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In accordance with its own rules?

The role of the European Court of Human Rights in developing the protection for seriously ill migrants under Article 3 ECHR

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Summary

The thesis examines, through the use of the doctrinal research method, the role of the European Court of Human Rights in developing the scope of protection for seriously ill migrants under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950, ETS. 5). Through the examination, the thesis answers the question as to whether the Court has acted within the principles and methods governing the interpretation of the Convention in its legal development of the protection for seriously ill migrants under Article 3. The thesis is based on the assumption that the Court is governed by the means of interpretation that flows from the Vienna Convention on the Law of Treaties (22 May 1969, 1155 UNTS 331), as well as the Court's general jurisprudence.

According to the Court's case law, seriously ill migrants may benefit the protection of *non-refoulement* inherent in Article 3. The Court recognised the scope of protection for seriously ill migrants for the first time in the *Case of D v the United Kingdom*. In its judgment, the Court determined that medical *non-refoulement* cases would be subject to a high threshold of severity, hence only protecting *very exceptional* cases. The 'very exceptional' threshold was later clarified by the Court in the *Case of Paposhvili v Belgium* in order to guarantee that the Convention would stay practical and effective and not theoretical and illusory. Consequently, seriously ill migrants may benefit the protection of *non-refoulement* if they are subject to a real risk of being exposed to a serious, rapid and irreversible decline in its state of health, resulting in intense suffering or to significant reduction of life expectancy.

The examination finds that the Court has acted within some of its methods and principles of interpretation in determining the scope of protection for seriously ill migrants under Article 3. While an examination of the *travaux préparatoires* as well as a meta-teleological interpretation may speak in favour of the scope of protection of medical *non-refoulement* cases, an evolutive interpretation may speak against the scope of protection due to the lack of European consensus. Furthermore, the examination finds that the application of a higher threshold of severity is *inconsistent* with the general jurisprudence of Article 3, as it undermines the notion of the *non-refoulement* principle and the absolute nature of the provision. An overall assessment thus reaches the conclusion that the Court has acted *beyond* the principles and methods governing the interpretation of the Convention in its legal development of the protection for seriously ill migrants under Article 3.

Sammanfattning

Uppsatsen undersöker, genom att använda en doktrinär forskningsmetod, Europadomstolens roll i att utveckla skyddsomfånget för svårt sjuka migranter enligt artikel 3 i den Europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna (4 november 1950, ETS. 5). Genom utredningen besvarar uppsatsen frågan om Europadomstolen har agerat inom de metoder och principer som styr tolkningen av konventionen i sin rättsutveckling av skyddet för svårt sjuka migranter under artikel 3. Uppsatsen utgår från antagandet att Europadomstolen styrs av de tolkningsmetoder som följer av Wienkonventionen om traktaträtten (22 maj 1969, 1155 UNTS 331), samt domstolens allmänna rättspraxis.

Enligt domstolens rättspraxis kan svårt sjuka migranter åtnjuta ett visst skydd enligt artikel 3 utifrån principen om *non-refoulement*. Skyddsomfånget för svårt sjuka migranter enligt artikel 3 erkändes för första gången av Europadomstolen i fallet *D v the United Kingdom.* I målet fastslog domstolen att skyddet för medicinska refouleringsfall skulle vara föremål för en hög tröskel och därmed endast skydda fall som utgjorde *exceptionella omständigheter.* Den 'exceptionellt höga' tröskeln klargjordes senare i fallet *Paposhvili v Belgium* i syfte att garantera att skyddet skulle förbli praktiskt och effektivt och inte teoretisk och illusorisk. Följaktligen kan svårt sjuka migranter gynnas av principen om *non-refoulement* om de löper en reell risk att utsättas för en allvarlig, snabb och oåterkallelig försämring av deras hälsotillstånd, vilket resulterar i intensivt lidande eller en betydande minskning av den förväntade livslängden.

Sammanfattningsvis konstaterar utredningen att Europadomstolen har agerat inom vissa tolkningsmetoder och tolkningsprinciper för att fastställa omfattningen av skyddet för svårt sjuka migranter enligt artikel 3. Medan en granskning av förarbetena samt en meta-teleologisk tolkning kan tala för skyddsomfånget för medicinska refouleringsfall, kan en dynamisk tolkning tala mot skyddsomfånget eftersom det saknas europeisk konsensus. Vidare finner utredningen att tillämpningen av en högre tröskel är oförenlig med domstolens allmänna rättspraxis av artikel 3 eftersom den underminerar betydelsen av principen om *non-refoulement* och bestämmelsens absoluta karaktär. En samlad bedömning leder således till slutsatsen att Europadomstolen har agerat bortom de principer och metoder som styr tolkningen av konventionen i sin rättsutveckling av skyddet för svårt sjuka migranter enligt artikel 3.

Preface

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Abbreviations

CAT	The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.
CJEU	Court of Justice of the European Union.
The Commission	European Commission of Human Rights.
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms.
ECtHR	European Court of Human Rights
EU	European Union.
ICJ	International Court of Justice
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 for persons eligible for subsidiary protection, and for the content of the protection granted.
UDHR	Universal Declaration of Human Rights.
VCLT	Vienna Convention on the Law of Treaties.

1 Introduction

1.1 Background

The Convention for the Protection of Human Rights and Fundamental Freedoms[1] has, for more than 70 years, been providing Europe with a rigorous catalogue of human rights protected on a regional basis. Since 1959, the European Court of Human Rights (ECtHR or the Court) has delivered 53 023 judgments[2], thus making it the most important agent in developing the scope of protection of human rights protected by the ECHR. By constituting an International Human Rights Court, the ECtHR does not only *interpret the law* in legal disputes, but *shapes the law* by determining the meaning of an abstract norm.[3] However, the Court's interpretation of the ECHR is governed by general rules of treaty interpretation, such as the VCLT, and methods and principles especially produced by the Court, such as the principle of evolutive interpretation.

The many judgements delivered by the ECtHR throughout the years provides us with a rather ambiguous picture of the role of the Court and the limits of its judicial power. While some judgments have constituted a purposefully widening of the scope of protection, some questions have been nationally sensitive matters resulting in judicial self-restraint by the Court.[4] The case law of the ECtHR even shows that a certain matter subjected to the Court's adjudication may have been given a rather narrow scope of protection by the Court in one case in order to receive a wider scope of protection in subsequent case law.

One such matter is the *medical non-refoulement cases.* Through its case law, the Court has given seriously ill migrants a possibility to benefit the protection of Article 3 of the ECHR in very exceptional cases. However, on the road of widening the scope of protection, it seems that the Court has been torn apart between the wish of strengthening the individual protection in new contexts arising in the field of refugee law against a Europe that highly values the right to State sovereignty. As a result, the Court may have acted beyond the methods and principles governing the interpretation of the ECHR.

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[1] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS. 5.

[2] Council of Europe, '*Overview 1959-2020 ECHR*', August 2021. Available at: https://www.echr.coe.int/Documents/Overview_19592020_ENG.pdf (Accessed 26 December 2021).

[3] E Yildiz article 'A Court with Many Faces: Judicial Characters and Mode of Norm Development in the European Court of Human Rights' (2020) 31 No. 1 *The European Journal of International Law,* 73-99, p. 74.

[4] Ibid., p. 75.

1.2 Purpose and research questions

The purpose of the thesis is to examine the role of the ECtHR in developing the scope of protection for medical *non-refoulement* cases under Article 3 of the ECHR. Through the examination, the thesis aims at investigating if the ECtHR has acted within the principles and methods governing the interpretation of the ECHR in its legal development.

In order to examine the role of the ECtHR, the thesis aims to review how the ECtHR has developed the scope of protection of Article 3 to contain medical *non-refoulement* cases and how the ECtHR has supported its legal development of the protection for seriously ill migrants in its case law. The examination aims in particular at scrutinising the characteristics of the Court's reasoning in medical *non-refoulement* cases adjudicated under Article 3. The examination of how the ECtHR has adjudicated these cases will subsequently be compared to the principles and methods of interpretation governing the Court's adjudication, as well as its general jurisprudence of Article 3.

The main research question is the following:

Has the ECtHR acted within the principles and methods governing the interpretation of the ECHR in its legal development of the protection for seriously ill migrants under Article 3?

In order to answer the main research question, the thesis will be guided by the following sub-questions:

1. What was the original purpose of Article 3 and how did the principle of *non-refoulement* gain protection under Article 3?
2. Under what circumstances may seriously ill migrants benefit from the protection of the *non-refoulement* principle and what arguments has the ECtHR used to support its conclusions in these cases?
3. How has the ECtHR motivated its decision to apply a higher threshold in medical *non-refoulement* cases, hence only protecting *very exceptional* cases under the scope of protection in Article 3?
4. How should the Contracting States assess the risk in medical *non-refoulement* cases according to the "Paposhvili test"?
5. Should seriously ill migrants be protected by the scope of protection of Article 3 according to the principles and methods of interpretation governing the Court's adjudication?
6. Is the Court's motivation of applying a higher threshold of severity consistent with the general jurisprudence of Article 3?

1.3 Delimitations

The role of the ECtHR may be analysed and discussed through a wide range of legal areas. Hence, an examination of the role of the ECtHR may be impugned through different perspectives. However, while some cases adjudicated by the Court almost passes by without further questioning, other cases have resulted in discussions where the opinions of the Court's judgements have differed. Medical *non-refoulement* cases is an example of the latter. These cases tie in with longstanding discussions of migration and State sovereignty, two questions where the opinions amongst the Contracting States differs due to differences in the political climate. It is also a legal area where the ECtHR has created a legal development that might appear as contrary to the restrictive approach held by several Contracting States, hence making it an interesting area to analyse in the perspective of the role of the ECtHR.

This thesis focuses on *medical non-refoulement* cases and the protection these cases have gained through the case law presented in section 3.2. Hence, the thesis does not aim at analysing the role of the ECtHR in general, but only the Court's role in these specific cases relating to the same issue – people seeking refuge for health-related reasons. Even if other cases protected by the *non-refoulement* principle will be discussed, the thesis does not aim at reaching a conclusion regarding the role of the ECtHR in all cases concerning the principle of *non-refoulement* adjudicated by the ECtHR.

In addition, the thesis focuses on the scope of protection under *Article 3* and will thus not examine the protection that these cases might enjoy through other provisions of the ECHR. For example, the *Case of Paposhvili v Belgium* and the *Case of Savran v Denmark* also concerns alleged violations of the right to respect for private and family life in Article 8.[5] Furthermore, the thesis does not aim at concluding neither the role of the ECtHR in every case concerning an absolute provision of the ECHR nor the role of the ECtHR in every case concerning an alleged violation of Article 3.

Finally, the thesis will not examine the potential protection that a person might enjoy in another international instrument or international legal act. Consequently, the thesis does not claim at concluding the entire range of protection that a person might be able to enjoy, domestically as well as internationally, by seeking protection in Europe based on medical grounds. Furthermore, the author acknowledges that the role of the ECtHR in medical

[5] *Case of Paposhvili v Belgium* [GC], ECtHR, App. No. 41738/10, 12 December 2016, para. 208; *Case of Savran v Denmark* [GC], ECtHR, App. No. 57467/15, 7 December 2021, para. 149.

non-refoulement cases adjudicated under Article 3 might raise further issues than the thesis has space and time to include. For instance, the thesis will not discuss the procedural aspect of the risk assessment concerning the principle of subsidiarity. Instead, the examination only focuses on the scope of protection and the high threshold of severity guarding the scope of protection.

1.4 Methodology and material

In order to examine if the ECtHR has acted within the methods and principles governing its interpretation of the ECHR, I will initially examine the general jurisprudence of Article 3. The examination in chapter 2 thus aims at examining the historical background of Article 3 by describing the initial draft of Article 3 and its original purpose. Furthermore, the examination aims at clarifying the notion of the absolute nature of Article 3 and how the ECtHR recognised the *non-refoulement* principle inherent in Article 3. This initial examination is descriptive and aims to clarify *de lege lata,* meaning what the law 'is'.[6]

Approaching the first sub-question in chapter 2 *de lege lata* naturally connects to the method of *doctrinal research*, which has been described by Gonzalez-Salzberg and Hodson as constituting the most commonly used method in the field of international human rights research. Gonzalez-Salzberg and Hodson describes *doctrinal research* as "research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, [sometimes], predicts future developments".[7] Consequently, the doctrinal research method will also be used in chapter 3 in order to systematically examine the case law of medical *non-refoulement* cases and thereafter explain the areas of difficulty in these cases by decomposing the case law and highlight how these cases distinguishes from 'regular' *non-refoulement* cases adjudicated by the Court.

The doctrinal research method identifies, analysis and synthesises the content of the law by using conventional sources of law.[8] In the field of public international law, the conventional sources of law is based on Article 38(1) of the Statue of the International Court of Justice[9] and constitutes international Conventions, international customary law and general

[6] C Sandgren, *Rättsvetenskap för uppsatsförfattare* (Författaren & Norstedts Juridik AB, 2018) p. 52.
[7] D.A. Gonzalez-Salzberg and L Hodson, '1 Human rights research beyond the doctrinal approach', in *Research Methods for International Human Rights Law: Beyond the Traditional Paradigm* (Routledge, 2020) 1-12, p. 2.
[8] T Hutchinson, 'Doctrinal research – Researching the jury', in *Research Methods in Law* (Routledge, 2013) 7-33, p. 10.
[9] Statue of the International Court of Justice, 24 October 1945, 33 UNTS 993 (ICJ).

principles, which creates the primary sources of law. However, the primary sources of law provides us with a limited amount of material. The thesis will thus use secondary sources of law which may be used as means of interpretation.[10] The means of interpretation used in the thesis are the ECtHR's case law, the preparatory work behind the initial draft of Article 3 (*travaux préparatoires*) and legal doctrine. Another important source that has been used in the thesis is articles from several academic human rights journals, since they provide reflections and discussions in the field of international human rights law.[11]

As the main purpose of the thesis is to examine if the ECtHR has acted within the principles and methods governing the interpretation of the ECHR, it is crucial to determine what these principles and methods of interpretation are and how they govern the Court's interpretation of the ECHR. The main Convention governing the interpretation of international treaties is the Vienna Convention on the Law of Treaties (VCLT)[12], thus also making it the point of departure in the ECtHR's interpretation of the ECHR.[13] The recognition of VCLT as an important instrument in the interpretation of the ECHR has also been made by the Court in its case law.[14] The means of interpretation are found in Article 31-33 of the VCLT and the main rule governing the use of VCLT as a tool in treaty interpretation is that the VCLT only shall be used when the meaning of a treaty is *unclear* and that the interpretation shall stop as soon as the meaning of a treaty is *clear.*[15]

Notwithstanding that the ECtHR are bound by the rules of interpretation of the VCLT, the Court does not have a habit of referring to international rules of interpretation to back up its interpretation of the Convention. Rather, the Court refers back to its general principles established in previous jurisprudence. Even if these principles can be said to follow from, or at least be compatible with, the rules of VCLT, the Court's application of these principles does not always respect the distinction between the general rule of interpretation and the supplementary means of interpretation set forth in the VCLT. As this thesis aims to examine if the ECtHR has acted within the principles and methods governing *its interpretation* of the ECHR*,* the thesis will use the same methods and principles as the ECtHR would have used. These methods and principles of interpretation will be described in connection with the examination made in section 4.2.

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[10] Article 38 (1) (d) Statue of the International Court of Justice.
[11] Gonzalez-Salzberg et al. (2020) p. 2.
[12] Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331 (VCLT).
[13] *Caamaño Valle v Spain Judgment,* ECtHR, App. No. 3564/17, 11 May 2021, para. 52.
[14] *Golder v the United Kingdom*, ECtHR, App. No. 4451/70, 21 February 1975, para. 29.
[15] U Linderfalk, 'Tolkningen av traktater', in *Folkrätten i ett nötskal* 3:e uppl (Studentlitteratur, 2020) 95–108, p. 96.

Besides the methods and principles that flows from the means of interpretation of the VCLT, the Court is also governed by its own jurisprudence. However, the ECHR is not formally a precedent-based system and the Court is not bound by its own judgments. Consequently, every judgement delivered by the Court may be assessed on its own merits.[16] Nevertheless, the Court tends to follow its own jurisprudence. An empirical study of the case law of the ECtHR gives at hand that the Court follows and applies its general jurisprudence. This has also been explicitly stated by the ECtHR in its own case law, where the Court highlighted the "legal certainty and the orderly development of the Convention case-law" as an argument in favour of applying its own precedents.[17] Accordingly, the general jurisprudence of the ECtHR is a principle that governs the interpretation of the ECHR.

In conclusion, chapter 4 analysis if the ECtHR has acted within the methods and principles governing the interpretation of the ECHR. One the one hand, chapter 4 is also approached *de lege lata*, as it scrutinises what methods and principles that the Court has used to determine the scope of protection of Article 3. However, by taking the methods and principles governing the interpretation in account in order to examine how the Court should rule, the fourth chapter is also approached *de sententia ferenda,* meaning 'how the judgement of the court should be'.[18] This is also the approach that will be held in the final chapter as the thesis aims to provide propositions regarding how the Court should adjudicate medical *non-refoulment* cases.

1.5 Contribution of the thesis

The role of the ECtHR is subject to an ongoing discussion in the field of public international law and is thus a constantly current topic in the area of European human rights law.[19] Still, the role of the ECtHR in medical *non-refoulement* cases has not been subject to much academic research except for the *acknowledgement* of its protection through the *non-refoulement* principle inherent in Article 3. For instance, the legal development has been discussed in the Strasbourg Observer. However, the discussion has mainly been focused on briefly commenting the legal development. Moreover, the examination of

[16] J Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press, 2019) p. 37-38.
[17] *Cossey v the United Kingdom,* ECtHR, App. No. 10843/84, 27 September 1990, para. 35.
[18] Sandgren (2018) p. 52.
[19] See i.a., J Viljanens article 'The Role of the European Court of Human Rights as a Developer of International Human Rights Law' (2011) *Cuadernos constitutucionales de la Catedra Fadrique Furio Ceriol. 62/63*, p. 249–265.

the role of the ECtHR in medical *non-refoulement* cases raises questions about the absolute nature of Article 3, where there has been a lot of previous academic research. Two important persons who have contributed to the critical debate are Natasa Mavronicola and Hemme Battjes, as both of them have discussed the Court's application of absolute rights, such as Article 3.[20]

There are two important research outputs where the legal development of medical *non-refoulement* cases has been subject to critical academic debate. These are two journal articles by Kathryn Greenman and Vladislava Stoyanova. In her article 'A Castle built on Sand? Article 3 ECHR and the Source of Risk in *Non-Refoulement* Obligations in International Law', Greenman analyses the source of the risk being naturally occurring illness and how the protection within Article 3 corresponds to the notion of *non-refoulement*.[21] While Greenman's examination is built on the case law of the *Case of D v the U.K.* and the *Case of N v the U.K.,* Stoyanova's article is based on the legal development made through the *Case of Paposhvili v Belgium.* In her article 'How Exceptional Must 'Very Exceptional' Be? *Non-Refoulement*, Socio-Economic Deprivation, and *Paposhvili v Belgium,* Stoyanova scrutinises the consequences of the Paposhvili judgment and the inconsistencies in the Court's reasoning through the notion of the negative obligation framework. Stoyanova focuses on the retention of the source of the harm test and the balancing of opposed interests at the definitional stage, hence questioning the ECtHR's application of a higher threshold of severity in these specific cases.[22]

Finally, the author would like to acknowledge that medical *non-refoulement* cases have been subject to a 2016 Master thesis in law from Lund University where the scope of complementary protection of medical *non-refoulement* cases was examined. The thesis examined the scope of protection of Article 3 of the ECHR, and found among other things, that the threshold of severity of medical *non-refoulement* was high due to the source of the harm and the balancing of opposed interests.[23]

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[20] See i.a. N Mavronicolas article 'What is an 'absolute right'? Deciphering absoluteness in the context of Article 3 of the European Convention on Human Rights' (2012) 12:4 *Human Rights Law Review* 723-758; H Battjes, 'In search of a fair balance: the absolute character of the prohibition of refoulement under Article 3 ECHR reassessed' (2009) 22 *Leiden Journal of International Law* 583-621.

[21] K Greenman 'A Castle built on Sand? Article 3 ECHR and the Source of Risk in *Non-Refoulement* Obligations in International Law' (2015) 27 *International Journal of Refugee Law,* 264-296.

[22] V Stoyanova 'How Exceptional Must 'Very Exceptional' Be? *Non-Refoulement*, Socio-Economic Deprivation, and Paposhvili v Belgium' (2017) 29 *International Journal of Refugee Law,* 580–616.

[23] L Wallenberg, 'Return to Socio-Economic Deprivation: A Critical Analysis of the Scope of Complementary Protection under European Law (Master thesis in law, Lund University 2016). Available at: https://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=8874825&fileOId=8877703 (Accessed 26 December 2021).

This thesis contributes to previous research in that it does not only explain how the ECtHR has *distinguished* the medical *non-refoulement* cases protected within Article 3 from other *non-refoulement* cases, but also examines the role of the ECtHR. As discussed above, the main research question concerns whether the Court has acted within the principles and methods governing its interpretation of the ECHR *in the first place*. With this focus the thesis aims at contributing with a new perspective to the ongoing discussions about the proper scope of protection for seriously ill migrants in Europe. Furthermore, the thesis constitutes an analysis of the Grand Chamber judgement in the *Case of Savran v Denmark* that was delivered on the 7th of December 2021, which at this point has not yet been subject to critical debate.

1.6 Outline

This thesis is divided into five chapters that follows the logic of the research undertaken to answer the main research question.

Chapter 2 aims at providing an answer to sub-question 1 by examining the initial purpose of Article 3 and its absolute nature. It also examines how the ECtHR has recognised the *non-refoulement* principle inherent in Article 3.

Chapter 3 describes under what circumstances seriously ill migrants may benefit from the protection of *non-refoulement* based on the key cases adjudicated by the ECtHR and will thus aim at providing an answer to sub-question 2. It thereafter highlights how the Court has motivated its application of the 'very exceptional' threshold, which constitutes sub-question 3, and how the Contracting States should assess the risk according to the 'Paposhvili test', which constitutes sub-question 4.

Chapter 4 analyses if seriously ill migrants should be protected by the scope of protection of Article 3 according to the principles and methods of interpretation that governs the Court's adjudication, which constitutes sub-question 5, and if the 'very exceptional' threshold is consistent with the general jurisprudence of Article 3, which constitutes sub-question 6.

Chapter 5 summarises the findings made and answers the main research question as to whether the ECtHR has acted within the principles and methods governing the interpretation of the ECHR in its legal development of the protection for seriously ill migrants under Article 3.

2 The general jurisprudence of Article 3

2.1 Historical background

The ECHR was signed by the members of the Council of Europe in order to take the first steps for the collective enforcement of certain rights stated in the Universal Declaration of Human Rights.[24] The ECHR was thus initiated in the light of the UDHR, which had been created in 1945 as a response to the end of World War Two.[25] By introducing the UDHR, hopes were raised that international law would act against a world order where States had the capacity to commit brutal acts against human beings.[26] Hence, the ECHR is born out of the reactions of World War Two and the initial intention behind the ECHR was to create a protection of human rights on a regional basis in order to prevent Europe from becoming a place of tyranny and oppression.[27]

The initial purpose of the Convention was, in comparison to the Convention system of today, slightly less ambitious. In the proposal of the Convention in the 1950's, the intention was to create a "collective pact against totalitarianism". This was also the one thing that the Contracting States could totally agree on. To go a step further and create a "European Bill of Rights" was however met with more scepticism in the early years of the ECHR.[28] Notwithstanding, the Court has treated Article 3 as one of the most sacred human rights of the ECHR.[29] According to the ECtHR, Article 3 enshrines one of the most fundamental values of a democratic society.[30]

Article 3 of the ECHR states the prohibition of torture. According to the article, the prohibition of torture constitutes the following protection:

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

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[24] Preamble to the European Convention on Human Rights; Universal Declaration of Human Rights, GA Resolution 217A (III), A/RES/3/217 A, 10 December 1948 (UDHR).
[25] E Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010) p. 33.
[26] Ibid., p. 34.
[27] Ibid., p. 40, p. 45.
[28] Ibid., p. 75.
[29] W.A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) p. 164.
[30] A Reidy, '*The prohibition of torture: A guide to the implementation of Article 3 of the European Convention on Human Right'* July 2003, Human Rights handbooks, No. 6., Available at https://rm.coe.int/168007ff4c (Accessed 26 December 2021) p. 8.

The prohibition of torture and inhuman or degrading treatment or punishment in Article 3 is an absolute right with no acceptable derogations.[31] Article 3 is not limited to a specific group which means that every person in the jurisdiction of the ECHR is protected by the scope of protection covered by Article 3. The absolute nature of Article 3 also means that no public interest can be important enough to limit the prohibition.[32] Furthermore, the prohibition is one of few articles in the ECHR where no derogations are allowed under a time of public emergency.[33] Besides the protection covered by the ECHR, the prohibition of torture has been described by the ICJ as part of international customary law and as a peremptory norm.[34]

Besides the character of the provision as an important human right in the international community, other reasons were brought up in the initial draft of Article 3. For instance, the prohibition of torture was seen as closely linked to other political and civil rights, such as freedom of thought, conscience and opinion. These human rights were primarily discussed in the context of police methods and judicial processes. One of the original purposes was, in other words, to protect persons from being subjected to torture in a legal process.[35] Not only was Article 3 intended to protect persons from severe ill-treatment by the police. It also focused on other State actors such as the military authorities, but also private organisations and frankly any other person in the society. In the proposal for the draft of the ECHR it was suggested that Article 3 should prohibit "all forms of physical torture that are inconsistent with a civilised society" and that such ill-treatment should be seen as "offences against heaven and humanity".[36]

In the initial draft of Article 3, the drafters did not only discuss what different agents of harm that could cause the ill-treatment prohibited by Article 3. The drafters also discussed the nature of the harm, i.e. what *means* of torture that would be prohibited. In the *travaux préparatoires,* the drafters rejected the idea of establishing a certain number of means of torture that would be prohibited. Instead, the drafter's stated that *all forms* of torture were prohibited according to Article 3. The drafters argued that if they would enumerate all of the different forms of torture that would be prohibited, it would *e contrario* lead to the conclusion that the means of torture not enumerated would be seen as permitted by the Convention. Hence,

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[31] H Danelius, *Mänskliga rättigheter i europeisk praxis: En kommentar till Europakonventionen och de mänskliga rättigheterna* 5 uppl. (Nordstedts Juridik 2015) p. 78.
[32] G Gooch and M Williams, *A Dictionary to Law Enforcement* (Oxford University Press, 2015).
[33] Article 15.2 ECHR.
[34] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [20 July 2012] ICJ Rep 144, para. 99.
[35] Schabas (2015) p. 166.
[36] Ibid., p. 166.

enumerating the means of torture prohibited by Article 3 would be contradictory to the fundamental principle that the drafters wished to enshrine.[37]

It is clearly seen in the published *travaux préparatoires* that the Council of Europe wished to stress how serious the European countries needed to be in their effort to prohibit all forms of torture and severe ill-treatment. Consequently, it was important to separate the right to life protected in Article 2 and the prohibition of torture in Article 3.[38] Despite the different opinions expressed in the draft of the protocols regarding the structure of the text, it seems clear that the Council of Europe was putting great emphasis on the fact that torture was to be seen as "barbarism behaviour" not belonging in a civilised society.[39]

Article 3 of the ECHR has been adjudicated by the ECtHR countless times, hence creating a rich jurisprudence on the subject of torture. The thesis does not aim to account for all different forms of ill-treatment that have been established by the Court as prohibited by Article 3. However, and in order to conclude this section, some brief words should be said about the most common context of application of Article 3 in the ECtHR. Most violations of Article 3 are in the context of detainees. In the context of ill-treatment of detainees, the agents of harm are thus the police, the military forces and members of the prison service.[40] Other repeated violations of Article 3 are in the context of arrests and interrogations,[41] conditions of detention,[42] and deportations and disappearances through detention.[43] In conclusion, Article 3 is an important protector of the ill-treatment that a detainee might face by the State authorities or a non-State actor in charge of a prison or detention centre where the authority derives from a public authority.[44]

2.2 The Court's application of an absolute provision

Although Article 3 is an absolute provision that under no circumstances is allowed to be limited for any person falling under the scope of protection, it

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[37] Preparatory work on Article 3 of the European Convention on Human Rights, Strasbourg, 22 May 1956, p. 8.
[38] Ibid., p. 8.
[39] Ibid., p. 6.
[40] A Reidy (2003), Available at https://rm.coe.int/168007ff4c (Accessed 26 December 2021), p. 22.
[41] Ibid., p. 23.
[42] Ibid., p. 26.
[43] Ibid., p. 31-33.
[44] Ibid., p. 22.

is also formulated in general terms without clear indications of its precise scope of application. The Convention text does not state specifically what *torture* and *inhuman or degrading treatment or punishment* means.[45] Inevitably, this has given the ECtHR a mandate to determine the scope of protection in individual cases. Due to the absolute character of the provision – and contrary to the notion of the qualified rights under the ECHR – the assessment in cases under Article 3 is purely a matter of determining the scope of protection.[46] The application of Article 3 does not fit the "two-stage model of human rights adjudication" where the Court first establishes if a case constitutes an *interference* and secondly, if that interference either constitutes a *violation* or could be justified as necessary in a democratic society due to its legitimate aim.[47] Consequently, if an ill-treatment constitutes an interference of Article 3, it automatically constitutes a violation of Article 3.

In order to guarantee the absolute nature of the prohibition of torture or other inhuman or degrading treatment while determining the scope of protection, Article 3 of the ECHR consists of a so-called "threshold".[48] To be protected by the absolute prohibition in Article 3, the alleged ill-treatment needs to reach a minimum level of severity. In other words, the threshold marks the lowest form of severity that an ill-treatment needs to constitute of in order to fall within the scope of protection in Article 3.[49] Furthermore, when the ill-treatment reaches the threshold, it is protected by the absolute nature of Article 3 and may thus never be justified under any circumstances.[50] One of the reasons to apply this threshold was to guarantee that Article 3 of the ECHR did not get "trivialized" by prohibiting more than the most severe forms of ill-treatment.[51]

In the *Greek Case*, the Commission[52] confirmed a hierarchy constituting of three different forms of ill-treatment based on the level of severity. The most severe form of ill-treatment is torture and every case of ill-treatment that is torture is also inhuman and degrading treatment. Furthermore, inhuman treatment is always degrading but not always torture. Last of all, degrading treatment is not necessarily inhuman or be seen as torture. In conclusion,

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[45] Bates (2010) p. 112.
[46] Battjes (2009) p. 587.
[47] S Smet, 'The 'absolute' prohibition of torture and inhuman or degrading treatment in Article 3 ECHR', in *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press, 2013) 273-293, p. 273.
[48] C. M. Buckley, D. J. Harris, E. P. Bates, M. O'Boyle, *Law of the European Convention on Human Rights* 4th ed. (Oxford University Press, 2018) p. 238.
[49] Ibid., (2018) p. 237.
[50] Smet (2013) p. 274.
[51] Buckley et al. (2018) p. 237.
[52] The European Commission of Human Rights (revoked). Removed and replaced by the European Court of Human Rights in accordance with Protocol no. 11, Strasbourg 1994.

degrading treatment constitutes the minimum level of severity covered by the scope of protection in Article 3.[53]

Consequently, the hierarchy between the different forms of ill-treatment motivates an initial assessment by the Court that focuses on identifying the type of ill-treatment. Ill-treatment that constitutes torture or inhuman treatment are more severe forms of ill-treatment and it may thus be concluded without thorough scrutiny that they are covered by the scope of protection of Article 3. However, cases of ill-treatment where there is an uncertainty as to whether it is degrading treatment or not are the cases that constitutes a lower form of severity. Consequently, these cases initiate the assessment of identifying and deciding the threshold.[54] In conclusion, this motivates a distinction between the different forms of ill-treatment notwithstanding that all three forms of ill-treatment constitute breaches of Article 3.

Even though the Court applies a gradation in the scope of absolute protection it has also stated that, based on the evolutive interpretation of the Convention, cases of ill-treatment that previously have been classified as inhuman or degrading treatment may be re-classified as torture in the future.[55] Today, the scale between these different forms of ill-treatment seems to be less interesting to the Court since it seldom finds that an ill-treatment constitutes torture. One of the reasons why might be that the kind of ill-treatment that Article 3 initially was supposed to prohibit has been eradicated in Europe.[56]

In its early case law, the ECtHR only took *the severity* of the ill-treatment into account when examining if the ill-treatment constituted torture.[57] When the Court determined as to whether the ill-treatment constituted torture or not, focus was on *how* a person had been ill-treated. Ill-treatment that according to the ECtHR was severe enough consequently fell under the prohibition of torture.[58] In the key case of *Ireland v the U.K.*, the ECtHR stated that the minimum level of severity "…depends on all circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some cases, the sex, age and state of health of the victim".[59] Consequently, the precedent of

[53] Y Arai-Yokoi 'Grading scale of degradation: Identifying the threshold of degrading treatment or punishment under Article 3 of ECHR' (2003) 21/3 *Netherlands Institute of Human Rights* 385-421, p. 386-397.
[54] Ibid., p. 387.
[55] *Selmouni v France,* ECtHR, App. No. 25803/94, 28 July 1999, para. 101,
[56] Schabas (2015) p. 177.
[57] *Ireland v The United Kingdom,* ECtHR, App. No. 5310/71, 18 January 1978.
[58] *Aksoy v Turkey,* ECtHR, App. No. 21987/93, 18 December 1996, para. 64.
[59] *Ireland v The United Kingdom*, para. 162.

the Ireland case is that the threshold of severity is *relative* and may thus be subjected to a certain flexibility due to the circumstances of the case.[60]

However, the ECtHR evolved its case law by also taking *the purpose* of the ill-treatment into consideration. Instead of only focusing on *how* a person had been ill-treated, the Court also took in consideration *why* the person had been ill-treated.[61] When the Court put a purposive element into the assessment it referred to the definition of Article 1 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[62] By reference to CAT, the ECtHR held that the key factor in determining if an act of ill-treatment constitutes torture or inhuman or degrading treatment is the purpose of the conduct rather than the severity of the pain or suffering inflicted.[63]

As mentioned above, the question as to whether an act of ill-treatment reaches the minimum level of severity, and thus the “entry level threshold” to the scope of protection of Article 3, is primarily a question as to whether an ill-treatment constitutes degrading treatment or not. In other words, by examining the “threshold cases” in the Court’s jurisprudence, the “least serious” cases covered by the scope of protection of Article 3 will be discovered. As referred to above, this has been made by Arai-Yokoi in order to delineate the boundaries of protection within Article 3.[64]

Arai-Yokoi found that the assessment of the scope of protection for degrading treatment, by the use of a threshold assessment, has resulted in a more creative ‘law-making’ policy by the ECtHR. Furthermore, it has led to a graded scale of ill-treatment covered by the scope of protection of Article 3.[65] Consequently, the assessment as to whether an ill-treatment reaches the threshold or not has given the Court a greater possibility to address, and also protect, multiple issues that may not be associated to the special stigma attached to the notion of torture, hence protecting a wider scope of claims that initially may be seen as inadmissible under Article 3.[66] Finally, Arai-Yoki found that the use of a relative threshold has resulted in a more extensive coverage of issues protected by the scope of protection under Article 3 without overruling the absolute nature of Article 3. Issues that the ECtHR might assess through a ‘threshold test’ may thus never be tolerated due to opposed public interests.[67]

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[60] Buckley et al. (2018) p. 238.
[61] *Ilhan v Turkey* [GC], ECtHR, App. No. 22277/93, 27 June 2000, para. 85.
[62] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85 (CAT).
[63] Schabas (2015) p. 176 f.
[64] Arai-Yokoi (2003).
[65] Ibid., p. 420-421.
[66] Ibid., p. 421.
[67] Ibid.

Cases adjudicated by the ECtHR that constitutes ‘threshold cases’ are thus cases that instinctively may appear as not falling within the scope of protection of Article 3. Arai-Yoki concluded that the majority of cases concerning degrading treatment, that thus actualise a threshold assessment, were raised in the context of deprivation of liberty and ill-treatment in detention.[68] Other threshold cases regarded medical treatment of prisoners,[69] difficulties by transsexuals to obtain legal recognition by the State through a change of birth certificate[70] and cases concerning immigration controls and asylum seekers.[71]

In conclusion, the ECtHR is merely allowed to determine if an ill-treatment is severe enough to reach the threshold of severity or not while adjudicating a case under Article 3. Hence, the ECtHR should refrain from creating a margin of appreciation since no derogations are accepted from the prohibition of torture or other inhuman or degrading treatment or punishment reaching the threshold of minimum severity.[72] Consequently, the Court is allowed to act within the ‘threshold test’ where the point of departure is, according to the Ireland case, that the threshold is relative. However, the practical effect of the threshold assessment is never allowed to result in a derogation of Article 3, due to the absolute nature of the provision.

2.3 The principle of *non-refoulement* inherent in Article 3

2.3.1 Definition and concept

In cases where a person has applied for asylum, the main principle governing the possibility to expel that person is the *principle of non-refoulement.* The principle of *non-refoulement* is an absolute right that prohibits any State from transferring or removing a person from its jurisdiction or effective control to another State if there are substantial grounds for believing that the person in question would face a risk of irreparable harm in the recipient State. Such irreparable harm includes prosecution, torture, ill-treatment or other serious human rights violations.[73] The principle of *non-refoulement* is protected under several international law treaties in the areas of international human

[68] Ibid., p. 401.
[69] See i.a. *Aerts v Belgium*, ECtHR, App. No. 61/1997/845/1051, Judgement of 30 July 1998.
[70] See i.a. *X v Germany,* No. 6699/74, Decision of 15 December 1977, 11 DR 16 (friendly settlement).
[71] See i.a. *Cemal Kemal Altun v Germany,* No. 10308/83, Decision of 3 May 1983, 36 DR 209.
[72] Buckley et al. (2018) p. 238.
[73] United Nations Human Rights Office of the High Commission, ‘*The principle of non-refoulement under international human rights law’.* Available at: https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf (Accessed 26 December 2021).

rights, international humanitarian law, and international refugee law. Furthermore, it is also part of international customary law.[74]

One important part of the principle of *non-refoulement* is that it does not take the status of the affected person in consideration. It does not matter if you are a citizen, if you are Stateless, if you have a residence permit or if you are a migrant applying for asylum. The scope of protection includes every person located under the jurisdiction or the effective control of the State.[75] However, the principle of *non-refoulement* and its absolute nature has not been shielded from criticism and opposed interests, especially regarding its position in the asylum process. One of the most significant interests balanced against the absolute nature of the *non-refoulement* principle is every State's right to control the entry of non-nationals into its territory. Every State's right to absolute control of its territory and borders is based on well-established international law and flows from the principle of State sovereignty.[76] The right to control the entry, residence and expulsions of aliens has also been established in the Court's jurisprudence.[77]

For the matter of protection governed by the ECHR, applications regarding expulsion of migrants have been rejected in the early case law of the Court with reference to State sovereignty and every Contracting State's mandate to control its territory.[78] The *travaux préparatoires* seem to neither accept nor reject the principle of *non-refoulement* inherent in the prohibition of torture in Article 3. Support of the notion of the *non-refoulement* principle inherent in Article 3 could, however, be based on the fact that the drafters wanted to create the "main lines in which [article 3] would flow" rather than the ultimate form of the Convention.[79] Consequently, it seems that the drafters wanted the prohibition of torture in Article 3 to be wide-ranging and dynamic.[80]

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[74] Ibid., Available at: https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf (Accessed 26 December 2021).
[75] Ibid., Available at: https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf (Accessed 26 December 2021).
[76] R Perruchoud 'State Sovereignty and Freedom of Movement', in *Foundations of International Migration Law* (Cambridge University Press, 2012) 123-151, p. 124.
[77] *Vilvarajah and others v the United Kingdom*, ECtHR, App. No. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, 30 October 1991, para. 102-103.
[78] See i.a. *Abdulaziz, Cabales and Balkandali v the United Kingdom,* ECtHR, App. No. 9214/80; 9473/81; 9274/81, 28 May 1985, para. 67 in fine.
[79] Preparatory work on Article 3 of the European Convention on Human Rights, Strasbourg, 22 May 1956, p. 5.
[80] Ibid., p. 8.

2.3.2 Case of Soering v the United Kingdom

The first time the *non-refoulement* principle was assessed by ECtHR was in the famous *Case of Soering v the U.K.* in 1989.[81] Mr Soering was accused of murder in the U.S. when he got arrested in England in 1986 and subject to an extradition request by the U.S..[82] Due to the extradition request, Mr Soering filed a claim in the ECtHR where he alleged that, in the event of a death sentence in the U.S., he would be put on "death row" and that the treatment he would face on death row would amount to treatment contrary to Article 3 of the ECHR.[83] Hence, the Court had to examine if the decision by the U.K. to surrender Mr Soering to the U.S. would give rise to a breach of Article 3.[84] According to the ECtHR, the issue in the Soering case was as to whether Article 3 could be applied when the consequences of the extradition would be suffered *outside* the jurisdiction of the extraditing State as a result of treatment or punishment administered in the receiving State.[85] Through its examination, the Court found that the "death row phenomenon" would be severe enough to reach beyond the threshold set in Article 3 and thus amount to a violation.[86]

The question as to whether Article 3 contained an extra-territorial protection gave rise to a discussion in the Court regarding the general principles governing the ECHR. One such consideration was the fact that Article 1 explicitly states that the Contacting States only shall secure the rights and freedoms of the ECHR *within their jurisdiction*. Hence, the case gave rise to a question as to whether the obligations of the Contracting States are set by a territorial limit. Furthermore, the Court held that it would not be reasonable that the Contracting States of the ECHR should impose obligations, in accordance with the Convention, on a State that is not a party to the treaty.[87]

Despite the issues related to a potential extra-territorial application of Article 3, the ECtHR argued that the protection of torture in cases where the ill-treatment would occur outside the territorial boarders of the jurisdiction already was inherent in the general terms of Article 3 in cases of extradition. The Court argued that, despite it not being explicitly stated in the clear wording of Article 3, it would be contrary to the spirit and intendment of the provision if such a case would not enjoy the protection of the Convention.[88] The ECtHR underlined that the ECHR is to be seen as a treaty for the collective enforcement of human rights and fundamental freedoms and that

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[81] *Soering v the United Kingdom,* ECtHR, App. No. 14038/88, 7 July 1989, para. 1.
[82] Para. 12-14.
[83] Para. 76–77.
[84] Para. 80.
[85] Para. 85.
[86] Para. 111.
[87] Para. 86.
[88] Para. 88.

in order to protect individual human beings the provisions need to be practical and effective. Furthermore, the interpretation of the Convention needs to be consistent with "the general spirit of the Convention as an instrument designed to maintain and promote the ideals and values of a democratic society".[89]

As for the interpretation of Article 3 specifically, the ECtHR held that the absolute nature of the prohibition, even in a time of a national emergency, showed that Article 3 constitutes "one of the fundamental values of the democratic societies that makes up the Council of Europe".[90] In sum, the Court concluded that the principle of *non-refoulement*, even though not explicitly mentioned in the text, was *inherent* in the general terms of Article 3. Consequently, the Court did not *create* a *non-refoulement* protection but only *recognised*, for the first time, that such protection already existed within the scope of protection under Article 3.[91]

2.3.3 *Non-refoulement* in the Court's jurisprudence

In the *Case of Soering v the U.K.*, the question of *non-refoulement* was raised in a case of extradition of a fugitive. However, the principle of *non-refoulement* has also been recognised as a corner stone in international refugee law and it may also be seen as the single most important principle in the national asylum procedure.[92]

It might not come as a surprise that the *non-refoulement* principle protected under Article 3 would receive an important role in the assessment of an asylum application. In the Soering case, the ECtHR approached the examination of the alleged violation of Article 3 by considering a hypothetical violation rather than a violation that had already taken place.[93] A forward-looking assessment of the objective risk that a person would face upon expulsion is a cornerstone of the asylum examination.[94] In the Soering case, the ECtHR motivated the forward-looking assessment in view of the serious and irreparable nature of the alleged suffering risked. Furthermore, the

[89] Para. 87.
[90] Para. 88.
[91] Ibid.
[92] M Seidlitz, *Asylrätt: En praktisk introduktion* (Nordstedts Juridik, 2014) p. 18.
[93] *Soering v the United Kingdom*, para. 91.
[94] J.C Hathaway 'Refugees and asylum', in *Foundations of International Migration Law* (Cambridge University Press, 2012) 177-205, p. 184-185.

ECtHR noted that a forward-looking assessment was necessary in order to ensure the effectiveness of the safeguards provided by Article 3.[95]

Support for an application of the *non-refoulement* principle in other cases than the extradition of a fugitive has been established by the ECtHR in its later case law. In the *Case of Cruz Varas and others v Sweden,* the Court concluded that the principle of *non-refoulement*, as applied in the Soering case, was applicable in extradition cases and cases of expulsion of asylum seekers.[96] This has been supported by the Court's subsequent case law, where the Court has emphasised that the legal basis of a person facing removal may not be decisive as to whether the *non-refoulement* principle should be applied.[97]

The importance of the *non-refoulement* principle may be seen in a selection of case law by the ECtHR, where the Court has developed the scope of protection and clarified the obligations that flow from the *non-refoulement* principle inherent in Article 3. One example is the *Case of M.S.S v Belgium and Greece* where the Court found that Belgium had violated Article 3 by transferring an asylum seeker to Greece, hence knowingly exposing him to degrading treatment due to the living conditions in the detention centre in Greece.[98] In the M.S.S case, the Court also expressed, in the context of Article 3 and the deficiencies in the Greek asylum procedure, that the diplomatic assurances sought by the Belgian authorities from Greece did not amount to sufficient assurances to ensure adequate protection from treatment contrary to Article 3, partly due to the lack of individualisation and thus the situation for the specific person at stake.[99]

Apart from extending and clarifying the scope of protection of the *non-refoulement* principle under Article 3, the ECtHR has also clarified how the *non-refoulement* principle should be assessed. In the *Case of Chahal v the U.K.,* the Court emphasised the absolute nature of Article 3. The Court stated that, in cases of expulsions, the national authorities are strictly prohibited from making exceptions or derogations due to the circumstances of the case.[100] Hence, the Court concluded that, without undermining the foundations of the extradition system, there would be no room for balancing of the reasons for the ill-treatment against the reasons for expulsion in the assessment of an alleged violation of Article 3.[101] Once again, the Court also questioned the diplomatic assurances from the receiving State of guaranteeing

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[95] *Soering v the United Kingdom,* para. 90.
[96] *Cruz Varas and others v Sweden,* ECtHR, App. No. 15576/89, 20 March 1991, para. 70.
[97] *Babar Ahmad and others v the United Kingdom,* ECtHR, App. No. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012, para. 168.
[98] *M.S.S. v Belgium and Greece* [GC], ECtHR, App. No. 30696/09, 21 January 2011, para. 367.
[99] Para. 354.
[100] *Chahal v the United Kingdom* [GC], ECtHR, App. No 22414/93, 15 November 1996, para. 79-80.
[101] Para. 81.

that the expelled person would be protected from treatment contrary to Article 3, however this time due to country of origin information regarding the agent of potential harm.[102]

In the *Case of Saadi v Italy*, the Court further stressed the absolute nature of Article 3 and the importance of not balancing opposed interests in a case of expulsion assessed against the standards of Article 3. The Court held that balancing opposed interests against the risk of expulsion would be inconsistent with the notion that a potential risk upon expulsion and a potential risk of letting that person stay in the Contracting State should be assessed separately. In the context of *non-refoulement* under Article 3, the latter question is not decisive. Hence, the only question at stake is if there is a risk of ill-treatment in the receiving State upon arrival or not. If the answer is yes, then the expulsion would constitute a violation of Article 3.[103]

In conclusion, the ECtHR has established that the scope of protection in Article 3 includes every form of removal of a person that, upon expulsion, would face a risk of being subject to treatment contrary to Article 3. In order to decide whether a removal of a person to another State could constitute a breach of Article 3, the Court requires an assessment of the conditions in the receiving State against the standards of Article 3. The Court has also specifically stated that there is no reason to take the responsibility of the receiving State in consideration.[104] Consequently, the recognition of the *non-refoulement* principle inherent in Article 3 by the Court does not constitute an extra-territorial application of the ECHR.[105] This is based on the notion that the act that is prohibited according to the principle of *non-refoulement* is not the ill-treatment abroad, but the *act of removal* of a person despite the real risk of ill-treatment in the receiving State.[106] Hence, the crucial part of the assessment of an alleged violation of Article 3 is the question as to whether a Contracting State has decided to send a person back *despite the fact* that the person would risk ill-treatment contrary to Article 3, not the actual ill-treatment that the person might risk in the receiving State.[107]

[102] Para. 104-105.
[103] *Saadi v Italy* [GC], ECtHR, App. No. 37201/06, Judgement 28 February 2008, para. 139.
[104] *Soering v the United Kingdom,* para. 91.
[105] M Milanovic, *Extra-territorial application of Human Rights Treaties* (Oxford University Press, 2011), p. 9.
[106] F De Weck, *Non-Refoulement under the European Convention on Human Rights and the UN Convention Against Torture: The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee against Torture under Article 3 CAT* (Brill Nijhoff, 6 International Refugee Law Series, 2016) p. 138.
[107] Ibid., p. 138.

3 Medical *non-refoulement* cases

3.1 Definition and concept

As described in chapter 2, the principle of *non-refoulement* constitutes the prohibition of expelling a person to another State if there are substantial grounds for believing that the person at stake would face a risk of irreparable harm upon expulsion.[108] As for the Contracting States of the ECHR, an expulsion of a person would constitute a violation of Article 3 if the expelled person would face a risk of being subject to treatment contrary to Article 3 in the recipient State.[109]

The primary focus in the *non-refoulement* cases under Article 3 has been to protect persons from harm *in* the recipient State *by* the recipient State. In other words, the main purpose has been to protect a person that, upon expulsion, could be subject to ill-treatment caused by the public authorities in the receiving State.[110] However, in some cases, the alleged harm that a person might face upon expulsion originates from socio-economic deprivation in the receiving State. One example of this is the lack of available and accessible health care. The lack of available and accessible health care in the country of origin can thus result in a situation where a person, residing within the jurisdiction of the ECHR, faces a risk of not receiving the health care that he or she needs upon expulsion to the country of origin.

The ECtHR has stated in its jurisprudence that socio-economic considerations necessarily do not have a bearing on the question of the risk of ill-treatment, within the meaning of Article 3, that a person may face upon expulsion.[111] However, by using the expression "not necessarily", the Court indicated that socio-economic considerations in some cases *may have* a bearing.[112] In these cases, the Court has defined the scope of protection as a case where a person, upon expulsion, would face a risk of not receiving sufficient health care due to his or hers state of health. These cases are called *medical non-refoulement cases* and have gained a certain protection under Article 3 through the Court's jurisprudence.[113]

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[108] Section 2.3.1.
[109] Section 2.3.3.
[110] De Weck (2016) p. 164.
[111] *Salah Sheekh v the Netherlands,* ECtHR, App. No. 1948/04, 11 January 2007, para. 141.
[112] De Weck (2016), p. 168.
[113] Section 3.2.

3.2 Key cases

3.2.1 Case of D v the United Kingdom

The *Case of D v The U.K.* was referred to the ECtHR by the Commission and the Government of the United Kingdom in 1996. The application originated from an application against the U.K. by "D", a national of St Kitts.[114] Due to the seizure of a great amount of cocaine brought into the U.K. by D, he was sentenced in May 1993 to six years' imprisonment.[115] In August 1994, while D served his prison sentence, he suffered an attack of PCP and was diagnosed with HIV and AIDS.[116]

Because of his state of health, D requested to be granted leave to remain in the U.K. on compassionate grounds since a removal to St Kitts would constitute a loss of the medical treatment that D was receiving in the U.K., thus shortening his life expectancy. The request was refused by the Chief Immigration Officer, who stated that domestic law did not treat a person suffering from AIDS differently from another person who applies for leave to remain in the U.K.[117] D appealed to the High Court which agreed with that decision. The High Court replied to the arguments by D, stating that D would not have been in the U.K. when his AIDS-diagnosis was discovered if it had not been for the crime of cocaine smuggling that he was sentenced for in 1993.[118]

Before the ECtHR, D argued that a removal of him from the U.K. to St Kitts would amount to a decrease of his life expectancy and that the conditions he would live in at St Kitts would be inhuman and degrading. D argued that a removal would "condemn him to spend his remaining days in pain and suffering in conditions of isolation, squalor and destitution". This was due to the lack of close relatives, accommodation, financial resources and social support. Furthermore, his life expectancy would decrease and hasten his death due to the unavailability of medical treatment equivalent to the treatment he was receiving in the U.K.[119] In contrast, the U.K. stated that D would not be subject to treatment below the standards of Article 3 upon expulsion to St Kitts. The U.K. argued that D's reduced life expectancy was due to his terminal illness in combination with socio-economic deprivation in St Kitts and that D would find himself in the same position as other AIDS victims in

[114] *D. v the United Kingdom* [GC], ECtHR, App. No. 30240/96, 2 May 1997, para. 1.
[115] Para. 7.
[116] Para. 8.
[117] Para. 11.
[118] Para. 12.
[119] Para. 40.

St Kitts.[120] The U.K. confirmed that the medical treatment of AIDS in St Kitts "fell short" in comparison to the treatment that D was receiving in the U.K. However, the U.K. held that the fact that the medical treatment of AIDS in St Kitts was not as good as in the U.K. could not in itself amount to a breach of Article 3.[121]

As the ECtHR normally does in cases regarding migration and asylum, it initially stated that every Contracting State has the right to control its entry, residence and expulsion of aliens. In this case, the ECtHR accepted the act of responding to drug trafficking by expelling an alien like D, who brought in a large amount of drugs to the U.K.[122] Despite the interest of every Contracting State to control the entry and residence of aliens, the Court clearly underlined that Article 3 is an important provision to take into consideration in cases of extradition, expulsion and deportation. The Court emphasised the notion of Article 3 as a fundamental value of a democratic society and that the absolute character of the provision should guarantee an equal protection "irrespective of the reprehensible nature of the conduct of the person in question".[123]

In its judgment, the Court discussed the question of the harm emanating from naturally occurring illness rather than acts of the public authorities or a non-State actor. The Court found that it was not prevented from scrutinising an application under Article 3 despite the fact that the source of the risk did not engage the responsibility of the public authorities of the receiving State. The Court supported this by highlighting the fundamental importance of Article 3 in the Convention and that a limitation of the scope of protection would undermine the absolute character of the protection. The Court explicitly stated that, due to the fundamental importance of Article 3 in the ECHR, the Court should be allowed to use sufficient flexibility in its application of the provision.[124]

In its assessment, the ECtHR found that the case concerned exceptional circumstances, based on the conditions D would live in and the uncertainty as to whether D would receive a place at one of the hospitals that cared for AIDS patients. These exceptional circumstances together with the critical stage of his state of health would, according to the Court, amount to inhuman treatment contrary to Article 3.[125] The Court further stressed that D had become reliant on the medical and palliative care in the U.K. and that a removal would expose him to a risk of dying under very distressing

[120] Para. 42.
[121] Para. 43.
[122] Para. 46.
[123] Para. 47.
[124] Para. 49.
[125] Para. 53.

circumstances compared to the environment that he would otherwise be spending his last days in.[126] Nevertheless, the Court stated that despite the verdict in this case, aliens who have served a prison sentence in a Contracting State and who are subject to an expulsion cannot regularly claim a future enjoyment of medical or social benefits that have been provided by the expelling State during their time spent in prison. Only in *very exceptional* cases, where humanitarian considerations are at stake, is it possible to conclude that an expulsion would violate Article 3 of the ECHR.[127]

3.2.2 Case of N v the United Kingdom

The *Case of N v the U.K.* was lodged to the ECtHR by a Ugandan national, "N", in 2005.[128] N was at the time of the application living in London, where she had been living since 1998. When N applied for asylum in the U.K., she was diagnosed with HIV.[129] Almost half a year after her entry to the U.K., N was diagnosed with Kaposi's sarcoma, an AIDS-defining illness.[130] In a report presented by N's solicitors, a physician expressed that if N would be sent back to Uganda she would not get the adequate treatment and monitoring that she needed, which would constitute a reduced life expectancy of less than a year. The report further stated that there was a lack of publicly funded blood monitoring, basic nursing care, social security and housing in Uganda.[131]

In the domestic procedure, members of the Court of Appeal discussed the scope of protection of Article 3 of the ECHR and the precedent of the *Case of D v the U.K.* According to the judges who thought that N should not be granted leave to remain in the U.K., arguments were raised that the application of Article 3 in medical *non-refoulement* cases only could be justified where the humanitarian appeal was so powerful that an expulsion of that person would be contrary to a civilised State. One judge specifically held that these circumstances constituted an "extremely fragile basis" and that a duty to allow a person to remain due to the contrast of two different countries health care was "unsupported by any decision or policy adopted by the democratic arm, executive or legislature, of the State's Government".[132]

The case was later appealed to the House of Lords who unanimously dismissed the applicant's appeal. The House of Lords concluded that a

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[126] Para. 53.
[127] Para. 54.
[128] *N v the United Kingdom* [GC], ECtHR, App. No. 26565/05, 27 May 2008, para. 1.
[129] Para. 9-10.
[130] Para. 11.
[131] Para. 12.
[132] Para. 16.

removal of N to Uganda would not violate Article 3. It concluded that an extension of the principles in the D case would result in the right for every person in the same state of health as N to be granted asylum until the standards of the HIV/AIDS care in its country of origin would be the same as in Europe. This would result in a large number of people suffering from HIV/AIDS entering Europe in hope of receiving the medical care provided by the European countries. According to the House of Lords, this would constitute an unquantifiable commitment of resources which it was highly questionable whether the Contracting States of the ECHR would ever have agreed to.[133]

In her application to the ECtHR, N argued that her removal to Uganda would cause acute physical and mental suffering, followed by an early death, due to the lack of available medical treatment and social support or nursing in Uganda.[134] N alleged that the Court should not distinguish between expulsion cases and other cases of alleged future harm under Article 3. Furthermore, the applicant held that ill-treatment emanating from naturally occurring illness should not be distinguished from a risk of ill-treatment emanating from public authorities.[135] However, the U.K. argued that the case did not reach the 'very exceptional' threshold as set out in the *Case of D v the U.K.*[136] The Government further stressed that a grant of leave to remain in these circumstances would amount to an extension of the scope of protection in Article 3 contrary to the consent and intention of the Contracting States.[137]

The ECtHR concluded that the Court, since the *Case of D v the U.K.,* consistently had held that aliens who are subject to expulsion cannot claim an entitlement to the medical treatment provided by a Contracting State. The Court stressed that a case of medical *non-refoulement* could only constitute a violation of Article 3 if it reached beyond the 'very exceptional' threshold. However, the Court did not exclude that there might be other humanitarian circumstances that could reach the threshold of severity.[138] While establishing the general principles applicable in expulsion cases under Article 3, the Court further held that Article 3 principally applies when the risk emanates from the public authorities or a non-State actor.[139] Thus, the Court emphasised that it should maintain the high threshold stated in the D case due to the source of harm being naturally occurring illness.[140]

[133] Para. 17.
[134] Para. 20.
[135] Para. 25.
[136] Para. 23.
[137] Para. 24.
[138] Para. 42.
[139] Para. 31.
[140] Para. 43.

Furthermore, the ECtHR underlined that the ECHR is a Convention directed to protect civil and political rights, not social, economic and cultural rights. The Court also noted that, inherent in the ECHR is the search for a fair balance between demands of the general interest of the community and the requirement to protect the individual's fundamental rights. In this case, the Court balanced the interest of retaining the flexibility of Article 3 in order to prevent expulsions in very exceptional cases against the idea that an obligation to provide free and unlimited health care for aliens would place too great a burden on the Contracting State.[141] Based on these principles, previous case law and country of origin information, the Court did an assessment of the potential risk upon expulsion. The Court found that the case did not reach the 'very exceptional' threshold, since N was not critically ill at the present time, and since the alleged risk upon expulsion involved a certain degree of speculation. Hence, an expulsion of N to Uganda would not constitute a violation of Article 3.[142]

3.2.3 Case of Paposhvili v Belgium

The *Case of Paposhvili v Belgium* concerned a Georgian national, Mr Paposhvili, who arrived in Belgium via Italy in 1998 accompanied by his family.[143] Upon arrival, Mr Paposhvili and his wife applied for asylum. However, their application was refused due to concerns under the Dublin Convention and their possession of a Schengen visa.[144]

In 2005, Mr Paposhvili was sentenced to three years imprisonment due to involvement in criminal organisations.[145] While Mr. Paposhvili was in prison, he was diagnosed with chronic lymphocytic leukaemia.[146] At first, no treatment was commenced, but when his health deteriorated, he was admitted to Bruges Prison Hospital to receive chemotherapy. He was thereafter transferred to Antwerp University Hospital where he received a prognosis stating a life expectancy of three to five years.[147] Mr Paposhvili's leukaemia later developed into lymphocytic lymphoma and he continuously received treatments in different hospitals in Belgium.[148] In addition to the cancer diagnosis, Mr Paposhvili was diagnosed with active pulmonary tuberculosis, hepatitis C, liver fibrosis and he also suffered from a stroke that resulted in a

[141] Para. 44.
[142] Para. 50.
[143] *Paposhvili v Belgium* [GC], para. 11
[144] Para. 19–20.
[145] Para. 12–16.
[146] Para. 34.
[147] Para. 34–36.
[148] Para. 41.

permanent paralysis of the left arm.[149] Due to his state of health and his need of medical treatment in Belgium, he requested regularisation on medical grounds.[150] However, the applications were denied due to the severity of his state of health not reaching the threshold of severity set in the *Case of N v the U.K.*[151]

In the ECtHR, the application was denied by the Chamber and thereafter referred to the Grand Chamber. The application claimed that if Mr Paposhvili would have been sent back to Georgia, he would not have had access to the treatment he needed due to his state of health.[152] The application requested the ECtHR to go beyond the criterion of *very exceptional* circumstances as set in the N case in order to redefine a realistic threshold of severity.[153] The Belgian Government stated however, that the case did not fall within the scope of protection of Article 3 due to the lack of extreme humanitarian considerations contrary to human dignity.[154] It further stressed that Georgia is a Contracting State of the ECHR, hence engaging the responsibility of Belgium only in a case where Georgia would manifestly fail to comply with its Convention obligations.[155]

In its assessment, the ECtHR held that the scope of protection for medical *non-refoulement* cases under Article 3 had been very limited due to the high threshold applied in these cases. It further stressed that the *Case of D v the U.K.* was the only case that had fallen within the scope of protection of Article 3.[156] The Court concluded that subsequent case law had not provided any more details regarding the *very exceptional* cases.[157] Hence, in order to guarantee that the ECHR should stay practical and effective, and not theoretical and illusory, the Court concluded that the approach adopted in previous case law needed clarification.[158] The Court thus created a new definition of 'other very exceptional cases' which should be understood as:

"Situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his

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[149] Para. 49–53.
[150] Para. 54 and 59.
[151] Para. 57 and 68.
[152] Para. 141.
[153] Para. 149.
[154] Para. 150.
[155] Para. 158.
[156] Para. 178.
[157] Para. 181.
[158] Para. 182.

or her state of health resulting in intense suffering or to significant reduction of life expectancy".[159]

The Court concluded that it is for the applicant to adduce evidence that an expulsion would lead to treatment contrary to Article 3. When such evidence are adduced, it is up to the Contracting State to dispel any doubts raised by it after close scrutiny based on country of origin information.[160] Contrary to previous case law, the Court explicitly stated that the issue at stake was the *negative obligation* not to expose a person to a risk of ill-treatment proscribed by Article 3. Thus, a comparison needs to be made between the migrant's state of health prior to removal and how it might evolve upon expulsion.[161]

Furthermore, the Court decided that the returning State must clarify that the medical care is *available* in the receiving State and that the care is *accessible* in the individual case. Factors that needs to be taken into consideration are the cost of the medical care, the existence of a social and family network and the distance that needs to be travelled in order to reach the medical care.[162] The Court finally concluded that if the assessment leaves the national decision-making bodies with serious doubts regarding the impact of removal – on account of the general situation in the receiving State *and/or* its individual situation – the State are obliged to obtain individual and sufficient assurances from the receiving State, as a precondition for removal, that there is available and accessible treatment in the receiving State.[163]

By applying these principles on the case of Mr Paposhvili, the ECtHR concluded that the Belgian authorities had not examined the several opinions provided by the Alien Office's medical adviser from the perspective of Article 3.[164] The absence of this assessment and of any assurances that the treatment Mr Paposhvili needed was accessible in Georgia led to the conclusion that the Belgian authorities' information was insufficient for them to conclude that Mr Paposhvili would not run a real and concrete risk of treatment contrary to Article 3 upon a removal to Georgia.[165]

[159] Para. 183.
[160] Para. 186–187.
[161] Para. 188.
[162] Para. 189–190.
[163] Para. 191.
[164] Para. 200.
[165] Para. 205.

3.2.4 Case of Savran v Denmark

The *Case of Savran v Denmark* was adjudicated in the Fourth Section in October 2019. The case was referred to the Grand Chamber in January 2020 and the Grand Chamber delivered its judgement on the 7th of December 2021.[166] The case regards a Turkish national, Mr Savran, who has been living in Denmark since he arrived in 1991 but who now resides in Turkey.[167] In 2008, Mr Savran was convicted of abuse that caused a man's death.[168] Due to a diagnosis of paranoid schizophrenia and the medical reports that was produced during the criminal proceedings, he was sentenced to committal to the secure unit of a residential institution for severely mentally impaired. The sentence was combined with an expulsion order and a permanent ban to re-enter Denmark.[169]

In 2012, Mr Savran's guardian requested a review of the applicant's sanction measures due to the question of adequate health care in Turkey.[170] After several appeals, the High Court in Denmark stated that a removal of Mr Savran to the area of Konya in Turkey would be possible. The High Court stated that Mr Savran would be able to receive the same medical treatment in Konya and that he was aware of his disease and the importance of his medical treatment.[171]

In the ECtHR, Mr Savran complained that an expulsion of him to Turkey would constitute a breach of Article 3 due to his mental health.[172] Mr Savran claimed that, upon expulsion, he would not have a real possibility of receiving adequate psychiatric treatment which would lead to a relapse of his illness and thus, the risk of suffering contrary to Article 3. The applicant further stressed that there was a risk of relapse due to the lack of supervision regarding his need to continuously take part in his treatment.[173]

The Chamber concluded that the case fell under the principles set in the Paposhvili case and that such ill-treatment may be covered by the scope of protection even though that the suffering flows from naturally occurring illness. The Chamber concluded that sufficient medication was available in the area of Konya, where Mr Savran was most likely to settle down. However, the Chamber observed the importance of supervision and a follow-up scheme of the applicant in order to prevent the risk of worsening psychotic symptoms

[166] *Savran v Denmark* [GC].
[167] Para. 10.
[168] Para. 13.
[169] Para. 26.
[170] Para. 32
[171] Para. 65.
[172] Para. 85.
[173] Para. 3.

which might increase the risk of aggressive behaviour.[174] Against the background of medical experts in Denmark, the risk of a relapse in Mr Savran's mental health was connected to his awareness of his illness. Hence, it was essential that Mr Savran was supervised by a contact person.[175]

The Chamber concluded that upon expulsion, Mr Savran would lack the support of both a family and a social network. In combination with the lack of a follow-up scheme and a contact person, this would cause Mr Savran additional hardship.[176] These uncertainties gave rise to serious doubts as to the impact of the removal of Mr Savran, which triggered the obligations set in the Paposhvili case. Consequently, the Chamber concluded that an expulsion of Mr Savran would constitute a breach of Article 3 if the Danish authorities did not obtain individual assurances that Mr Savran would receive a regular and personal contact person.[177]

The Grand Chamber begun its assessment by stating the general principles of Article 3, for instance, the fundamental value of Article 3.[178] It also stressed the relative threshold of severity guarding the scope of protection of Article 3 and underlined that Article 3 may protect ill-treatment flowing from naturally occurring illness despite the fact that it will not engage the responsibility of the receiving State.[179] The Grand Chamber noted that no further development in the relevant case law had occurred since the Paposhvili case.[180] The Grand Chamber held that the Paposhvili case has offered a "comprehensive standard taking due account of all the considerations that are relevant for the purpose of Article 3 of the Convention".[181] Furthermore, it stated that the Paposhvili case maintains the right to State sovereignty while recognising the absolute nature of Article 3. Consequently, the Grand Chamber reaffirmed the standards and principles set in the Paposhvili case.[182]

Although reaffirming and applying the standards set in the Paposhvili case, the Grand Chamber clarified two things in its judgement. Firstly, it concluded that the obligations put on the Contracting State to verify on a case-by-case basis that *available* and *accessible* health care exists and to obtain individual assurances as a precondition of removal only becomes of relevance *if* the

[174] Para. 86.
[175] Para. 87.
[176] Para. 88.
[177] Para. 88.
[178] Para. 121.
[179] Para. 123.
[180] Para. 132.
[181] Para. 133.
[182] Para. 133.

‘threshold test’ has been met.[183] Consequently, if the alleged ill-treatment does not constitute *very exceptional* circumstances, the Contracting State is not obliged to examine the obligations described above. Secondly, the Court concluded that the scope of protection of medical *non-refoulement* applies irrespective of the nature of the illness. The matter at stake is if the decline in health leads to an intense suffering.[184] The Grand Chamber thus recognised that illness due to mental health is equally protected within the scope of protection of Article 3.

Applying the principles set in the Paposhvili case on the Savran case, the Grand Chamber concluded that schizophrenia in itself is not sufficient to reach the threshold of severity.[185] The Grand Chamber further concluded that the evidence provided by the applicant did not demonstrate that the removal of Mr Savran would expose him to a serious, rapid and irreversible decline in his state of health resulting in intense suffering or a significant reduction in life expectancy.[186] Hence, the Grand Chamber did not find that the evidence adduced by the applicant satisfied the ‘Paposhvili test’.[187] The Grand Chamber thus concluded that the *Case of Savran v Denmark* did not reach the threshold of severity. Furthermore, the Grand Chamber stressed that the threshold should remain high in these cases. Consequently, the question of Denmark’s obligations did not have to be addressed.[188]

3.3 Creating the ‘very exceptional’ threshold

3.3.1 Introduction

The examination in section 3.2 shows that seriously ill migrants may benefit the protection of *non-refoulement* in *very exceptional* cases. Accordingly, the ‘very exceptional’ criterion constitutes the entry level threshold to the scope of protection of Article 3. This high threshold was found through the specific circumstances in the *Case of D v the U.K.*, where the Court took the critical stage of D’s illness and the compelling humanitarian situation that D was in prior to the planned expulsion into consideration.[189]

[183] Para. 135.
[184] Para. 137–139.
[185] Para. 141.
[186] Para. 143.
[187] Para. 145.
[188] Para. 147.
[189] *D v the United Kingdom* [GC], para. 53.

The 'very exceptional' threshold was strictly upheld by the Court in subsequent case law, hence making it such a high threshold to reach that no violations of Article 3 was found by the ECtHR until the *Case of Paposhvili v Belgium*.[190] In the Paposhvili case, the Court emphasised that medical *non-refoulement* cases were subjected to a high threshold and that the approach adopted since the D case needed clarification.[191] However, the Court only clarified the uncertainties which had prevailed in the case law prior to the Paposhvili case by filling the gap with a new definition of the 'very exceptional' criterion. Instead of only protecting cases where the person at stake would risk an *imminent death,* the scope of protection of medical *non-refoulement* under Article 3 now protects cases where the person at stake would be exposed to a *serious, rapid and irreversible decline in his or her state of health* resulting in *intense suffering* or to *significant reduction of life expectancy*.[192] The new definition of the 'very exceptional' threshold has later been confirmed and adopted in the *Case of Savran v Denmark,* where the ECtHR once again stressed that the threshold of severity shall remain high for cases of medical *non-refoulement*.[193]

In conclusion, the Court has created a distinction between *medical non-refoulement* cases and other *non-refoulement* cases by creating a higher threshold, hence only accepting *very exceptional* circumstances to fall within the scope of protection of Article 3.[194] The discrepancy between medical *non-refoulement* cases and other *non-refoulement* cases adjudicated under Article 3 raises the question of how the ECtHR has motivated its decision to apply a higher threshold in medical *non-refoulement* cases, hence only protecting *very exceptional* cases within the scope of protection of Article 3.[195]

3.3.2 The source of the harm

The distinction made in the case law presented above can be divided into two elements of characterisation: The *nature* of the harm and the *source* of the harm.[196] The *nature* of the harm is the element that divides torture from inhuman and degrading treatment by assessing the level of severity of the alleged ill-treatment. The nature of the harm may thus be of interest as to whether the Court has to thoroughly identify the threshold of severity, as described in section 2.2. Except the issues regarding a potential threshold

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[190] *N v the United Kingdom* [GC], para. 34.
[191] *Paposhvili v Belgium* [GC], para. 182.
[192] Para. 183.
[193] *Savran v Denmark* [GC], para. 147.
[194] See i.a. *N v the United Kingdom* [GC], para. 42.
[195] *Gäfgen v Germany* [GC], ECtHR, App. No. 22978/05, 1 June 2010, para. 107.
[196] De Weck (2016) p. 140.

assessment, the nature of harm seems to be of little interest to the ECtHR as the Court seldom discusses the *classification* of the ill-treatment that has reached the threshold.[197] This is supported by the fact that every ill-treatment that falls within one of the classifications covered by the scope of protection constitutes an equally severe violation of Article 3. Furthermore, the Court has stated that, due to the absolute nature of the provision, every form of treatment contrary to Article 3 that a person would face upon expulsion is protected under the principle of *non-refoulement* inherent in the provision.[198]

The *source* of the harm focuses on where the harm *emanates from*. The Court has described Article 3 as a primarily negative obligation on the Contracting States to refrain from inflicting harm on persons within the jurisdiction of the ECHR.[199] Consequently, focus is on harm inflicted by State actors. However, the Court has recognised that a violation of Article 3 may be at hand where the source of the harm is a socio-economic issue such as the lack of available and accessible health care.[200] Even though socio-economic issues have been recognised by the Court as an "accepted" source of harm, the threshold of severity of the alleged ill-treatment is higher in these cases.[201] A question that arises is thus as to whether the source of harm in the medical *non-refoulement* cases has constituted a reason for the ECtHR to apply a higher threshold.

In the *Case of D v the U.K.*, the Court noted that the scope of protection of Article 3 previously only included harm emanating from acts of the public authorities or non-State actors in the receiving State. The Court recognised that an expulsion of D would amount to harm emanating from socio-economic deprivation in the receiving State, more specifically the lack of sufficient health care. However, the Court concluded that a limitation of Article 3 in cases such as this one would be contrary to the absolute character of Article 3 and that the Court needed to be flexible enough to apply Article 3 in new contexts arising.[202]

The Court specifically noted that the assessment of the circumstances in these cases needs to be made with rigorous scrutiny. However, the Court did not motivate the impact that the source of harm should have on the threshold more than stating that the alleged risk of ill-treatment upon expulsion would emanate from factors which could not engage the responsibility of the receiving State or in itself infringe the standards of Article 3.[203] Furthermore,

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[197] See i.a. Schabas (2015) p. 177.
[198] De Weck (2016) p. 154.
[199] *Pretty v the United Kingdom*, ECtHR, App. No. 2346/02, 20 April 2002, para. 50.
[200] De Weck (2016) p. 164-168.
[201] See i.a. *Paposhvili v Belgium* [GC], para. 183.
[202] *D v the United Kingdom* [GC], para. 49.
[203] Ibid.

the Court observed the existence of the very exceptional circumstances of the present case and determined that such circumstances needs to exist in subsequent cases in order for the threshold to be met.[204] In conclusion, the Court created a connection between the source of harm and the 'very exceptional' criterion amounting to an increased threshold. Yet, it did not thoroughly explain why socio-economic deprivation as a source of harm would amount to an increased level of the threshold of severity more than distinguishing it from harm emanating from the State or a non-State actor.

As described in section 3.2, the 'very exceptional' criterion has, since the *Case of D v the U.K.*, constituted the applicable threshold of severity. In the *Case of N v the U.K.*, the Court noted that there might be other very exceptional cases than the circumstances which prevailed in the D case. Still, the Court stressed that the high threshold set in the D case should maintain due to the source of harm emanating from naturally occurring illness and the lack of sufficient health care in the country of origin.[205] However, this was not adjudicated without dissent.

In the Joint Dissenting Opinion, the dissenting judges argued that the Court had misunderstood the impact of the source of harm flowing from socio-economic deprivation in two senses.[206] Firstly, the dissenting judges disagreed with the connection made between the need to maintain a high threshold and the source of the harm emanating from naturally occurring illness. The dissenters highlighted the so-called 'Pretty threshold' that had been set in the *Case of Pretty v the U.K.*. The Pretty threshold recognises degrading treatment within the scope of Article 3 as treatment that, *inter alia,* humiliates or debases an individual, showing lack of respect or diminishing a person's human dignity. Such ill-treatment is also covered by the scope of protection in Article 3 where the harm emanates from naturally occurring illness and its risks being exacerbated by expulsion. Thus, the dissenters argued that if there are substantial grounds for believing that an expulsion would expose an individual to ill-treatment reaching the minimum level of severity set by the Pretty threshold, a removal of that individual would constitute a breach of Article 3 regardless of the source of the harm.[207]

Secondly, the dissenters showed worry for the policy considerations raised in the Grand Chamber judgement. The dissenting judges argued that the Court had misunderstood the principles set in the *Case of Airey v Ireland* and the policies at hand in medical *non-refoulement* cases, such as the case regarding

[204] Ibid., para. 52-53.
[205] *N v the United Kingdom* [GC], para. 43.
[206] *N v the United Kingdom* [GC], Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann, para. 4.
[207] Para. 5.

N. In the Airey case, the ECtHR concluded that social and economic rights may enjoy protection under the ECHR in order to safeguard the practical and effective enjoyment of the rights covered in the Convention. Hence, socio-economic considerations in the interpretation of the ECHR should not be a decisive factor in itself, even if the ECHR originally was meant to protect civil and political rights. The dissenters expressed considerations regarding both the misunderstood interpretation of socio-economic considerations set in the Airey judgement, and of the character of the N case. The dissenters argued that the N case was about one of the core fundamental *civil* rights of the ECHR, namely Article 3.[208]

The source of the harm as a key factor of upholding the 'very exceptional' threshold has been maintained and no further discussed in the *Case of Paposhvili v Belgium* and the *Case of Savran v Denmark.* The source of harm constituting the lack of adequate resources has been emphasised as a general principle without further questioning of the reason why such source of harm should imply a *higher* threshold.[209] In the new definition of *very exceptional* cases set in the Paposhvili case, the Court explicitly held that the circumstances within the meaning of the 'very exceptional' criterion were corresponding to a high threshold of the application of Article 3.[210] This was also stressed by the Grand Chamber in the Savran case.[211] However, the Court also stated, for the first time, that the issue at stake was the *negative obligation* to refrain from expelling an individual to a State where that person would not receive the medical treatment that it needed, hence exposing that person to a risk of ill-treatment prohibited to Article 3.[212]

The notion of the negative obligation in medical *non-refoulement* cases may be seen as a step closer to the definition of *the non-refoulement* principle as set in the *Case of Soering v the U.K.*.[213] The nature of the *non-refoulement* principle is the negative obligation *not to deport* a person if an individual risk has been established. The risk is assessed by comparing the conditions in the country of origin against the standards of Article 3. If such an assessment shows that an expulsion constitutes a real risk of ill-treatment contrary to the standards of Article 3, the Contracting State is obliged not to deport that person. It is important to note that such an assessment does not involve a question of the responsibility of the receiving State.[214] As mentioned in section 2.3.3, the act that is prohibited according to the principle of *non-*

[208] Para. 6.
[209] *Paposhvili v Belgium* [GC], para. 175; *Savran v Denmark* [GC], para. 123.
[210] *Paposhvili v Belgium* [GC], para. 183.
[211] *Savran v Denmark* [GC], para. 147.
[212] *Paposhvili v Belgium* [GC], para. 188
[213] *Soering v the United Kingdom*, para. 90–91.
[214] De Weck (2016) p. 137.

refoulement is not the ill-treatment abroad, but the *act of removal* of a person despite the real risk of ill-treatment in the receiving State. Medical *non-refoulement* cases should thus never result in Convention standards being imposed on a State that is not a party to the ECHR.

The notion of the negative obligation set in the Paposhvili case raises a question of its connection to the source of the harm and the inconsistencies in the Court's reasoning. If the prohibited act is the removal of a person, despite the risk of ill-treatment contrary to Article 3 and notwithstanding the responsibility of the receiving State, why does the source of the harm in the receiving State matter?[215] This has been asked by Stoyanova in an article where she discusses the inconsistencies in the Court's reasoning in the Paposhvili case. Stoyanova concludes that the application of a higher threshold in medical *non-refoulement* cases, due to the source of harm emanating from lack of adequate health care, is contrary to the notion of the negative obligation explicitly stated in the Paposhvili case.[216]

3.3.3 Balancing of opposed interests

In the *Case of Soering v the U.K.*, the ECtHR concluded that, inherent in the scope of protection of Article 3, is the principle of *non-refoulement*. In its assessment the Court explicitly stated that, inherent in the whole 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 the individual's fundamental rights.[217] The main factors that were balanced by the Court were, on the one hand, the risk of undermining the extradition system, and on the other hand, the risk of an intense and protracted suffering on death row that Mr Soering would face upon expulsion.[218]

In the *Case of D v the U.K.*, the Court did not use the "fair balance" test in order to determine the scope of protection of Article 3. Similar to the Soering case, the question regarded a person that had committed serious crimes. Hence, the Court's argumentation in the D case was similar to the argumentation made in the Soering case. In the D case, the Court noted the gravity of the offence committed by D and stated that expulsion of aliens convicted of serious crimes was a justified response.[219] Subsequently, in determining the scope of protection, the Court considered circumstances related only to D himself, such as the compelling humanitarian situation that

[215] Stoyanova (2017) p. 598.
[216] Ibid., p. 598.
[217] *Soering v the United Kingdom*, para. 89.
[218] Para. 89 and 110.
[219] *D v the U.K.* [GC], para. 46.

D would face and the lack of housing, close relatives and a proper diet.[220] Consequently, the Court never balanced *opposed* interests against letting D stay in the Contracting State, as it only considered circumstances relating to D's state of health and the humanitarian considerations at stake. In other words, the Court did an examination of how D's condition would evolve if he would be sent back to St Kitts. Nevertheless, and as mentioned in section 3.2.1, the Court underlined that aliens who have served a prison sentence in a Contracting State and who are subject to an expulsion cannot claim a future enjoyment to medical or social benefits that have been provided by the expelling State during their time spent in prison.[221] Thus, the Court argued that the threshold of severity should be high in cases where such opposed interests are at stake.

Despite the adjudication made in the *Case of D v the U.K.*, the notion of the fair balance test was later used in the *Case of N v the U.K.*. In its reasons, the Court held that, even though Article 3 may prevent expulsions in very exceptional cases, given its fundamental importance, it may not place an obligation on the Contracting State to provide free and unlimited health care to all aliens without the right to stay within its jurisdiction. The Court stated that such a finding would place *too great a burden* on the Contracting States.[222] The Court further argued in favour of maintaining a high threshold by stating that expulsions of aliens to a country where the medical treatment is inferior to the treatment available in the Contracting State only would constitute a violation of Article 3 in very exceptional cases.[223]

Criticism against the Court's use of a fair balance test was later made by the dissenting judges, who argued that the balancing test had been rejected by the ECtHR in the *Case of Saadi v Italy*.[224] Furthermore, the dissenting judges criticised the domestic courts and the Grand Chamber in finding that a violation of Article 3 would place too great a burden of the Contracting States since that may "open the floodgates" to medical immigration and make Europe a "sickbay" of the world. The dissenters held that such considerations would be contrary to the absolute nature of Article 3.[225]

In the *Case of Paposhvili v Belgium*, the fair balance test was finally rejected by the Court. The Court explicitly stated that the issue at stake was not the disparities between the health care in the receiving State and the returning

[220] Para. 52.
[221] Para. 54.
[222] *N v the U.K.* [GC], Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann, para. 44.
[223] Para. 42.
[224] Para. 7., Reference to *Saadi v Italy* [GC], para. 138.
[225] *N v the United Kingdom* [GC], Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann, para. 8.

State or that Article 3 would create the right to free and unlimited health care to all aliens residing within the jurisdiction of the ECHR. As mentioned above, the issue at stake was the negative obligation not to expel a person to a country where that person would risk being exposed to ill-treatment prohibited by Article 3.[226] As described by Stoyanova, the Paposhvili case marks a significant shift in how the ECtHR frames these cases. Instead of focusing on how the lack of an expulsion would *benefit* the person who was allowed to stay in a Contracting State due to its state of health, the focus was put on how an individual's state of health would *decrease* upon expulsion.[227]

Notwithstanding the rejection of the fair balance test, the Court has referred to *State sovereignty* in all of the cases examined in section 3.2. In all of the cases referred to above, the Court has begun by concluding that every State shall have the right to control the entry, residence and expulsion of aliens. The notion of State sovereignty was also emphasised by the Court in the Savran case, where it endorsed the Paposhvili judgment as it maintained every State's right to control the entry, residence and expulsion of aliens.[228]

It is not entirely clear what the Court wishes to stress by its reference to State sovereignty. The reference is commonly used by the Court in cases concerning potential expulsions of asylum seekers and was first established in connection to Article 3 in the *Case of Vilvarajah and Others v the U.K.*.[229] In the Vilvarajah and Others case, the Court referred to the *Case of Cruz Varas and Others v Sweden*, where the Court held that expulsions of asylum seekers may raise a violation of Article 3 where substantial grounds have been shown for believing that the person concerned would face a real risk of being subjected to treatment contrary to Article 3 upon expulsion.[230] Thus, it seems that the Court wishes to stress that the *non-refoulement* principle inherent in Article 3 weighs heavier than State sovereignty, hence giving it the position as a minimum standard in the European asylum procedure.

The reference to State sovereignty was reiterated in the Paposhvili case.[231] The ECtHR observed that cases involving expulsion of aliens shall be examined by the Contracting State since they have the absolute power of its territory and thus the entry, residence and expulsion of aliens. By reference to Article 1 of the ECHR, the Court stated that the Contracting States have the primary responsibility to implement and enforce the rights protected by the Convention [*inter alia,* the *non-refoulement* principle inherent in Article

[226] *N v the United Kingdom* [GC], para. 192.
[227] Stoyanova (2017) p. 596.
[228] *Savran v Denmark* [GC], para. 133.
[229] *Vilvarajah and others v the United Kingdom*, para. 102.
[230] Para. 103.
[231] *Paposhvili v Belgium* [GC], para. 172.

3].[232] In conclusion, the Court seems to have balanced the Contracting State's right to control its territory and borders with the rights safeguarded under the ECHR by, on the one hand, stating that the rights guaranteed under the Convention weighs heavier than the right to State sovereignty, but on the other hand, giving the Contracting State the full responsibility to comply with these rights.

In contrast to the impact of the source of the harm discussed in section 3.3.2, it seems harder to pinpoint if the balancing of opposed interests has been a key factor in creating and maintaining a high threshold of severity in medical *non-refoulement* cases or not. The fact remains that the scope of protection for medical *non-refoulement* cases under Article 3 contains a higher threshold and thus a narrower scope of protection than other *non-refoulement* cases covered by Article 3. On the one hand, it seems to be almost entirely clear that the fair balance test has been rejected through the Paposhvili case. On the other hand, the question persists as to whether the Court's assessment contains some form of balancing, such as taking State sovereignty in consideration, in its determination of the level of severity constituting the 'very exceptional' threshold applied in medical *non-refoulement* cases.

This question has frequently been a subject for discussion. Gerards has specifically referred to the Paposhvili case and the N case in her discussion of the absolute nature of absolute Convention rights.[233] By using the threshold of severity as a 'gateway' to the scope of protection, the ECtHR has had the possibility to introduce elements of justification and reasonableness in its review. The practical effect of nuancing the scope of protection of Article 3 has thus been a similar balancing exercise as the one made by the Court in qualified rights.[234] Battjes questions if the absolute nature of Article 3 actually means *absence of the possibility of justifying interferences* or if the absence of a limitation clause does not necessarily hinder a limitation of the scope of protection.[235]

In the context of the *Case of Paposhvili v Belgium*, Stoyanova concludes that balancing of interests might have been done at the *definitional stage*. The balancing of interests at the definitional stage is made on a case by case-basis by determining the scope of protection through the threshold of severity.[236] By reference to Zühlke and Pastille, Stoyanova concludes that it is through the balancing of interests at the definitional stage that general interests of the community, among them the interest of State sovereignty, may be balanced

[232] Para. 184.
[233] Gerards (2019) p. 22.
[234] Ibid., p. 24.
[235] Battjes (2009) p. 588.
[236] Stoyanova (2017) p. 599.

against the interest of the individual.[237] In conclusion, that may serve as an answer to the question as to whether the Court's assessment contains a balancing of interests and if such a balancing test has created a high threshold of severity, hence only protecting *very exceptional* cases under the scope of protection of medical *non-refoulement* cases under Article 3 of the ECHR.

3.4 Clarifying the 'Paposhvili test'

In the *Case of Paposhvili v Belgium*, the ECtHR explicitly stated for the first time that the issue at stake in medical *non-refoulement* cases is the *negative obligation* not to expose a person to a risk of ill-treatment proscribed by Article 3.[238] However, the Court also established a new *positive obligation* on the State to obtain individual and sufficient assurances from the receiving State that adequate medical treatment would be *available* and *accessible* upon return.[239] In the Paposhvili case, the ECtHR argued that, due to the absence of any assessment of the existence of medical treatment, the Belgian authorities could not be certain that Mr Paposhvili would not have run a real risk of treatment contrary to Article 3.[240]

The assessment, that was created through the Paposhvili case, is initially divided into two questions. Firstly, if the medical care is *generally available* in the receiving country and secondly, if the individual in question actually will have *access* to such medical care.[241] The Court's reasoning does not make it entirely clear how much the first assessment should focus on the individual in question. On the one hand, the assessment should be made on a case-by-case basis and it should focus on whether the availability of the general care is sufficient and appropriate in practice in order to prevent the individual from being exposed to treatment contrary to Article 3. On the other hand, the next question is entirely dedicated on assessing as to whether the medical care generally available is accessible to the individual in question.

The Court have given some answers regarding the question of how the Contracting States shall assess if the care is *generally available*. The Court explicitly stated what should *not* be assessed by the Contracting State, such as the level of care existing and whether the care is equivalent or inferior in comparison to the care provided by the Contracting State. The Court further

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[237] Ibid., p. 600; Reference to S Zühlke and J.C. Pastilles article 'Extradition and the European Convention – Soering Revisited' (1999) 59 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 749-784, p. 771
[238] *Paposhvili v Belgium* [GC], para. 188.
[239] Para. 191.
[240] Para. 205.
[241] Para. 189–190.

stated that it would not be possible to derive a right to a specific treatment which is not available to the rest of the population.[242] The main focus in the availability assessment seems to be an assessment of whether the general care available in the receiving State is *sufficient and appropriate* in the specific case. Hence, the care available is not sufficient and appropriate if it does not prevent the individual in question from being exposed to treatment contrary to Article 3.

The next question is if the care generally available also is *accessible* to the expelled individual. In determining the accessibility, the Court has provided the Contracting State with several considerations. The question whether the care is accessible depends on the cost of the medication and treatment, the existence of a social and family network and the distance that needs to be travelled in order to access the required care.[243] In comparison to the assessment of the availability, the accessibility test is entirely focused on the accessibility in *the specific case*, not the general accessibility. However, the critical point is reached in the last step. As described in section 3.2.3 and section 3.2.4, the Court has established an obligation on the Contracting States to obtain *individual and sufficient assurances* from the receiving State if the assessment described above leaves the Contracting States with *serious doubts* regarding the impact of removal.[244] Consequently, the Court has created a positive requirement that the Contracting States needs to meet in order to comply with Article 3.

The Court did not thoroughly motivate the introduction of a new positive obligation in the Paposhvili judgment. The Court generally describes how an assessment of the alleged risk under Article 3 should be made by stressing the distinction between the obligations on the individual, such as the obligation to adduce evidence that there are substantial grounds for believing that they would be exposed to a real risk of treatment contrary to Article 3 upon expulsion, and the obligations set on the Contracting States.[245] By referring to previous case law, the Court observed that when such evidence is adduced by the individual, it is up to the Contracting State to dispel any doubts raised by it.[246] Furthermore, the Court stressed the Contracting State's obligation to assess the risk with close scrutiny by considering the foreseeable consequences of removal in the light of the general situation in the receiving State and the individual's personal circumstances.[247]

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[242] Para. 189.
[243] Para. 190.
[244] Para. 191.
[245] Para. 186.
[246] Para. 187; Reference to *Saadi v Italy* [GC], para. 129.
[247] Para. 187.

The assessment created through the Paposhvili case was later adopted in the *Case of Savran v Denmark*. In the Chamber judgement, the Court concluded that Denmark had not done enough to dispel any doubts or obtained individual assurances from Turkey. Consequently, the Chamber found that an expulsion would constitute a violation of Article 3.[248] However, this was overruled by the Grand Chamber. As described in section 3.2.4, the Grand Chamber has clarified how the risk assessment should be done according to the 'Paposhvili test'.

The Grand Chamber judgment in the *Case of Savran v Denmark* clarifies how the Paposhvili test should be made, something that was not entirely clear by reading the Paposhvili case or the Chamber judgement of the Savran case. The Grand Chamber judgment shows that the interpreter shall stop the risk assessment if it reaches an answer contrary to the criteria set in the Paposhvili case. The so-called 'threshold test' obliges the applicant to adduce evidence capable of demonstrating that there a substantial ground for believing that the applicant would be exposed to a real risk of being subjected to treatment contrary to Article 3.[249]

The Grand Chamber expressed that once the threshold test is met then Article 3 is *applicable*.[250] However, the Contracting State may be able to remove a person without violating Article 3 if it dispels any doubts and scrutinises the foreseeable consequences of removal by comparing the applicant's State of health prior to removal to how it would evolve after the transfer.[251] Inherent in the risk assessment are also the obligations described above regarding the availability and accessibility of sufficient health care and the possibility to obtain individual assurances as a precondition for removal.[252]

Even if the Grand Chamber judgment offers a clarification of the risk assessment, it remains questionable if the Court is allowed to "offer" the Contracting States a possibility to obtain individual and sufficient assurances from the receiving State as a precondition for removal. One could argue that it might be contrary to the absolute nature of Article 3 to allow the Contracting States to remove a person based on individual assurances if the initial risk assessment has reached the conclusion that the threshold of severity has been met and that Article 3 thus is applicable. However, the clearest problem that the precondition of removal through individual assurances might amount to is the question as to whether it imposes obligations on non-Contracting States, which will be analysed further in section 4.2.1.

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[248] *Savran v Denmark* [GC], para. 88.
[249] Para. 130 (a).
[250] Para. 135.
[251] *Savran v Denmark* [GC], para. 130 (b).
[252] Para. 130 (c)-(e).

4 The Role of the ECtHR

4.1 Introduction

The examination shows that Article 3 stands out as an important provision in the ECHR as it constitutes a fundamental value in a democratic society. Furthermore, the notion of its absolute nature, even in a time of public emergency, undoubtedly marks the importance of the provision. Inherent in Article 3 is also the principle of *non-refoulement*. According to the general jurisprudence of the Court, the *non-refoulement* principle enjoys the absolute protection of Article 3, meaning that the consequences of a potential expulsion of an individual never may be balanced against an opposed interest of the Contracting State. According to the *non-refoulement* principle, the act that is prohibited is not the ill-treatment abroad, but the *act of removal* of a person despite the real risk of ill-treatment in the receiving State.

Against the examination made above, the thesis aims in section 4.2 to analyse if seriously ill migrants should be protected by the scope of protection of Article 3 according to the principles and methods of interpretation governing the Court's adjudication. Primarily, section 4.2 aims to determine the ordinary meaning of Article 3 in its context and in the light of the object and purpose of the provision. Thereafter, the scope of protection will be determined through the preparatory work of Article 3 (*travaux préparatoires*) and through a meta-teleological interpretation of Article 3. Last of all, section 4.2 will examine if seriously ill migrants should be protected by the scope of protection of Article 3 according to the principle of evolutive interpretation and a common ground interpretation.

Moreover, the protection of Article 3 is guarded by a threshold of severity that, in cases of medical *non-refoulement,* only protects *very exceptional* cases under the scope of protection in Article 3. According to the examination in section 3.3, the ECtHR has motivated the application of an exceptionally high threshold by, on the one hand, referring to the source of harm emanating from naturally occurring illness, and on the other hand, by implicitly balancing opposed interests at the definitional stage. Consequently, in order to examine if the Court has acted within the principles and methods governing the interpretation of the ECHR, section 4.3 will examine if the Court's motivation of applying a higher threshold of severity is consistent with the Court's general jurisprudence of Article 3.

4.2 Should seriously ill migrants be protected?

4.2.1 The ordinary meaning of Article 3

Based on the Convention text of Article 3, it may seem far-reaching to conclude that, inherent in the prohibition of torture, is a prohibition to remove a person to a country where that person might not receive sufficient health care. The Convention text in Article 3 is very short in comparison to other Convention rights in the ECHR. The text only provides the reader with the information that there are three different forms of ill-treatment prohibited by Article 3, those being *torture*, *inhuman* treatment and punishment and *degrading* treatment and punishment. Hence, the clear wording of Article 3 does not indicate that the scope of protection in Article 3 should include medical *non-refoulement* cases as developed by the ECtHR in the case law presented in section 3.2.

In accordance with Article 31.1 of the VCLT, the scope of protection of Article 3 may be determined through the ordinary meaning of the terms of the treaty in its *context* and in the light of the *object* and *purpose* of the treaty. The ordinary meaning is the current and normal meaning of the text of a treaty.[253] Furthermore, the object and purpose of the treaty is the intentions of the Contracting parties.[254] In the context of the ECHR, the Court refers to parts of this interpretation as a *textual interpretation*.[255]

As examined in section 2.1, the ECHR was born out of the reactions of World War Two and the initial intention behind the Convention was to create a protection for human rights on a regional basis in order to prevent Europe from becoming a place of tyranny and oppression. In my opinion, the intentions behind the entire Convention are in line with the original purpose of Article 3. This may seem reasonable since Article 3 is to be seen as one of the most fundamental human rights that enjoys the protection of several different international law treaties, such as the UDHR, but also because of its position as a peremptory norm. There is thus a great similarity behind the object and purpose of the ECHR as *a whole* and the object and purpose of Article 3 *specifically*.

One example of the similarities between the original object and purpose of the ECHR as a whole and the ECtHR's interpretation of the object and

[253] M. E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009, Martinus Nijhoff Publishers) p. 426.
[254] Linderfalk (2001) p. 229.
[255] Gerards (2019) p. 79.

purpose of Article 3 is the intention behind the use of a threshold in determining the scope of protection of Article 3. The ECtHR decided to apply a threshold that marks the minimum level of severity protected by Article 3 in order to guarantee that the provision would not get "trivialized". The importance of not trivializing Article 3 is linked to the absolute nature of the provision but also the historical background of the Convention.[256] It is clear to say that the object and purpose behind the ECHR was the wish of creating a Convention that focused on protecting fundamental human rights of severe nature and character. As described above, the intention of creating the ECHR as a "collective pact against totalitarianism" was agreed on by the Contracting States. Meanwhile, the notion of a "European Bill of Rights" was met with more scepticism. The early approach of the ECHR thus gives an indication of the length that the proposers wished to go in their common protection of human rights, or rather, of the initial wish to limit the rights protected under the ECHR by prohibiting merely acts of a severe nature and character.

The examination of the cases in section 3.2 shows that there are two major shifts in the scope of protection of medical *non-refoulement* cases under Article 3. The first one is the recognition in the *Case of D v the U.K.* that a lack of sufficient health care in the recipient State might amount to inhuman treatment contrary to Article 3 in *very exceptional* cases. The D case thus marks the introduction of a wider scope of protection of Article 3. The second one is the new definition of 'very exceptional cases' in the *Case of Paposhvili v Belgium* and the precondition of obtaining individual and sufficient assurances from the receiving State. Consequently, the Paposhvili case extended the scope of protection by protecting more than just cases where the person at stake risk would risk an imminent death due to the lack of sufficient medical care.

The evolution of the scope of protection of Article 3 is in my opinion built upon several steps taken by the ECtHR. The initial purpose of Article 3 was the protection against severe ill-treatment by public authorities with the intention of protecting Europe from tyranny and oppression. Further on, the Court recognised the *non-refoulement* principle as inherent in Article 3. Through the D case, the Court widened the notion of the *non-refoulement* principle inherent in Article 3 to also contain medical *non-refoulement* cases, however only in *very exceptional* cases where humanitarian considerations were at stake. Through the Paposhvili case, the Court further extended the scope of protection of medical *non-refoulement* cases under Article 3 and established a more "rights-based" approach of medical *non-refoulement* cases by clarifying the steps that needs to be taken by the Contracting States in its

[256] See i.e. Buckley et al. (2018) p. 237.

risk assessment. In result, the Court created the "Paposhvili test" that until now has been adopted twice – in the Fourth Section and later on in the Grand Chamber in the *Case of Savran v Denmark*.

In conclusion, the Court has extended and modified the ordinary meaning of Article 3 through its case law by determining the scope of protection of medical *non-refoulement* cases under Article 3. By examining the ordinary meaning in the light of its object and purpose, it is my opinion that the Court has acted within the ordinary meaning of Article 3, since medical *non-refoulement* cases only protects seriously ill migrants against *severe* ill-treatment. Furthermore, in accordance to Article 31.4 of the VCLT, the ordinary meaning is relative and might change over time, which allows the parties to create a special meaning which may go beyond the terms.[257] However, an ordinary meaning beyond the terms requires that the parties intended to do so.[258] The ongoing extension of the scope of protection of Article 3 *in general* and the extended scope of protection of medical *non-refoulement* cases under Article 3 *specifically* may thus be in line with a the ordinary meaning of Article 3 given that such ordinary meaning is intended by the Contracting States. A more thorough analysis of a potential consensus between the Contracting States will be discussed in section 4.2.4.

In order to determine the ordinary meaning of Article 3, an interpretation may also be done by reading the ordinary meaning in its *context*. Reading the ordinary meaning in its context means that the ordinary meaning shall be read by considering the entire text of the treaty but also the preamble and annexes.[259] The preamble of the ECHR is very short but opens up for a wide interpretation of the ECHR and the values governing the Convention. Reading Article 3 in the context of the preamble may, on the one hand, argue in favour of an interpretation in the light of the underlying values of the ECHR but on the other hand, it is hard to reach an exact answer of the ordinary meaning by only considering the preamble. However, in order to examine the ordinary meaning of Article 3 in its context it is also possible to consider other provisions in the Convention, such as Article 1 of the ECHR.

The notion of Article 1 was, as described in section 2.3.2, discussed in the *Case of Soering v the U.K.* regarding extra-territorial jurisdiction of the ECHR. The Convention text in Article 1 states the obligations of the Contracting States and the text implies that the obligations are limited to only securing rights and freedoms within the jurisdiction of the ECHR. The clear wording of Article 1 thus sets a territorial limit to the obligations of the

[257] Villiger (2009) p. 426.
[258] Ibid., p. 434.
[259] Ibid., p. 427.

Contracting States. As examined above, the Court recognised that a textual interpretation of Article 1 may lead to the conclusion that the Contracting States are not obliged to guarantee that a person is secured from treatment contrary to the ECHR outside the borders of its jurisdiction. However, the Court concluded that, protection under Article 3 was inherent in cases of *non-refoulement*, based on the principle of effectiveness and the underlying values governing the Convention.

The Court's reasoning in the Soering case may be seen as the starting point of the protection of *non-refoulement* cases raised by the Court. Consequently, it created the foundation for the protection of medical *non-refoulement* cases. The evolution of the scope of protection for medical *non-refoulement* cases under Article 3, read in the context of the general obligation set in Article 1, thus raises the follow-up question as to whether the legal development made by the ECtHR has been predictable for the Contracting States. First of all, the clear wording of Article 3 does not give any indications that neither 'regular' *non-refoulement* cases nor medical *non-refoulement* cases is inherent in the provision. Furthermore, Article 1 provides even less indications of an extra-territorial dimension.

Reading Article 3 in the context of Article 1 also raises the question as to whether the obligation of protecting medical *non-refoulement* cases under Article 3 may impose Convention standards on non-Contracting States. This consideration was also made by the Court in the Soering case examined above.[260] The ECtHR stated in its reasons for judgement that it never may place a requirement on a State, that is not a party of the treaty, to comply with the Convention standards set in the ECHR. Such a prohibition goes in line with well-established international treaty law as well as the general principles of contract law.[261] Consequently, obligations put by the ECtHR on non-Contracting States would be contrary to Article 1, since the text states that the obligations of the ECHR only concerns the Contracting States.

As a response to this, the Court argued in the Soering case and later in the Paposhvili case, that the notion of the *non-refoulement* principle only concerns the negative obligation not to expose a person to a risk of ill-treatment proscribed by Article 3.[262] Hence, there is no question of adjudicating the responsibility of the receiving State.[263] The notion of the *non-refoulement* principle is, as concluded in section 2.3.2, not an extra-territorial application of Article 3. Instead, it is the act of removal of a person *within* the

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[260] Section 2.3.2.
[261] A Henriksen, *International Law,* 3rd ed (Oxford University Press, 2021) p. 22.
[262] *Paposhvili v Belgium* [GC], para. 188.
[263] *Soering v the United Kingdom*, para. 91.

jurisdiction of the ECHR that is prohibited according to the *non-refoulement* principle inherent in Article 3.

Despite the fact that the *non-refoulement* principle only should place an obligation on the Contracting States, the question yet arises whether the ECtHR imposes an obligation on non-Contracting States to comply with the Convention standards set in the ECHR. As described in section 3.2.3, the ECtHR has placed a requirement on the Contracting States to obtain individual and sufficient assurances from the receiving State that there will be available and accessible medical treatment upon arrival. The effects of this obligation put on the Contracting States was later seen in the Savran case, where the Chamber judgement concluded that Denmark had neither dispelled the doubts regarding the social support available in the receiving State nor obtained individual and sufficient assurances. The judgement in the Chamber judgment was however overruled by the Grand Chamber. Nevertheless, the obligation remains a part of the "Paposhvili test".

In the Joint Dissenting Opinion of three judges in the Chamber judgment of the Savran case, the dissenters argued that the Grand Chamber had opened the door slightly in the Paposhvili case by extending the protection of medical *non-refoulement* cases and that the Fourth Section had pushed that door "wide open" through its judgement in the Savran case.[264] The reasoning made by the dissenting judges thus speaks in favour of a new positive obligation that was not predictable for the Contracting States and beyond the reasonable limits governing Article 3. However, the opinion expressed by the dissenting judges has been answered by the Grand Chamber who clarified that the obligations put on the Contracting State only becomes of relevance if the applicant meets the "threshold test".

Despite the clarification made by the Grand Chamber judgment in the Savran case, the question remains whether the ECtHR, by requiring the Contracting State to obtain *individual* assurances from the receiving State, imposes obligations on a non-Contracting State. Dr Mark Klassen has argued in the Strasbourg Observer that the obligation to obtain individual assurances should not be seen as a novelty. Instead, he claims that such a requirement placed on the Contracting States has been regularly used in previous case law.[265] Stoyanova also concluded that such requirement is not something new

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[264] *Savran v Denmark* [GC], Joint Dissenting Opinion of Judges Kjølbro, Motoc and Mourou-Vikström, para. 9.

[265] M Klassens article 'A new chapter on the deportation of ill persons and Article 3 ECHR: The European Court of Human Rights Judgment in Savran v Denmark', Strasbourg Observers, 17 October 2019, Available at: https://strasbourgobservers.com/2019/10/17/a-new-chapter-on-the-deportation-of-ill-persons-and-article-3-echr-the-european-court-of-human-rights-judgment-in-savran-v-denmark/ (Accessed 26 December 2021).

to the notion of *non-refoulement*.[266] However, as briefly mentioned in section 2.3.3, diplomatic assurances have been found insufficient by the Court in previous case law due to the lack of individualisation and country of origin information which, despite the assurances given, has left the Court in doubt regarding the impact of removal.

Consequently, it seems that the ECtHR has created a positive obligation in two senses which might go beyond the ordinary meaning of Article 3. According to the Paposhvili test, the first option for the Contracting State is to obtain individual assurances from a non-Contracting State, which may impose obligations contrary to Article 1. However, if the Contracting State refrains from obtaining such individual assurances, it is also obliged to refrain from deportation in order to comply with Article 3, thus resulting in a wider scope of protection for medical *non-refoulement* cases.

The Chamber judgment in the Savran case showed that the lack of individual assurances was the decisive factor in finding a violation of Article 3. The Grand Chamber judgement thus seems to have mitigated the consequences that the Chamber judgment would have had on the obligations put on the Contracting States by making it harder to reach the point of such an assessment. However, the criterion is still the same. In spite of the Grand Chamber judgment in the Savran case, I share the worries expressed by Klassen that the Court has not provided the Contracting States with information regarding *how* the reliability of the assurances sought may be tested.[267] In order to reach the desirable effect of seeking assurances according to the 'Paposhvili test', the assurances needs to be *individualised.* However, seeking individual assurances will inevitably engage the receiving State, which most likely will be a non-Contracting State, and thus constitute an action beyond to the ordinary meaning of Article 1. In sum, determining the ordinary meaning in its context leads to the conclusion that the ECtHR has acted beyond the ordinary meaning of Article 3.

4.2.2 Travaux préparatoires

The VCLT and the ECtHR consider use of the preparatory work, *travaux préparatoires,* less relevant than the textual interpretation flowing from Article 31 of the VCLT.[268] The interpretation of a treaty in the light of its preparatory work is a supplementary mean of interpretation according to

[266] Stoyanova (2017) p. 608.
[267] Klassen (2019), Available at: https://strasbourgobservers.com/2019/10/17/a-new-section-on-the-deportation-of-ill-persons-and-article-3-echr-the-european-court-of-human-rights-judgment-in-savran-v-denmark/ (Accessed 26 December 2021).
[268] Gerards (2019) p. 83–84.

Article 32 of the VCLT.[269] Nevertheless, it is recognised as a method of interpretation by the ECtHR. One of the reasons why an interpretation in accordance with the *travaux préparatoires* is given less weight by the ECtHR is the fact that the travaux were drafted by the initial ten members of the Council of Europe, whereas the Convention today is signed by 47 States.[270] However, by examining the *travaux préparatoires* it is possible to discern the framework of Article 3 and the spirit and values that the drafters intended to protect by the provision.

Being closely linked to the object and purpose of Article 3, the protection of the prohibition of torture in the ECHR was seen by the drafters as a fundamental human right in the entire international community, thus receiving protection as one of the first provisions in Section I of the Convention. The drafters treated the prohibition of torture in Article 3 as closely linked to other *civil and political rights*, such as freedom of thought, conscience and opinion. The scope of protection of Article 3 should thus focus on civil and political rights according to the drafters. Read in the light of the preparatory works, a precondition for the protection of medical *non-refoulement* cases may thus be that such cases concern a civil or political right. Instead, in the *Case of N v the U.K.,* the Court argued that the case was of a social or economic nature, while the dissenting judges argued that the case constituted a civil right. Regardless of the question as to whether the dissenters were right or not, the preparatory works do not lead to the conclusion that *the mere protection* of medical *non-refoulement* cases under Article 3 automatically speaks in favour of it being a civil or political right.

According to the *travaux préparatoires*, the drafters wished to stress the fundamental value of the ill-treatment prohibited by Article 3. Consequently, the drafters wished to prohibit all forms of physical torture that are inconsistent with a civilised society and held that such ill-treatment should be seen as barbarism behaviour not belonging in a civilised society. One of the drafters even proposed that such ill-treatment should be seen as offences against “heaven and humanity”. It is clear to say that an interpretation of Article 3 in the light of the *travaux préparatoires* concludes that Article 3 was drafted with the purpose of protecting against severe forms of ill-treatment which cannot be acceptable in a civilised society. Once again, the interpretation of Article 3 highlights the wish to create and maintain a society that prevents the horrific acts committed during World War Two. In order to maintain the protection of only the most severe forms of ill-treatment and guarantee the absolute nature of prohibition, the scope of protection is governed by a threshold of severity.

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[269] Villiger (2009) p. 445.
[270] Gerards (2019) p. 84.

Even though the drafters stressed that Article 3 should protect only the most severe forms of ill-treatment, they were clear from the beginning that they did not want to define the specific ill-treatment that could be seen as torture, inhuman or degrading. As examined in section 2.1, the drafters wanted the provision to constitute a general obligation where the extent of the protection would not be specified in the Convention text. The drafters argued that not defining the exact scope of protection of Article 3 would ensure that the provision would maintain its absolute nature. The drafters stated explicitly that if Article 3 would state a certain number of means of ill-treatment that would be prohibited by Article 3, it would risk an interpretation that *e contrario* would conclude that all other forms of ill-treatment would be allowed.

Although the fact that the drafters did not wish to precise the specific acts or omissions that would constitute treatment contrary to Article 3, the drafters presented some indications of what sort of treatment they had in mind. The prohibition of torture was, as mentioned above, discussed in the context of other fundamental rights and freedoms protected by the ECHR. The drafters were primarily discussing acts such as ill-treatment used by the police or other forms of ill-treatment that could be exercised by a State in a judicial process. Hence, the drafters never discussed an extra-territorial dimension of Article 3 in the context of an asylum process or the application of Article 3 in cases of migrants suffering from serious illnesses. This thus indicates that the protection of medical *non-refoulement* cases was not intended by the drafters of Article 3.

Despite the lack of any statements in the *travaux préparatoires* in support of the protection for medical *non-refoulement* cases, the legal development may be supported by the wish of the drafters to create a "wide-ranging and dynamic" provision. As explicitly stated in the *travaux préparatoires,* the drafters wished to create "the main lines in which the article would flow" instead of limiting the scope of protection by stating the exact acts or omissions that should be protected by Article 3. The drafters thus seem to have intentionally created a provision that would protect the notion of its fundamental value and absolute character rather than the exact ill-treatment of concern by the time of the draft.

In conclusion, an interpretation according to the intentions in the *travaux préparatoires* has given the ECtHR a wide mandate to develop the scope of protection through its case law. This has been discussed above regarding the use of the threshold of severity. The use of the threshold has thus worked as a tool for the ECtHR to continuously develop the scope of protection of Article 3 while at the same time maintain the legitimacy of Article 3 by

sticking to the main lines in which the article should flow. In this sense, the *travaux préparatoires* supports the extended scope of protection of Article 3 that may go beyond the initial Convention text and consequently, speaks in favour of the ECtHR acting within the method of using the preparatory work in its determination of the scope of protection for medical *non-refoulement* cases.

4.2.3 Meta-teleological interpretation

As seen in the case law presented in section 3.2, the Court often refers to the absolute character of Article 3 and its fundamental value in a democratic society.[271] By referring to the underlying values, *the core values*, the Court uses a so-called *meta-teleological interpretation*. A meta-teleological interpretation is a type of teleological interpretation which may be derived from Article 31.1 of the VCLT, as it takes the object and purpose of the ECHR *as a whole* in consideration.[272] The meta-teleological interpretation was, as may be seen in section 2.3.2, used by the Court in the *Case of Soering v the U.K.,* which emphasised that the interpretation of the ECHR should be consistent with the general spirit of the Convention as an instrument designed to maintain and promote the ideals and values of a democratic society.[273]

It is hard to reach an exact answer regarding the definition of the general spirit of the ECHR and what an interpretation in accordance with the "ideals and values of a democratic society" actually means in practice. Yet, that seems to be the intention behind the meta-teleological interpretation of the ECHR. As described by Gerards, the meta-teleological interpretation takes place in a high level of abstraction.[274] Contrary to the use of a teleological interpretation in accordance with the object and purpose of the ECHR, the Court uses the notion of the general spirit in order to adapt its judgements to the general principles and underlying values of the Convention.[275] Most importantly, by using a meta-teleological interpretation, the Court is able to do fuller justice of the essential object of the entire Convention, which is the desire to effectively protect individual human rights and to create a minimum level of protection for human rights throughout Europe.[276]

Against the background of the case law in section 3.2, it seems that the general spirit of the ECHR has been used as a key factor to support the determination

[271] See i.a. *D v the United Kingdom* [GC], para. 47.
[272] Gerards (2019) p. 59-60.
[273] *Soering v the United Kingdom,* para. 87.
[274] Gerards (2019) p. 59.
[275] Ibid., p. 59.
[276] Ibid., (2019) p. 60.

and further extension of the protection of medical *non-refoulement* cases under Article 3. The Court has several times referred to the fundamental importance of Article 3 and the absolute nature of the provision. In the *Case of D v the U.K.*, which marks the starting point for the protection of medical *non-refoulement* cases under the ECHR, the Court explicitly referred to the fundamental importance of Article 3 in the Convention system. Furthermore, the Court argued that a limitation of the protection of medical cases under the protection of the *non-refoulement* principle inherent in Article 3 would undermine the absolute character of its protection.

The Court has clearly used a meta-teleological interpretation through the notion of the general spirit of the ECHR in its extension of the scope of protection for medical *non-refoulement* cases in Article 3. The protection of medical *non-refoulement* cases is in my opinion a clear evidence of how the Court has acted in order to pursue a fuller justice of the essential object of the Convention, since the protection of medical *non-refoulement* cases has led to a more efficient protection of the individuals at stake. I share this opinion with Peroni, who argued in the Strasbourg Observer that the ECtHR, through the *Case of Paposhvili v Belgium*, "seized the opportunity to do fuller justice of the spirit of Article 3".[277] Moreover, it has created a more distinct minimum level for medical *non-refoulement* cases adjudicated under Article 3 by the Contracting States of the ECHR.

In the *Case of D v the U.K.,* the Court emphasised the notion of Article 3 as a fundamental value in a *democratic society*.[278] The fundamental importance of Article 3 held by the Court in the D case was thus applied in relation to *democracy*, which is one of the core values of the ECHR.[279] Twenty four years later, in the Grand Chamber judgment of the *Case of Savran v Denmark,* the ECtHR still emphasise that Article 3 enshrines one of the most fundamental values of a democratic society.[280]

At first glance, it may be hard to derive the protection of medical *non-refoulement* from the protection of democracy in the sense of, *inter alia,* upholding a European public order.[281] The circumstances of the cases examined in section 3.2 do not have a clear relation to issues of democracy.

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[277] L Peronis article 'Paposhvili v Belgium: Memorable Grand Chamber Judgment reshapes Article 3 case law on expulsion of seriously ill persons', Strasbourg Observers, 15 December 2016. available at: https://strasbourgobservers.com/2016/12/15/paposhvili-v-belgium-memorable-grand-chamber-judgment-reshapes-article-3-case-law-on-expulsion-of-seriously-ill-persons/ (Accessed 26 December 2021).
[278] *D v the United Kingdom* [GC], para. 47.
[279] Gerards (2019) p. 64.
[280] *Savran v Denmark* [GC], para. 121.
[281] *United Communist Party of Turkey v Turkey* [GC], ECtHR, App. No. 133/1996/752/951, 30 January 1998, para. 45.

Instead, cases regarding health issues are often related to socio-economic issues that on the one hand also enjoy the protection of the ECHR, but on the other hand might not have a clear relation to democracy. Consequently, a meta-teleological interpretation through the notion of democracy may lead to the conclusion that medical *non-refoulement* cases should not enjoy the protection of Article 3.

However, this leads back to the opinions expressed by the dissenting judges in the *Case of N v the U.K.* and the policy considerations discussed above. As examined above, the Court argued against finding a violation of Article 3 partly based on the fact that the ECHR was directed to protect civil and political rights rather than social, economic and cultural rights. As described in section 3.3.2, the dissenting judges argued that the Court had misunderstood the Airey judgement and the protection of socio-economic rights under the ECHR, but furthermore, that the issue at stake was about one of the core fundamental *civil rights* of the ECHR, namely Article 3.

The statement made by the dissenters in the N case is, in my opinion, based on the notion of democracy as a core value in a meta-teleological interpretation of the ECHR. The protection of medical *non-refoulement* cases under the scope of protection in Article 3 is derived from the fact that the issue at stake triggers the principle of *non-refoulement*. By recognising the *non-refoulement* principle as a decisive factor in these cases, they have gained protection under Article 3. The *non-refoulement* principle was not explicitly referred to in the case of N and D, where the Court also stressed the humanitarian considerations at stake, but was explicitly referred to by the Court in the Paposhvili case.[282] Furthermore, and as stated by the Court in the D case, Article 3 enshrines one of the fundamental values of a democratic society.

In conclusion, a meta-teleological interpretation of Article 3 through the core notion of democracy speaks in favour of the protection of medical *non-refoulement* cases, mainly due to the notion of the *non-refoulement* principle triggered in these cases. Furthermore, a meta-teleological interpretation of Article 3 leads to the conclusion that medical *non-refoulement* cases should be protected by Article 3 in order not to undermine the absolute character of the provision by excluding seriously ill migrants from ill-treatment that are contrary to Article 3, but also to the general spirit of the ECHR.

[282] *Paposhvili v Belgium* [GC], para. 188.

4.2.4 Evolutive interpretation

The evolutive interpretation of the ECHR may be seen as the ECtHR's recognition of the Convention as a dynamic instrument and a possibility to interpret provisions that were drafted and established in the 1950's in the light of present-day issues. The legitimacy of the evolutive interpretation was first established in the *Case of Tyrer v the U.K.*, where the Court stated that the Convention should be seen as a "living instrument which must be interpreted in the light of the present-day conditions".[283]

The desire to do fuller justice to the ECHR might also be sought through the use of evolutive interpretation, which flows from the *principle of effectiveness*.[284] The principle of effectiveness was used by the Court in the *Case of Paposhvili v Belgium* when the Court stated that the approach to medical *non-refoulement* cases under Article 3 needed clarification in order to maintain the practical and effective protection of the ECHR. The Court clearly showed in the *Case of Paposhvili v Belgium* that it still wanted to protect medical *non-refoulement* cases under Article 3 and thus needed to create a protection that could be used in practice. Through the Paposhvili case, the Court showed that the scope of protection developed through the *Case of D v the U.K.* and the *Case of N v the U.K.* had opened the door to the protection of medical *non-refoulement* cases in theory, but not in practice.

The principle of effectiveness is also clearly visible in the Paposhvili case regarding the obligation to obtain individual assurances by the receiving State that sufficient health care will be both available and accessible upon arrival. The accessibility criterion speaks clearly, although not specifically, of a wish by the Court to ensure the practical effect of Article 3. The assessment creates a more practical guarantee that the person at stake will be protected from ill-treatment prohibited by Article 3, either through an individual assurance of accessibility to sufficient health care or, if such an assurance cannot be obtained, through the negative obligation not to return that person. The importance of interpreting the ECHR in the light of the principle of effectiveness was also stressed by Judge Serghides in his Dissenting Opinion in the *Case of Savran v Denmark,* where he argued that the Grand Chamber judgment had not rendered the practical and effective protection of Article 3 by interpreting Article 3 in an overly restrictive way.[285] By reference to

[283] *Tyrer v the United Kingdom*, ECtHR, App. No. 5856/72, 25 April 1978, para. 31.
[284] Gerards (2019) p. 52.
[285] *Savran v Denmark* [GC], Partly Concurring and Partly Dissenting Opinion of Judge Serghides, para. 16.

Orakhelashvili, Judge Serghides held that "the principle of effectives inherently contradicts the notion of a restrictive interpretation of treaties".[286]

The use of an evolutive interpretation supports a new or extended protection of a Convention right that might go beyond the original object and purpose of the specific provision. Consequently, the evolutive interpretation of Article 3 of the ECHR may support the extended protection of medical *non-refoulement* cases. However, there are limitations in the evolutive interpretation as well. The main reason behind the evolutive interpretation is the wish to maintain the ECHR as a dynamic instrument that complies with the present-day conditions. The Court is thus allowed to interpret a provision drafted in the 1950's in a sense that is more compatible with the issues and challenges facing Europe today. Still, the Court needs to stay inside its limits as an adjudicative body in order to not become a legislator. In some sense, this relates to the notion of interpreting the ECHR in good faith in accordance with Article 31.1 of the VCLT. On the one hand, the ECHR, as well as any other treaty, was intended to mean *something* rather than *nothing*.[287] On the other hand, a common ground needs to persist regarding what that something is supposed to mean.[288]

Common ground interpretation allows the Court to give a "new" meaning to a Convention right if a "European consensus" persists between the Contracting States that such a meaning should be given to the specific Convention right.[289] The connection between, on the one hand, the evolutive interpretation and the principle of effectiveness, and on the other hand, the common ground factor has also been recognised by the ECtHR.[290] The notion of European consensus – or common ground interpretation – may indicate the present day conditions that the evolutive interpretation wishes to highlight. As argued by Dzehtsiarou, the use of European consensus "provides a sufficient response to the legitimacy challenges made against evolutive interpretation".[291]

Initially, it seems to be well-established and undisputable to allow the ECtHR to treat Article 3 as a wide-ranging and dynamic provision as well as a fundamental right in the Convention system. Furthermore, it must be considered by most of the Contracting States that the ill-treatment prohibited

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[286] Para. 16; Reference to A Orkahelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008, Oxford University Press) p. 414.
[287] Villiger (2009) p. 425.
[288] *Caamaño Valle v Spain Judgment,* ECtHR, App. No. 3564/17, 11 May 2021, para. 43.
[289] Gerards (2019), p. 93.
[290] *Christine Goodwin v the United Kingdom* [GC], ECtHR, App. No. 28957/95, 11 July 2002, para. 74.
[291] K Dzehtssiarous article '*European Consensus and the Evolutive Interpretation of the European Convention on Human Rights'* (2019) 12 German Law Journal, No. 10, 1730–1745.

by Article 3 has shifted from the brutal acts such as those committed by States during World War Two to instead focusing on, *inter alia,* the conditions for detainees in some European countries, but also the extra-territorial dimension through the recognition of the *non-refoulement* principle inherent in Article 3. Through this extra-territorial dimension, Article 3 has been established as a minimum standard of the asylum procedure in the Contracting States. However, the case law presented in section 3.2 shows that the scope of protection of *non-refoulement* cases based on health issues and the lack of adequate medical care is not equally established and recognised by the Contracting States.

Consequently, an evolutive interpretation of Article 3 may speak both against and in favour of a protection for medical *non-refoulement* cases. The decisive factor is the question as to whether the protection of medical *non-refoulement* cases constitutes a desirable development of the scope of protection of Article 3 or not. In order to examine if an interpretation made by the ECtHR falls within the evolutive interpretation or not, it is useful to examine if such an interpretation is supported by a European consensus or not. The question if there is a European consensus may be answered by looking at national law or other international instruments that have been signed by several Contracting States.[292]

A way of examining and comparing the national legislation of the Contracting States may be to have a look at, *inter alia,* the "Relevant Domestic Law and Practice" section in the case law of the cases presented in section 3.2. The Contracting States in question have been the United Kingdom, Belgium and Denmark. As for the United Kingdom, the relevant domestic law by the time of the *Case of D v the U.K.* did not treat a person applying for leave to enter who was suffering from HIV in a different way than a person without a severe illness.[293] However, the guidelines of how to treat persons seeking grant to enter or remain in the U.K. stated that if "strong compassionate grounds" existed, the applicant would normally be granted leave to remain.[294] In the *Case of N v the U.K.,* adjudicated in 2008, the Court did not explicitly state the relevant domestic law prevailing. Although, and as described in section 3.2.2, the opinions of the judges in the domestic procedure was relatively straight forward. The judges thought, *inter alia,* that the protection of medical cases under Article 3 constituted a fragile basis that lacked a decision and a policy adopted by a democratic arm. Moreover, the judges questioned if the

[292] Gerards (2019) p. 93.
[293] The Immigration and Nationality Department of the Home Office, Policy document BDI 3/95, August 1995, para. 4.
[294] Ibid., para. 5.4.

legal development made by the ECtHR regarding medical *non-refoulement* cases could be considered as approved by the Contracting States.

The *Case of Paposhvili v Belgium* and the *Case of Savran v Denmark* were adjudicated in 2016 and 2019, thus considered against a more relevant domestic law in Belgium and Denmark. Regarding the domestic law in Belgium, the Aliens Act provides the possibility of granting leave to remain on medical grounds according to section 9*ter* of the Aliens Act.[295] The first paragraph of section 9*ter* states that "[an alien] suffering from an illness entailing a real risk to its life or physical well-being or a real risk of inhuman or degrading treatment if no appropriate treatment exists in its country of origin or previous country of residence may apply to the Minister or his or her representative for leave to remain in the Kingdom".[296] However, according to paragraph 4 of section 9*ter,* aliens are excluded from the scope of protection in paragraph 1 of section 9*ter* if there are substantial ground for believing that the alien concerned has committed an act referred to in section 55/4 of the act.[297] By reference to the drafting history of 9*ter*, an alien would however not be removed even if he or she had committed an act against section 55/4 if a removal would constitute a breach of Article 3 of the ECHR.[298]

Regarding the Savran case, the case constituted an expulsion due to a committed crime, hence engaging the national Penal Code. Section 22.1.6 of the Danish Penal Code states that an alien may be expelled if the alien is sentenced to, *inter alia,* assault of another person.[299] According to section 22.2, an alien must be expelled under, *inter alia,* section 22.1.6 unless it would be conclusively inappropriate due to the long-time residence in Denmark as mentioned in § 1.[300] One example of it being conclusively inappropriate to enforce a deportation is, according to the preparatory work, if it would be contrary to international obligations.[301]

Another source of common ground interpretation is international instruments, which may be used as means of interpretation according to Article 31.3 of the VCLT. A common legal framework between many of the Contracting States of the ECHR is the EU. EU law may thus work as a mean of interpretation in a common ground interpretation. The relevant EU legislation is the Qualification Directive, in particular Article 15 (b), which according to the

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[295] Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, Art. 9*ter.*
[296] Ibid., Art. 9*ter,* § 1.
[297] Ibid., Art. 9*ter,* § 4.
[298] *Paposhvili v Belgium* [GC], para. 100.
[299] 4 kap. 22 § 1 st 1p. Udlændingeloven, LBK nr 1022 af 02/10/2019.
[300] 4 kap. 22 § 2 st. Udlændingeloven.
[301] *Savran v Denmark* [GC], para. 34.

CJEU corresponds to Article 3 of the ECHR.[302] Contrary to the protection of medical *non-refoulement* cases in Article 3 of the ECHR, the CJEU has explicitly excluded medical cases from the subsidiary protection in Article 15 (b) of the Qualification Directive based on the lack of serious harm in the country of origin.[303] During the drafting of the provision, the Presidency stated, by reference to the *Case of D v the U.K.*, that such protection never was the intention of Article 15 (b) and that a limitation of the scope of protection of Article 15 (b) would avoid the inclusion of medical *non-refoulement* cases.[304] In the *Case of Mohamed M'Bodj*, the CJEU clearly stated that there was no room for the Member States of the EU to extend the scope of protection in Article 15 (b) to also protect medical *non-refoulement* cases, based on the "general scheme and objectives" of the Qualification Directive.[305]

The examination of the national legislation and the EU legislation shows certain disparities from the scope of protection of medical *non-refoulement* cases under Article 3 of the ECHR. The comparison initially concludes that the most far-reaching protection of medical *non-refoulement* cases is given through Article 3, especially due to the fact that the scope of protection of Article 15 (b) of the Qualification Directive explicitly exclude the protection of medical *non-refoulement* cases. However, the examination of the national legislation examined above shows some differences in the scope of protection, hence the common ground factor.

The examination shows that the concerned States, through its national legislation, shares a wish of protecting persons from expulsion if there are compelling circumstances prevailing or if it would be conclusively inappropriate. The national legislation in the United Kingdom and Denmark indicates an approach that corresponds to the D case and the N case. However, a consensus in regards of the legal development made in the Paposhvili case and the Savran case is not equally clear. On the one hand, the national legislation in Belgium and Denmark prohibits an expulsion that would constitute a breach of the respective States' international obligations in general. On the other hand, the clear wording of the national legislation does not open up for a wider interpretation than the 'very exceptional' criterion as set in the D case. Above all, it is hard to conclude that a European consensus

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302 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie*, Judgement of 17 February 2009, C-465/07, ECR I-921, para. 28.
303 *Mohamed M'Bodj v État belge*, Judgement of 18 December 2014, C-542/13, EU:C:2014:2452, para. 41.
304 Presidency Note to the Strategic Committee on Immigration, Frontiers and Asylum, *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*, EU Doc: 12128/02, 20 September 2002, p. 6.
305 *Mohamed M'Bodj v État belge*, para. 44.

persists regarding a more right-based approach of the protection for medical *non-refoulement* cases as set in the Paposhvili case, something that further has resulted in higher demands on the Contracting States to comply with.

The most notable opinion against the developed scope of protection of medical *non-refoulement* cases is seen in the domestic procedure in the N case.[306] The national authorities were clearly against a wider scope of protection than that prevailing in accordance with the D case. Arguments were raised by the national judges that an extended scope of protection of medical *non-refoulement* cases was unsupported by democratic decisions made by the Government and that the scope of protection rested on an extremely fragile basis. The national judges approached the N case by discussing the effects of an extended scope of protection, something that the ECtHR in the Paposhvili case implicitly overruled by shifting the approach to the notion of a negative obligation. Furthermore, the judges explicitly discussed if an extended scope of protection of medical *non-refoulement* cases were supported by a consensus by stating that it was highly questionable as to whether the Contracting States would ever have agreed to the consequences that would follow an extended scope of protection.

Finally, a European consensus regarding the legal development is clearly seen in the statements of the intervening Governments in the *Case of Savran v Denmark*.[307] The intervening Governments[308] criticised the Chamber judgement and insisted that the threshold of severity should remain very high in these cases. Similar to the British authorities in the N case, the intervening Governments emphasised that only very exceptional cases shall enjoy the protection of Article 3 in order to not impose an excessive burden on the Contracting State's health care service.[309] Consequently, they argued in favour of not extending the scope of protection of these cases any further.[310]

In conclusion, the examination shows that the fundamental value of Article 3 and the wish to keep the provision dynamic finds support by the principle of effectiveness. However, the specific protection of medical *non-refoulement* cases is not equally given by examining a selection of national legislation, EU law and opinions expressed by the intervening Governments. Hence, the lack of a European consensus might speak against an application that goes too far beyond the ordinary meaning of Article 3.

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[306] Section 3.2.2.
[307] *Savran v Denmark* [GC], para. 111.
[308] The Dutch, French, German, Norwegian, Russian, Swiss and United Kingdom Governments were granted leave to intervene and they submitted somewhat similar arguments, which was summarised in one section of the judgment.
[309] *Savran v Denmark* [GC], para. 112.
[310] Ibid.

4.3 Should seriously ill migrants be treated differently?

4.3.1 Re-shifting focus to the nature of harm

The examination in chapter 3 shows that the Court, in all the medical *non-refoulement* cases examined, used the source of the harm emanating from naturally occurring illness as an argument in favour of applying a higher threshold of severity. Consequently, it seems that the source of harm has been explicitly referred to by the Court in order to create a distinction between 'regular' *non-refoulement* cases and medical *non-refoulement* cases. In the *Case of D v the U.K.,* the Court recognised, before its examination of the applicability, that the scope of protection of Article 3 prior to the D case only had been applied in cases where the harm had emanated from State authorities or non-State actors. However, the Court quickly came to the conclusion that a limitation of Article 3 in medical cases would be contrary to the absolute nature of Article 3 and that the Court thus needed to be flexible in its application of the provision.

As concluded in section 3.3, the Court motivated the high threshold of severity due to the impossibility of obtaining responsibility of the receiving State when the source of the harm emanates from naturally occurring illness. This is contrary to the notion of *non-refoulement* set in the *Case of Soering v the U.K.,* where the Court stated that there is no reason at all to adjudicate the responsibility of the receiving State. This is supported by the fact that the *non-refoulement* principle does not constitute an extra-territorial application.

The Court also argued that the source of the risk emanating from naturally occurring illness in itself did not infringe the standards of Article 3. This statement has been highlighted by Greenman, where she noted that the scope of protection of medical *non-refoulement* cases might imply a wider scope of protection than the protection of Article 3 in itself.[311] In other words, if the medical *non-refoulement* cases examined in section 3.2 would have constituted a domestic case regarding the lack of sufficient health care, the application would have been unsuccessful.[312] Consequently, it is the act of removal that is decisive in the protection of medical *non-refoulement* cases. Hence, Greenman has tried to understand the notion of the source of the harm by seeking the theoretical foundations of the *non-refoulement* principle.[313]

[311] Greenman (2015) p. 270.
[312] Ibid., p. 270.
[313] Ibid., p. 271.

Despite the lack of a more thorough explanation as to why the Court wanted to apply a higher threshold in medical *non-refoulement* cases, later case law has retained the source of the harm test. In the *Case of N v the U.K.,* the Court held that Article 3 principally applies when the risk emanates from the public authorities or a non-State actor. However, the inconsistencies between the retention of the source of the harm test and the 'very exceptional' threshold gets even deeper in the *Case of Paposhvili v Belgium.*

As mentioned in section 3.3.2, the inconsistencies in the Court's reasoning in the Paposhvili case have been examined by Stoyanova, in the context of the *non-refoulement* principle and its protection within Article 3 of the ECHR.[314] Stoyanova concludes that the notion of the *non-refoulement* principle has been approached by the Court in previous case law as both a positive and a negative obligation.[315] As seen in the examination in section 3.2 and as held by Stoyanova, the ECtHR treated medical *non-refoulement* cases prior to the Paposhvili case as engaging a positive obligation of the Contracting States. This is most clearly seen in the *Case of N v the U.K.,* where the Court stressed that it would be too great a burden on the Contracting States if Article 3 would constitute a positive obligation to provide free and unlimited health care to all aliens within the jurisdiction of the ECHR.

In the Paposhvili case, the ECtHR explicitly stated that the issue at stake was the negative obligation not to expose a person to a risk of ill-treatment proscribed by Article 3. As already referred to in section 3.3.2, this has been questioned by Stoyanova, where she argued that the Court's statement is contrary to the negative obligation framework. I agree with Stoyanova that there are severe inconsistencies regarding the use of the source of the harm test and the negative obligation set in the *Case of Paposhvili v Belgium.* The Court's general jurisprudence of the *non-refoulement* principle, as examined in section 2.3.3, stipulates the obligation of a Contracting State to refrain from exposing a person of ill-treatment. The prohibited act is thus *the act of removal* of a person despite the real risk of ill-treatment in the receiving State. The re-classification of medical cases as a negative obligation is thus a closer step to the notion of the *non-refoulement* principle as examined in section 2.3. The source of the harm and its consistency with the principle of *non-refoulement* has also been questioned by Judge Serghides in his dissenting opinion in the *Case of Savran v Denmark.* By reference to the *Case of Tarakhel v Switzerland,* Judge Serghides held that the source of the risk should not alter the scope of protection.[316]

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[314] Stoyanova (2017).
[315] Ibid., p. 584-587.
[316] *Savran v Denmark* [GC], Partly Concurring and Partly Dissenting Opinion of Judge Serghides, para. 40 (a).

Regardless of the framing of the *non-refoulement* principle as a negative or positive obligation, the protection of the *non-refoulement* principle under the ECHR is always inherent in the absolute provision of Article 3. The examination in section 2.2 shows that the matter of determining the threshold of severity has been used by the Court in order to determine if an ill-treatment should be seen as degrading treatment or not. Hence, cases that instinctively may be seen as inadmissible within the scope of protection in Article 3 could benefit its absolute protection by defining the threshold of severity. Consequently, the Court has been able to abide the drafters' wish of treating Article 3 as a wide-ranging and dynamic provision. The classification of an ill-treatment as torture, inhuman or degrading is, as described in section 3.3.2, the element of the *nature of the harm.* Furthermore, the Court has stated that every form of ill-treatment that a person might face upon expulsion is protected under the principle of *non-refoulement* inherent in Article 3.

The use of the nature of harm, instead of the source of a harm, in order to define the threshold of severity is supported by the *Case of Ireland v the U.K.*. As described in section 2.2, the Ireland case supports a relative threshold that can be changed by the Court based on the circumstances of the case. However, it clearly states that those circumstances are connected to the *severity* of the ill-treatment, which in turn is connected to the nature of the harm. The use of a nature of harm test also corresponds to the so-called 'Pretty threshold' since the determining factors only relates to circumstances concerning the person subjected to the ill-treatment and how that person affects by the ill-treatment. The use of the Pretty threshold is also supported by the dissenting judges in the *Case of N v the U.K.*

On the other hand, the use of a source of the harm test might gain support by the *Case of Illhan v Turkey,* where the Court also included a purposive element in its assessment. However, the purposive element focuses on the distinction between on one the hand torture and the other hand, inhuman or degrading treatment. The purposive element is thus a way of distinguishing cases of ill-treatment that, due to its purpose, should be seen as torture. Hence, the purposive element is not relevant in determining the entry level threshold to the scope of protection of Article 3. Consequently, the Ilhan case does not support a source of the harm test in determining the threshold of severity.

In conclusion, the threshold of severity is used to determine *how severe* an ill-treatment needs to be in order to gain protection under the scope of protection in Article 3. Furthermore, determining the threshold of severity by using a nature of harm test should not make a difference between cases concerning ill-treatment in a Contracting State and ill-treatment abroad since the latter is protected by the *non-refoulement* principle. Consequently, it

should not matter, in determining the threshold of severity, if the harm emanates from a State authority, a non-State actor or the lack of sufficient health care as long as it reaches the minimum level of severity and thus, the entry level threshold. If the harm affects the person in the same way, regardless of the source of the harm, then the nature of the harm is the same. Consequently, and against the background of the Court's general jurisprudence of Article 3, that is the only thing that should matter in the determining the entry level threshold into the scope of protection in Article 3.

Shifting focus to the nature of harm might however be inconsistent with the statement made by the Court in the *Case of D v the U.K.,* that the lack of sufficient health care in itself does not infringe the standard of Article 3. If the nature of harm is the decisive factor, then domestic cases regarding the lack of sufficient health care which would amount to a "serious, rapid and irreversible decline [of an individual's] state of health resulting in *intense suffering* or to *significant reduction of life expectancy"* would also be protected. As stated by the Court, and as for what I know is still the case of today, this is not protected under Article 3. However, the "lack" of protection of 'medical *domestic* cases' might depend on the lack of *insufficient* health care in Europe and the fact that such a case has not been adjudicated by the ECtHR (yet). This is however not true since the Paposhvili case showed that a Contracting State (Georgia) lacked sufficient health care, which then engaged the responsibility of another Contracting State (Belgium). Evidentially, even Contracting State's might lack sufficient health care. However, the lack of sufficient health care often creates one common thing – seeking refuge. Consequently, the reason why a domestic case regarding the lack of sufficient health care in itself does not infringe the standards of Article 3 is that such a case probably would not end up in the ECtHR in the same extent that medical *non-refoulement* cases has done. The nature of the harm is however the same in a domestic case and a *non-refoulement* case. The latter is, however, the case most in need of the protection of Article 3.

Stoyanova came to the conclusion that the lack of an explanation from the ECtHR as to why the source of the harm matters leaves us with public policy reasons.[317] In regards of the examination made in section 4.2, I would like to draw a connection between the methods governing the interpretation of Article 3 in order to understand the reasoning made by the Court in medical *non-refoulement* cases and, what seems to be, a strong reluctance to reject the source of harm as a factor in creating a higher threshold of severity.

[317] Stoyanova (2017) p. 599.

As examined in section 2.1, most violations of Article 3 occur in the context of detainees. In the context of ill-treatment of detainees, the agents of harm are thus the State authorities. One example of the ill-treatment of detainees protected under Article 3 is the conditions in a detention centre. A majority of the "threshold cases" examined in section 2.2 concerned deprivation of liberty, medical treatment for prisoners, and treatment of people subjected to immigration controls. Once again, the agents of harm were the State authorities. As concluded in section 4.2, medical *non-refoulement* cases are thus different from the cases that the ECHR originally was aimed to protect.

The *non-refoulement* principle prohibits the act of removal of a person that would be exposed to treatment contrary to Article 3. However, the act of *not* removing creates consequences for the Contracting States whether you would like to frame it as a positive obligation or not. In *non-refoulement* cases where the harm emanates from a State authority, one can argue that the Contracting States also should refrain from exposing a person to the same treatment in order to not violate Article 3. In cases of, *inter alia,* torture in a detention centre, I would argue that most Contracting States would not see it as a problem to refrain from ill-treating a person in its own detention centres in violation of Article 3. This is supported by the fact that the original purpose of Article 3 was meant to protect such domestic cases.

However, in medical *non-refoulement* cases where the harm emanates from naturally occurring illness and the *lack of* sufficient health care, the source of the harm is the *lack of* positive measures instead of *the existence* of a State authority that causes ill-treatment. By using the same reasoning as above, the consequences in medical *non-refoulement* cases is that the Contracting State needs to provide that health care in order to not infringe the standards of Article 3 itself. This is however not supported by the original object and purpose of Article 3. Taking it into consideration would also amount to a prohibited balancing of interests due to the absolute nature of Article 3.

In conclusion, it is clear to see that the inconsistencies in the reasoning made by the Court and the issues in trying to understand the source of the harm is connected to the notion of the *non-refoulement* principle. My arguments thus finds support in the conclusion made by Greenman that the *non-refoulement* principle is 'a castle built on sand'.[318] Furthermore, I agree with Stoyanova that the ECtHR has deepened the inconsistencies even further by explicitly stating that medical *non-refoulement* cases involves a negative obligation.[319] My solution is to use the nature of the harm instead of the source of the harm in determining the threshold of severity. In that way, the protection will get

[318] Greenman (2015) p. 296.
[319] Stoyanova (2017) p. 598.

closer to the actual ill-treatment of the person at stake, but also the non-*refoulement* principle in the absolute protection of Article 3. Using a nature of the harm test might however be inconsistent with the general jurisprudence of Article 3 due to the fact that lack of health care in a non-Contracting State is included in the scope of Article 3 through the *non-refoulement* principle, while the lack of health care in a Contracting State would fall outside the scope of protection. However, if the nature of harm test would result in the protection of 'medical *domestic* cases' it might overrule public policy reasons against such an outcome.

4.3.2 Regaining the relative threshold

As concluded in section 2.2, the Court has applied a relative threshold enabling it to determine the entry level based on the circumstances prevailing in a specific case. As concluded by Arai-Yokoi, this has led to a more creative process in shaping Conventions rights, resulting in an extension of the scope of protection of Article 3, but without overruling the absolute nature of the provision.[320] Furthermore, the prohibition of balancing opposed interests to the reason against expulsion in *non-refoulement* has clearly been emphasised by the Court in the *Case of Chahal v the U.K.* and the *Case of Saadi v Italy.*[321]

The use of a fair balance test, which has been done in the *Case of Soering v the U.K.* and the *Case of N v the U.K.* is, in my opinion, a clear example of a balancing of opposed interests contrary to the absolute nature of Article 3. The burden put on the Contracting States in providing health care to aliens is linked to a public interest which constitutes an unacceptable derogation. Consequently, the ECtHR rejected the fair balance test in the *Case of Paposhvili v Belgium* by stating that the obligation at stake was the negative obligation not to expose a person to ill-treatment. Framing the obligation as negative is, as concluded in section 4.3.1, a step closer to the notion of the *non-refoulement* principle. My opinion is however, that the Court's framing of the protection as a negative obligation ignores the obvious consequences that follows the scope of protection of medical *non-refoulement* cases.

In reality, if a person is granted leave to stay due to medical reasons, every Contracting State would probably offer that person adequate medical care. Even if Article 3, through the notion of its negative obligation, does not require that of the Contracting State, it appears obvious that they would do it anyway. This is supported by the intervening Governments in the *Case of Savran v Denmark* since they obviously assume that individuals who cannot

[320] Section 2.2.
[321] Section 2.3.3.

be removed due to medical conditions will be offered medical treatment. Naturally, if the Contracting State systematically would refrain from expulsion but also from providing adequate health care, it would result to the same suffering for the person in question. The cost of providing that medical care is thus a legitimate question for the Contracting State. However, it does not matter how legitimate the question is – taking it into account in the expulsion procedure still results in an unacceptable derogation contrary to the absolute nature of Article 3. Consequently, the rejection of the fair balance test is a step closer towards the absolute nature of Article 3 but may also be a step further away from the practical reality of these cases.

As concluded in section 3.3.3, the Court may have 'solved' the discrepancy between the theoretical and practical protection of medical *non-refoulement* cases by balancing opposed interests in its determination of the threshold of severity, i.e. at the definitional stage. Hence, the Court has created a 'very exceptional' threshold that protects medical *non-refoulement* cases to such a small extent that the consequences that the absolute protection will result in may not lead to too much dissatisfaction on behalf of the Contracting States. However, by determining the threshold of severity through an implicit balancing of opposed interests, the Court erases the distinction between the assessment of qualified rights and the assessment of the relative threshold of severity in absolute rights.

The opinions regarding the implied balancing tests made by the Court in absolute provisions differs. As examined in section 3.3.3, Gerards describes the threshold assessment as a gateway to elements of, *inter alia*, justifications. Furthermore, Battjes argues that the absence of a limitation clause only is a formal feature that necessarily does not hinder an actual limitation of the scope of protection.[322] As a response to Battjes, Smit goes further than just concluding that Article 3 is not really absolute by proposing the Court to amend its reasoning in "problematic cases".[323] Smit refers, *inter alia,* to Mavronicola, who stated that considerations of proportionality and balancing against a public interest in the threshold assessment clearly is against the absolute nature of Article 3.[324] Judge Serghides goes even further in his dissenting opinion in the *Case of Savran v Denmark* as he argues that the 'very exceptional' threshold constitutes a double standard contrary to the principle of equality and non-discrimination since it does not respect the clear wording of Article 3 stating that '*no one*' shall be subject to ill-treatment prohibited by Article 3. An increased threshold for the protection of aliens

[322] Section 3.3.3.
[323] Smet (2013) p. 275.
[324] Mavronicola (2012) p. 757.

within the ECHR may thus, by reference to Mavronicola, run counter to the absolute nature of the provision.[325]

An implicit balancing of opposed interest is, in my opinion, a misinterpretation of the relative threshold that the Court itself created through the *Case of Ireland v the U.K.*. As Palmer has argued, the relativity requirement may have been confused with proportionality considerations.[326] From what has been examined above, the threshold of severity is allowed to be treated as relative and thus subject to an assessment based on the circumstances of the case. The reason to allow a relative threshold of severity is however not to allow implicit justifications. Instead, the reason is to only protect the most severe forms of ill-treatment within Article 3 in order to not trivialize it. It is also a way of maintaining a wide-ranging and dynamic provision that may change its protection due to present-day conditions.

The misunderstanding of the relative threshold set in the Ireland case has been described by Addo and Grief, who argue that the Ireland case allows the Court to determine the threshold in its context.[327] However, the circumstances of the context should only be connected to the individual at stake and the situation surrounding that individual.[328] Consequently, the justifiability – or relativity – only applies to "individual facts in the particular context in which they occur and not to the determination of a violation of Article 3 as such".[329] Once again, I am of the opinion that the assessment of the threshold of severity should focus on the nature of the harm in order to follow the standard set in the Ireland case, but also in the *Case of Pretty v the U.K.*.

The Saadi case and Chahal case have clearly shown that the ECtHR has promoted the absolute nature of Article 3 even in cases of *non-refoulement*. Even the *Case of Soering v the U.K.* supported this when the Court recognised that the principle of *non-refoulement* was "inherent in the general terms of Article 3 of the ECHR".[330] Hence, it is not the notion of *non-refoulement* in itself that is behind the Court's decision to apply a 'very exceptional' threshold in medical *non-refoulement* cases. Instead, it seems that the Court has ended up in a corner where it wishes to protect a certain kind of case,

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[325] *Savran v Denmark* [GC], Partly Concurring and Partly Dissenting Opinion of Judge Serghides, para. 48 (a); Reference to N Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs*, 1st ed, (2021, Hart Publishing) p. 182.
[326] S Palmers article 'A Wrong Turning: Article 3 ECHR and Proportionality' (2006) 65.2 *Cambridge Law Journal* 438–452, p. 439.
[327] M.K Addo and N Griefs article 'Does Article 3 of the European Convention on Human Rights enshrine absolute rights?' (1998) 9 European Journal of International Law, 510-524.
[328] Section 2.2.
[329] Addo et al. (1998) p. 522.
[330] Section 2.3.2.

medical *non-refoulement* cases, but is not able to fit these cases in the general jurisprudence of Article 3.

In the *Case of N v the U.K.*, the Court implicitly confirmed that if a person would stay due to medical *non-refoulement*, they would also be entitled to sufficient health care in Europe. On the one hand, that is a realistic solution since a deprivation of sufficient medical care for the individual at stake would create the same amount of suffering that Article 3 intended to protect against. However, balancing how it would affect the national health care system is an unacceptable derogation of the absolute nature of Article 3. Hence, the ECtHR tried, in the *Case of Paposhvili v Belgium,* to mend such an unacceptable derogation by framing medical *non-refoulement* cases as only concerning a negative obligation. The negative obligation is closer to the notion of *non-refoulement* and constitutes a statement by the Court where it clearly disagrees with the reasoning made in the N case. In my opinion, this is a way of implicitly saying that if the Contracting State would not give the individual at stake the medical care that he or she needs, which once again would result in the same amount of suffering, it would not be regarded as ill-treatment according to Article 3. It would also be contrary to the notion of practical and effective Convention rights rather than theoretical and illusory.

As has been examined in section 3.3.3, an opposed interest that may have been implicitly balanced in the Paposhvili case is the notion of State sovereignty. The ECtHR contentiously refers to every State's right to control the entry, residence and expulsion of aliens without further explaining what that means in the specific case. In this regard, it is obvious that State sovereignty is an opposed interest which is not allowed to be balanced against the absolute nature of Article 3. Furthermore, I believe that the Court has misunderstood and misinterpreted the general jurisprudence of Article 3 in two senses.

Firstly, the Court did not allow a balancing of interests in the *Case of Vilvarajah and Others v the U.K.*. On the one hand, it confirmed that every Contracting State is allowed to control the entry, residence and expulsion of aliens. However, the precedent of the Vilvarajah case is that the *non-refoulement* principle *weighs heavier* than State sovereignty.[331] Secondly, the Court has given the responsibility to every Contracting State to be aware of this standard. Every State is thus allowed control expulsions *as long as* the expulsion would not amount to treatment contrary to Article 3.[332] Consequently, State sovereignty should never be balanced against a potential expulsion of an alien.

[331] Section 3.3.3.
[332] Section 3.3.3.

In conclusion, the ECtHR has created an unavoidable issue due to the fact that the protection of medical *non-refoulement* cases under Article 3 in theory only protects the *act of removal* but in reality, engages health care resources in the Contracting States. Although not entirely clear, it seems that this unavoidable consequence has created the 'very exceptional' threshold applied in medical *non-refoulement* cases. Due to the absolute nature of Article 3, the consequences of protecting medical *non-refoulement* cases should never affect the threshold of severity. In order to retain the protection of Article 3 *absolute,* questions of opposed interests are not allowed to be balanced by the Court. Regarding State sovereignty, the Court has recognised in its jurisprudence the right of every State to control the expulsions of aliens. However, the *non-refoulement* principle weighs heavier than the right to State sovereignty and consequently, it may never be balanced in the assessment of a potential violation of the provision.

On the one hand, the notion of a *relative* threshold of severity may create distinctions in the level of severity depending on the circumstances of the specific case. However, these circumstances should be guided by the *Case of Ireland v U.K.,* meaning that the circumstances only should be connected to the individual at stake and the situation surrounding that individual. Consequently, a threshold of severity created through an implicit balancing of opposed interest is inconsistent with the absolute nature of the provision and the general jurisprudence of Article 3.

5 Conclusion

The main research question, whether the Court has acted within the principles and methods governing the interpretation of the ECHR in its legal development of the protection for seriously ill migrants under Article 3, departs from two sub-questions. Firstly, if seriously ill migrants should be protected according to the principles and methods of interpretation governing the Court's adjudication and secondly, if the Court's motivation of applying a higher threshold, hence treating medical *non-refoulement* cases differently than other *non-refoulement* cases, is consistent with the general jurisprudence of Article 3.

The first question does not have a clear answer. Instead, it is possible to argue both against and in favour as to whether seriously ill migrants should be protected by the scope of protection of Article 3. The answer depends on the method or principle of interpretation used. At first, the examination aimed at determining the *ordinary meaning* of Article 3 in the light of the *object* and *purpose* of the provision. The examination finds that the protection of medical *non-refoulement* cases cannot be derived from the *clear wording* of Article 3. By reading the text, one may not be able to draw the conclusion that, inherent in Article 3 is a prohibition to remove a person to a country where that person might not receive sufficient health care.

The examination of the original purpose of Article 3 provides us with the information that Article 3 was intended to protect against the most severe forms of ill-treatment and that the Court has been given a mandate of determining the scope of protection through the use of a threshold of severity. The initial purpose of Article 3 was the protection of severe ill-treatment by public authorities with the intention of preventing Europe from becoming a place of tyranny and oppression. Comparing the historical background of Article 3 with the scope of protection of medical *non-refoulement* cases clearly indicates a big step taken by the Court from the original purpose of Article 3.

Yet, the distinction between the original purpose of Article 3 and today's protection of medical *non-refoulement* cases may not necessarily speak in favour of the Court acting *beyond* the ordinary meaning of Article 3. Instead, the Court is allowed to fit a wide range of ill-treatments within the scope of protection of Article 3 as long as it does not 'trivialize' the provision by protecting more than just the most severe forms of ill-treatment. As regards medical *non-refoulement* cases, the scope of protection is built upon several

steps taken by the Court in its jurisprudence. Consequently, it is hard to pinpoint at what time the Court might have acted beyond the original purpose of Article 3. However, the use of a threshold may be seen as a 'counterweight' against the Court's mandate of developing the scope of protection of Article 3 *too far*, as it guarantees that the provision only protects severe forms of ill-treatment. The ordinary meaning of Article 3 may thus be 'the protection against *severe* ill-treatment'. In my opinion, medical *non-refoulement* cases prohibits an act of ill-treatment that is different from the Court's general jurisprudence. However, due to the 'very exceptional' threshold, it must be considered as *severe* ill-treatment in accordance with the ordinary meaning of Article 3.

The conclusion made in the examination of the ordinary meaning of Article 3 in the light of its object and purpose is similar to the conclusion made by examining medical *non-refoulement* cases in the light of its preparatory work (*travaux préparatoires*). The intention of the drafters was only to protect the most severe forms of ill-treatment. Furthermore, the drafters indicated that the ill-treatment they had in mind was acts caused by State actors, such as the police, and ill-treatment due to conditions in detention centres. However, the drafters also expressed that Article 3 should be wide-ranging and dynamic and subject to change due to present-day conditions. Consequently, they did not precise what acts or omissions that could be prohibited by Article 3. Hence, the *travaux préparatoires* may support an extended scope of protection of Article 3 that goes beyond the Convention text.

The ordinary meaning of Article 3 has also been examined in its *context*. As to the matter of medical *non-refoulement* cases, it is questionable if the 'Paposhvili test', created by the Court in the *Case of Paposhvili v Belgium* and applied in the *Case of Savran v Denmark,* is consistent with the ordinary meaning of Article 3 read in the context of *Article 1.* The Paposhvili test requires a Contracting State, as the last step in its risk assessment, to obtain *individual assurances* from the receiving State that there will be *available* and *accessible* medical treatment upon arrival. The examination finds that seeking *individual* assurances will inevitable engage the receiving State, which is most likely a non-Contracting State. Consequently, it would be contrary to the ordinary meaning of Article 1 as it would impose Convention standards on a non-Contracting States. Furthermore, the examination recognises an uncertainty in how the Contracting States should test the reliability of such an assurance in order to maintain the standards of Article 3. In conclusion, the examination finds that the Court has acted beyond the ordinary meaning of Article 3 read in the context of Article 1.

By using a *meta-teleological interpretation* of Article 3, the examination aimed at concluding if seriously ill migrants should be protected based on the *general principles* and *underlying values* of the ECHR. The examination finds that the Court has supported the scope of protection of medical *non-refoulement* cases by emphasising the notion of Article 3 as a fundamental value in a democratic society. The examination of the scope of protection of medical *non-refoulement* cases through the notion of *democracy* speaks in favour of protecting seriously ill migrants, mainly due to the notion of the *non-refoulement* principle triggered in these cases. Furthermore, by protecting medical *non-refoulement* cases the Court does not undermine the absolute nature of the provision.

Finally, the question as to whether seriously ill migrants should be protected by the scope of protection of Article 3 was assessed through an *evolutive interpretation.* The evolutive interpretation supports a new meaning or an extended protection of a Convention right that might go beyond the original object and purpose of a specific provision. However, a new meaning or an extended protection needs to be supported by a *European consensus.* Even if the Court is allowed to treat Article 3 as a wide-ranging and dynamic provision, it seems that the scope of protection of medical *non-refoulement* cases lacks the support of a European consensus. Instead, national legislation, EU law and opinions expressed by intervening Governments in the ECtHR speaks *against* an extended and more right-based approach of medical *non-refoulement* cases as developed by the Court in the Paposhvili case.

The second question whether the 'very exceptional' threshold is consistent with the general jurisprudence of Article 3 does, on the other hand, have a clear answer. The examination shows that using the *source of the harm* as a reason to apply a higher threshold of severity is inconsistent with the notion of the *non-refoulement* principle. Furthermore, a *balancing of opposed interests* is inconsistent with the absolute nature of Article 3. These inconsistencies are based on the distinction between the theoretical protection of Article 3 and the practical reality of medical *non-refoulement* cases. In practice, medical *non-refoulement* cases differs from 'regular' *non-refoulement* cases as the harm emanates from a *lack of* positive measures rather than *the existence* of a State authority that causes ill-treatment. Furthermore, they inevitable engages health care resources in the Contracting States. Taking the practical effect into consideration would however be contrary to the absolute nature of Article 3 and the *non-refoulement* principle.

In order to be consistent with the general jurisprudence of Article 3, the Court should determine the threshold of severity by using the standard set in the *Case of Ireland v the U.K.*, hence only focusing on the *nature of the harm.*

On the one hand, the Court is allowed to shift the entry level threshold based on the circumstances of the individual case. The impossibility of obtaining responsibility of the receiving State and the effects on the health care system in the Contracting State are thus circumstances that are not allowed to affect the threshold of severity according to the Ireland case.

It is my opinion that the ECtHR is making a dangerous move in medical *non-refoulement* cases by offering it a certain degree of protection through its inclusion in Article 3 without being able to fully ensure the absolute nature of its protection. The 'very exceptional' threshold is based on a misinterpretation of the absolute nature of Article 3 and the notion of the *non-refoulement* principle. The ECtHR's upholding of the 'very exceptional' threshold is, according to me, a way of giving seriously ill migrants a certain protection without disrupting a bigger question – whether the legal development of the protection of medical *non-refoulement* cases is supported by the Contracting States of today.

In conclusion, the examination shows that the methods and principles of interpretation governing the Court's adjudication may speak both *in favour* and *against* the question as to whether seriously ill migrants should be protected by the scope of protection of Article 3. On the one hand, the Court is allowed to treat Article 3 as a wide-ranging and dynamic provision and the legal development of medical *non-refoulement* cases clearly strengthens the protection of seriously ill migrants under Article 3. However, if the legal development of medical *non-refoulement* cases lacks European consensus, the Court might risk damaging the Contracting States' trust of the entire Convention. Notwithstanding, it is clear to say that the Court's motivation of applying a *higher* threshold of severity is *inconsistent* with the general jurisprudence of Article 3, as it undermines the notion of the *non-refoulement* principle and the absolute nature of the provision. Consequently, medical *non-refoulement* cases should not be treated differently than 'regular' *non-refoulement* cases protected within Article 3.

To summaries, the ECtHR seems to have acted within *some* of the principles and methods that governs the Court's adjudication in determining the scope of protection of medical *non-refoulement* cases. However, the application of a higher threshold of severity is *inconsistent* with the Court's general jurisprudence of Article 3. Consequently, an overall assessment of the principles and methods of interpretation used, as well as the general jurisprudence of Article 3, reaches the conclusion that the ECtHR has acted *beyond* the principles and methods governing the interpretation of the ECHR in its legal development of the protection for seriously ill migrants under Article 3.

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