompassed by the scope of Article 15(b). However, since the CJEU did not elaborate on the nature of the responsibility required, one cannot say from certainty that it has ruled out situations where socio-economic harm is indirectly attributable to one of the listed actors in Article 6 QD.[297] However, as was pointed out above, the logic of the judgement seems to suggest that only direct infliction of harm by a human actor would meet the requirement.[298] As raised by Costello, *M'Bodj* can therefore be seen as an attempt to "trim the ragged edges" of the ECtHR's *non-refoulement* case law in the formation of subsidiary protection.[299]

The approach of the CJEU in *Abdida* seems, in my opinion, contradictory to the reasoning in *M'Bodj*. In *M'Bodj*, the CJEU articulated that claims based on ill health and lack of adequate treatment in the receiving State have "no connection with the rational on international protection". Whilst in *Abdida*, it acknowledged that such situations, by virtue of Article 19(2) of the EU Charter (and indirectly Article 3 ECHR), can trigger the principle of *non-refoulement* enshrined in the Returns Directive. As such, Member States are not allowed to remove those individuals from its territory but are, at the same time, precluded from granting them subsidiary protection status. Such individuals are thus only entitled to the very basic rights (which are formulated as "principles") stipulated under Article 14 RD, along with whatever limited rights they may have under national law.[300] The situation created by the CJEU in relation to this category of migrants can be described in terms of a "legal limbo", where individuals meeting the exceptionality-threshold are irremovable under the RD but simultaneously precluded from enjoying subsidiary protection under the QD.[301] Peculiarly, however, the CJEU places Mr. Abdida in a more favourable position than Mr. M'Bodj in

[296] Save in cases of intentional deprivation of healthcare.
[297] Cf. the reasoning of the ECtHR in relation to predominant cause cases under section 3.2.3.
[298] See note 281 and 282 above.
[299] Costello 2016, p. 173.
[300] Cf. Peers, Steve: *Could EU law save Paddington Bear? The CJEU develops a new type of protection.* EU Law Analysis 21 December 2014. Available at: http://eulawanalysis.blogspot.se/2014/12/could-eu-law-save-paddington-bear-cjeu.html. Accessed on 2016-05-04.
[301] Taylor, Amanda: *The CJEU and its interaction with international law in the Qualification Directive: a calculated selectivity?* European Database of Asylum law, 12 February 2015. Available at: http://www.asylumlawdatabase.eu/en/journal/cjeu-and-its-interaction-international-law-qualification-directive-calculated-selectivity. Accessed on 2016-05-11.

terms of access to healthcare under Union law, since Mr. M'Bodj falls outside the scope of both the QD and the RD and is thus not entitled to any of the rights in these instruments.[302]

[302] Peers, Steve: *Could EU law save Paddington Bear? The CJEU develops a new type of protection*. EU Law Analysis 21 December 2014. Available at: http://eulawanalysis.blogspot.se/2014/12/could-eu-law-save-paddington-bear-cjeu.html. Accessed on 2016-05-04.

5 Conclusion

This thesis has examined how the European regime of complementary protection relates to migrants basing their claims for protection on socio-economic deprivation. For this purpose, it has been investigated what the scope of protection under Article 3 ECHR and Article 15(b) Qualification Directive is in relation to these types of claims and how the ECtHR and the CJEU justify their respective legal approaches in this regard.

After a thorough review of the jurisprudence of the ECtHR and the CJEU, it is apparent that both European Courts struggle with the issue of how to approach this category of migrants. Are they to be regarded as *right-holders* in the sense that they have an internationally recognized right of remaining on the territory of the state (and even enjoy a legal status)? Or are their faiths to be subject to the discretion and mercy of each individual state? Both Courts have demonstrated ambivalent approaches to answering these questions, but with outcomes leaning towards the latter option.

In respect of Article 3 ECHR, the ECtHR has developed an approach where it uses the *source of the feared* harm as a means for determining the scope of Article 3 in the context of removal. While acknowledging that harm emanating from a "naturally occurring phenomena" and the lack of sufficient resources do deal with it in the receiving State in principle can engage the protection of Article 3, these cases have been subject to a *threshold of exceptionality*. This exceptionality-threshold has been formulated as being reached when exceptional circumstances are at hand and humanitarian grounds against removal are compelling. In practice, this assessment has largely been reduced to the criteria of not being "critically ill" at the time of the removal and being "fit to travel". Fulfilment of these criteria, coupled with a hypothetical possibility of obtaining treatment in the receiving State, has rendered removal permissible. This approach thus requires an applicant to be practically dying, at the time of the removal, in order to trigger the protection of Article 3. As demonstrated by several cases in this thesis (cf. e.g. *N*, *S.J*, *M.T* and *Paposhvili*), such a condition is rarely reached at the time of the removal due to the medication received in the host State. However, as the particular case of *N* illustrates, such a condition may well be at hand shortly upon return in the receiving State.

Although the majority of socio-economic harm cases before the ECtHR have concerned seriously ill individuals basing their claims for protection on the lack of medical care in the receiving State, the principles expressed by the Court in these cases are likely to have implications beyond this particular category of claims. In this regard, the exceptionality-threshold introduced by the ECtHR can be said to preclude all situations where removal is not *immediately life threatening*. As such, return to a situation of general poverty and thereby related adversities, such as a starvation, homelessness, lack of education etc. is likely to fall outside the scope of Article 3. Although the Court in *Sufi and Elmi* introduced a lower threshold applicable to cases where socio-economic harm is predominantly attributable to the conduct of state or non-state actors in the receiving State, this approach has been applied restrictively. In example, the Court has refrained from engaging in elaborate discussions relating to the "politics of poverty" and plausible connections between, for instance, inadequate medical facilities and state repression/political decisions. It has likewise refrained from problematizing the issue of labelling certain phenomena, such as illnesses and droughts, as inherently "naturally occurring", detached from political structures and anthropological influence. Instead, the approach of the Court suggests that poverty and economic disadvantage is status quo in some parts of the world and cannot, as such, be attributed to any responsible (human) actor.

The core argument for subjecting socio-economic harm cases to a threshold of exceptionality was addressed by the Court in *N* and relates to the *source* of their feared harm. In addition, it was supported by a need for a balancing of interests between those of the applicant and those of the state, and the fact that the ECHR essentially is directed at the protection of civil-political rights. As has been argued above, none of these arguments stand up to scrutiny.

First, focusing on the source of the harm *following* removal and on this basis subject individuals fearing a particular type of harm to a threshold of exceptionality is conceptually incoherent and lacks any logical explanation. Ever since *Soering*, responsibility under Article 3 in the context of *non-refoulement* has been conceptualized as arising out of the measure of expulsion and its *direct consequences* in terms of suffering for the applicant. In this regard, focusing on the source of the harm becomes a means of shifting focus from the deliberate conduct of expulsion (and its immediate consequences) to the harm occurring in the receiving State. As such, it effectively *delinks* the conduct of the Contracting State from the harm suffered by the applicant upon expulsion.

Second, the reference to the ECHR as a civil-political rights instruments as an argument for limiting the socio-economic implications of Article 3 in this particular context contradicts the Court's integrated approach and undermines contemporary understandings of indivisibility of human rights. Furthermore, the reference to the need for a balancing of interests between those of the applicant and those of the state waters down the absolute character of Article 3 and contradicts fundamental principles stipulated in the Court's case law on this matter.

However, disguised in this balancing-reference appears to be the real concern of the Court for subjecting socio-economic harm cases to a threshold of exceptionality and refraining from embracing the integrated approach in relation to this category of claims. As has been argued in this thesis, this position cannot be rationalized in any other manner than viewed from an economic-policy perspective. In this respect, the ECtHR can be said to have applied a politicized (consequentialist) approach to legal interpretation, through which the scope of Article 3 has been shaped on the basis of economic considerations i.e. the floodgate concern. In my opinion, it remains highly questionable whether such speculative economic implications can be said to constitute legitimate *legal* concerns when ruling on the scope of an absolute Article and if the legal boundaries of Article 3 ought to be governed by the number of people hypothetically in need of its protection. However, the approach of using the source of the harm has become a means for favouring political outcomes and the lack of clarity concerning the conceptual justification for the implied *non-refoulement* obligation can be said to have facilitated such a politicized approach to legal interpretation.

That said, it is imperative that Article 3 and its implied *non-refoulement* obligation is constrained by some limitations. Not all socio-economic harm cases raise issues of sufficient severity as to call for international protection. However, using the source of the feared harm as a means for establishing the scope of protection is conceptually flawed and undermines the absolute nature of Article 3. In line with the reasoning of the minority in *N*, I therefore suggest that the only conceptually coherent approach, compatible with the absolute nature of Article 3, would be to focus on the measure of expulsion and the severity of harm it exposes the applicant to. Under this assessment, it ought not to matter whether the feared harm emanates from deliberate infliction or from the inability of the receiving State to deal with a "naturally occurring phenomenon". If the harm awaiting the applicant is severe enough, Article 3 should bar removal *notwithstanding* the source of the harm. In determining whether the threshold of severity is met in relation to health cases, I affirm the approach suggested by the Human

Rights Centre of Ghent University in its third party intervention in *Paposhvili*. Especially important is the aspect of shifting focus from *theoretical availability* to *practical accessibility* of treatment in the receiving State, in order to create a protection that is not purely illusory in relation to this category of migrants. In this regard, I also believe that the concept of international assurances can be used a practical means of assuring such accessibility.

Nevertheless, the interpretative approach of using the source of the feared harm as means for determining the scope of protection in relation to socio-economic harm cases has been reproduced in the jurisprudence of the CJEU. In respect of Article 15(b) Qualification Directive, the CJEU has applied an even stricter approach than the ECtHR and has precluded socio-economic harm cases from being encompassed by the scope of subsidiary protection. Not even in cases where the exceptionality-threshold imposed by the ECtHR is attained will subsidiary protection be granted (with the exception of situations where the harm is the result of deliberate conduct of a third party). In reaching this conclusion, the CJEU interpreted the scope of Article 15(b) in the light of Article 6 QD, which requires there to be an *actor* of serious harm. As such, it distanced the scope of Article 15(b) QD from the jurisprudence of the ECtHR concerning expulsion of the seriously ill on the basis that serious harm must be attributable to a responsible actor. Although it did not elaborate further on the precise nature of the responsibility required, it has been argued in this thesis that the CJEU is likely to assume a restrictive approach to "indirect causation" of serious harm. Furthermore, the CJEU declared that the Member States are *prohibited* from extending subsidiary protection to this category migrants since their claims have "no connection with the rational of international protection" and it thus would be against the objectives of the QD to grant them protection.

As has been argued under chapter 4, the CJEU did not provide an adequate explanation as to how its interpretation of Article 15(b) QD is compatible with Article 19(2) of the EU Charter (indirectly Article 3 ECHR). Even assuming that this position was based on the different objectives of Article 15(b) QD and Article 19(2) EU Charter, one can still question the adequacy of developing an autonomous concept of "inhuman or degrading treatment", which is distinct from primary Union law and Article 3 ECHR, for the specific purpose of the QD. In addition, this approach can be said to contradict the position of the CJEU in *Elgafaji* where it held that Article 15(b) QD, in essence, corresponds to Article 3 ECHR.

Contrary to the highly restrictive approach assumed in relation to Article 15(b) QD, the CJEU interpreted the general reference to the principle of *non-refoulement* in the Returns Directive in an extensive manner. Although subsidiary protection shall not be granted to seriously ill migrants that do not have access to medical treatment in their home countries, Article 5 RD bars removal in situations where the exceptionality-threshold set by the ECtHR is met. As such, the CJEU has introduced an *alternative avenue* for protection under Union law that does not provide the concerned individuals with the extensive rights stemming from a subsidiary protection status, but still renders removal impermissible.

To summarize the current state of law, it can be said that only in *highly exceptional* cases will migrants basing their claims for protection on socio-economic deprivation be encompassed by the scope of complementary protection under European asylum law. Those migrants who manage to meet the exceptionality-threshold set by the ECtHR are irremovable under Article 3 ECHR and Article 5 RD but do not enjoy subsidiary protection under the QD. As such, their substantive entitlements may not be governed by Union law, other than the vague principles set out in Article 14 RD. As a consequence, the faiths of socio-economic protection seekers will in most cases be decided on the basis of national legislation, which can be formulated with wide discretion in this regard.

As the Grand Chamber of the ECtHR is now presented with an opportunity to revisit the exceptionality-approach in *Paposhvili*, it remains to be seen if the increasing discontent voiced from within and outside the Court will render in a change of course. While the prevailing approach of the ECtHR signals a view that these cases are not truly claims for international protection (other than those evoking the utmost of our compassion), a conceptually coherent approach, based on solid and cogent legal argumentation, would make it more difficult for the CJEU to simply reject this branch of its case law. As such, it can be argued that a change of direction, first and foremost, has to take place in the jurisprudence of the ECtHR in order to affect the approach of the CJEU. As argued by Judge Pinto de Albuquerque, the time has come for a *right-based approach* to dealing with the claims of this category of migrants, instead of letting their faiths be governed by the level of sympathy or compassion extended by the individual host State in question.

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