ARTICLES

In Limbo: Divergent Conceptualisations of Ill-treatment by European Courts and the Creation of Non-removable Migrants

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Abstract: Arts 2(f) and 15(b) of the EU Qualification Directive confer subsidiary protection to those third-country nationals in respect of whom there are substantial grounds to believe that, if expelled, would face a real risk of suffering "torture or inhuman or degrading treatment or punishment". These provisions mirror the wording and risk-assessment criteria of art. 3 of the European Convention on Human Rights. This *Article* explores the possibility that protection from expulsion under art. 3 of the Convention is not followed by the award of subsidiary protection under EU law, leading to limbo-like situations of non-removability. By analysing the text of the Directive and the jurisprudence of both the Court of Justice of the EU and the European Court of Human Rights, and putting a particular emphasis on the case of *MP* (C-353/16 ECLI:EU:C:2018:276), this *Article* shows an asymmetric dialogue between both courts in this field. By ruling that, in medical cases, applicants will need to be intentionally deprived of treatment in the country of origin in order to access subsidiary protection, the Court of Justice attaches a narrower scope to the very same concept and leaves the door open to situations of non-removability. This *Article* contends that the Directive allows for a different interpretation that captures the most recent developments of the principle of *non-refoulement*.

Keywords: expulsion – *non-refoulement* – subsidiary protection – inhuman or degrading treatment – intentional deprivation – non-removability.

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I. Introduction

By non-removable migrants, this *Article* refers to those third-country nationals (TCNs) who are in an irregular situation but that, due to the existence of diverse "obstacles", cannot be removed from the host State. Non-removability thus derives from the simultaneous presence of an "illegal stay",[1] and an obstacle precluding the removal of the person concerned.

This issue is only marginally dealt with by the Directive 2008/115 (Return Directive), despite the fact that its recital 12 reads that "[t]he situation of third-country nationals who are staying illegally but who cannot yet be removed should be addressed".[2] Whereas the general non-binding clause of art. 6(4) notes that Member States *may* grant a residence permit at any time due to "compassionate, humanitarian or other reasons", the Directive does not include an obligation to do so if return proves to be impossible in practice.

The impossibility of returning irregular migrants can be due to human rights and humanitarian considerations, practical circumstances and technical reasons, or policy choices not to return.[3] This *Article* examines one of the so-called humanitarian or legal obstacles to removal, namely the legal obligation not to remove a person under European Human Rights Law. In particular, it analyses the situation of those TCNs who hold a human rights-based claim to remain in the host State under art. 3 of the European Convention on Human Rights (ECHR), but who are not recognised as refugees or beneficiaries of subsidiary protection under the Directive 2011/95/EU (hereinafter Qualification Directive or simply QD).[4]

Section II begins with an overview of the European Court of Human Rights' (ECtHR) case law on art. 3 of the Convention as a *non-refoulement* obligation. It does so by emphasising the inclusion of purely situational cases in applications concerning ill persons, focusing on the Grand Chamber's ruling of *Paposhvili* in particular.[5]

Section III then compares art. 3 ECHR with the protection afforded under art. 15 of the Qualification Directive, putting a particular emphasis on art. 15(b) (whose wording and risk assessment criteria are based on art. 3 of the Convention), and discusses the arguments against a coordinated interpretation of both provisions. Section IV reflects on

[1] This is defined at the EU level in art. 3(2) of the Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying Third-Country Nationals (TCN), as the presence of a TCN who "does not fulfil, or no longer fulfils the conditions of [...] entry, stay or residence".

[2] Recital 12 of the Directive 2008/115 cit.

[3] European Agency for Fundamental Rights, Fundamental Rights of Migrants in an Irregular Situation in the European Union, fra.europa.eu.

[4] 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.

[5] ECtHR *Paposhvili v Belgium* App n. 41738/10 [13 December 2016].

the consequences that the current non-harmonised approach has in terms of non-removability in light of the *MP v Secretary of State for the Home Department* case[6] (hereinafter *MP*) and, more generally, in light of the interaction of the Court of Justice of the EU (CJEU) with the Convention and the jurisprudence of the ECtHR. It is finally argued that the Directive allows for a different interpretation of subsidiary protection that captures the latest developments of the principle of *non-refoulement*.

II. Art. 3 ECHR as an obstacle to deportation

II.1. *Soering* and beyond: absolute protection under the ECHR

The principle of *non-refoulement*, first envisaged in the 1951 Convention Relating to the Status of Refugees,[7] has been expanded by different instruments under International Human Rights Law. In the European context, the ECtHR has consistently interpreted art. 3 of the Convention as a non-removal clause since the seminal case of *Soering* in 1989.[8] Despite the fact that art. 3 of the Convention simply states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment" and does not make explicit reference to the prohibition of *refoulement*, the Court ruled that the extradition of the applicant to face the death row in the United States would be "contrary to the spirit and intendment of the Article". As a result, art. 3 included an obligation not to extradite if there were "substantial grounds" to believe that there was a "real risk" that treatment proscribed by art. 3 would have followed upon the removal of the applicant.[9]

Since *Soering*, the Court has maintained that the principles and reasoning there articulated not only apply to cases of extradition but to any form of expulsion,[10] consistently highlighting the absolute and non-derogable nature of States' *non-refoulement* obligations. It is because of this, that the Court has offered protection under its non-removal case law to former refugees whose legal residence was withdrawn due to criminal convictions,[11] or international criminals accused of terrorist acts, irrespective of the applicant's conduct and the nature of the offence committed,[12] among others.

It is also due to the absolute nature of *non-refoulement* that the Court decided to abandon the idea that State actors must be the source of the alleged risk in *H.L.R. v France* and

[6] Case C-353/16 *MP* ECLI:EU:C:2018:276.
[7] General Assembly, Convention Relating to the Status of Refugees [1951] (Refugee Convention).
[8] ECtHR *Soering v the United Kingdom* App n. 14038/88 [7 July 1989].
[9] *Ibid*. para. 91.
[10] ECtHR *Cruz Varas and Others v Sweden* App n. 15576/89 [20 March 1991] paras 69-70.
[11] ECtHR *Ahmed v Austria* App n. 25964/94 [17 December 1996].
[12] ECtHR *Saadi v Italy* App n. 37201/06 [28 February 2008].

subsequent jurisprudence.[13] In these cases, the Court positioned itself with the so-called "protection view" (as opposed to the "accountability view"), according to which the accountability of a State is not a necessary condition to grant international protection.[14]

As regards the substantive conceptualisation of torture or inhuman or degrading treatment or punishment, the Court has extended its scope to the death penalty, situations of indiscriminate violence and medical cases. Concerning the death penalty, the Court made explicit in *Al-Saadoon* that the transfer of the applicants to Iraqi authorities to face a *real risk* of being condemned to death penalty and executed had violated their rights under art. 3 of the Convention.[15] The Court has also observed a violation of art. 3 in the return of TCNs to situations of indiscriminate violence in the country of origin. In *NA v the United Kingdom* (hereinafter *NA*), the Court stressed that it had never excluded the possibility that a situation of generalised violence in a country of destination reached such a level of intensity as to entail that any removal to that country or region would necessarily be in breach of art. 3 of the Convention,[16] but it did not provide any further guidance and it finally decided the case based on a series of individual risk factors. It was in *Sufi and Elmi* that the Court found that the situation of indiscriminate violence in Somalia was of such intensity that any person being returned to Mogadishu would be at risk of suffering inhuman or degrading treatment solely on the basis of their presence there.[17]

II.2. From inflicted to situational risks: cases of illness and *non-refoulement*

In addition to the case law described above, the Court has ruled that, exceptionally, art. 3 can prevent removal in cases of illness. Already in 1997, the Court stressed in *D v the United Kingdom* (hereinafter *D*) that it was not precluded from examining a claim under art. 3 in medical cases where the risk stemmed from factors that did not directly or indirectly engage the responsibility of State (or non-State) actors in the country of origin.[18] However, the Court established a very restrictive approach, to the extent that some authors questioned

[13] ECtHR *H.L.R. v France* App n. 24573/94 [29 April 1997]. In the same line, see: ECtHR *Salah Sheekh v the Netherlands* App n. 1948/04 [11 January 2007] para. 163; ECtHR *Sufi and Elmi v the United Kingdom* App n. 8319/07 [28 June 2011] para. 213.

[14] B Vermeulen, T Spijkerboer, K Zwaan and R Fernhout, 'Persecution by Third Parties' (1998) Nijmegen University Centre for Migration Law 10-17; C Phuong, 'Persecution by Third Parties and European Harmonization of Asylum Policies' (2001) Georgetown Immigration Law Journal 81.

[15] ECtHR *Al-Saadoon and Mufdhi v the United Kingdom* App n. 61498/08 [2 March 2010] para. 144. It must be recalled that in *Soering* it was not the death penalty in itself, but the "death-row phenomenon" that amounted to proscribed ill-treatment.

[16] ECtHR *NA v the United Kingdom* App n. 25904/07 [17 July 2008] para. 115.

[17] *Sufi and Elmi v the United Kingdom* cit.

[18] ECtHR *D v the United Kingdom* App n. 30240/96 [2 May 1997] para. 115.

the absolute nature of the provision in this field.[19] In *N v the United Kingdom* (hereinafter *N*) the Court, arguably concerned about the budgetary burden that an expansive interpretation would place upon States,[20] and probably reluctant to offer generous protection in cases involving purely situational risks with no specific actors involved in the causing of the harm,[21] denied protection to the applicant and reiterated that art. 3 of the Convention only precludes removal in cases of illness under very exceptional circumstances. Although the applicant was suffering from an advanced state of AIDS, which decreased her life expectancy from decades to less than a year if returned, the Court determined that the applicant was "stable" and "fit to travel" and authorised her expulsion to Uganda, where she died a few months later.[22] Despite the Court's claim that medical cases involving situational risks were included under the umbrella of the Convention due to the absolute nature of *non-refoulement*, these were *de facto* excluded, tacitly concurring with the theory that those risks who do not stem from the acts of States or non-State actors are not worthy of protection.[23] In practice, this meant that every case that had sought to rely on the virtually impossible to reach threshold set in *N* for cases of illness was rejected by the Court.[24]

The case law of the Court changed drastically in 2016 under the Grand Chamber judgment of *Paposhvili*, where the threshold of severity was significantly lowered to a wider array of less exceptional circumstances. Under *Paposhvili*, the removal of a seriously ill person will be contrary to art. 3 if there are substantial grounds to believe that the applicant, "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 or her state of health resulting in intense suffering or to a significant reduction in life expectancy".[25] As a result, if States find that this lowered (yet still high) standard of ill-treatment would be reached upon removal, they will now be obliged not to remove the TCN concerned even in the absence of an imminent risk of death.

Paposhvili can thus be seen as the logical consequence of the Court's "protection view", which now finally recognises the absolute nature of *non-refoulement* regardless of the source of ill-treatment. The approach of the Court under *N* in which ill migrants were sent to perhaps not immediate, but certain death, was surely difficult to reconcile with the Court's commitment to absolute and non-derogable protection from expulsion. The

[19] C Bauloz, 'Foreigners: Wanted Dead or Alive? Medical Cases Before European Courts and the Need for an Integrated Approach to Non-Refoulement' (2016) European Journal of Migration and Law 409.

[20] ECtHR *N v the United Kingdom* App n. 26565/05 [27 May 2008] para. 44.

[21] C Bauloz, 'Foreigners' cit. 414.

[22] *N v the United Kingdom* cit. paras 12, 17, 47.

[23] K Greenman, 'A Castle Build on Sand? Article 3 ECHR and the Source of Risk in *Non-Refoulement* Obligations in International Law' (2015) IJRL 266.

[24] ECtHR *Yoh-Ekale Mwanje v Belgium* App n. 10486/10 [20 December 2011]; *Paposhvili v Belgium* cit.

[25] *Paposhvili v Belgium* cit. para. 183.

de facto non-application of this general principle in cases of illness is thus to be considered as an anomaly which was finally addressed by the Court in *Pasposhvili*.

II.3. What next? *Non-refoulement* and non-removability

The ECtHR has consistently noted, firstly, that the obligations enshrined in the Convention do not (quite evidently) contain a right to asylum,[26] and secondly, that the protection against expulsion does not provide the necessary legal basis for any type of residence permit. This could be observed in *Ahmed v Austria*, where the Court protected the applicant against expulsion but noted that the applicant's status as a refugee (withdrawn due to criminal convictions) fell beyond its jurisdiction.[27] Moreover, in *SJ* the Court stressed that the fact that a person cannot be expelled does not mean that he or she can claim entitlement to medical, social or other forms of assistance provided by the expelling State.[28] This has also been made clear by the Court in numerous cases concerning so-called "undesirable and unreturnable" migrants, where it has consistently declared their claims to regularisation on the basis of art. 3 and art. 8 of the Convention inadmissible.[29]

There is, in this context, a gap between refugee protection as defined in the Refugee Convention, which is subject to derogations and requires the persecution of the applicant to be based on Convention grounds for refugee law to apply,[30] and the situations covered under art. 3 ECHR, which merely require a *real risk* of torture or inhuman or degrading treatment upon removal as interpreted by the Court. This unbalanced interaction between different supranational systems of norms effectively addresses the human rights concerns in the country of origin while giving rise to a new set of challenges in the host country as a result of migrants' prolonged irregular statuses,[31] to the extent that a mi-

[26] ECtHR *M.S.S. v Belgium and Greece* App n. 30696/09 [21 January 2011] para. 38. See also *Ahmed v Austria* cit. para. 38.

[27] *Ahmed v Austria* cit. paras 35-38.

[28] ECtHR *SJ v Belgium* App n. 70055/10 [19 March 2015].

[29] By "undesirable and unreturnable" this *Article* refers to those TCNs who have committed, or are suspected of having committed particularly serious crimes (normally in connection with art. 1(f) of the Refugee Convention), but who cannot be removed because their deportation would be contrary to art. 3 ECHR. See: DJ Cantor, JV Wijk, S Singer and MP Bolhuis, 'The Emperor's New Clothing: National Responses to "Undesirable and Unreturnable" Aliens under Asylum and Immigration Law' (2017) Refugee Survey Quarterly 1. For an extensive analysis of the Court's jurisprudence in this field, see: MB Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015) 442-481.

[30] These are race, religion, nationality, membership of a particular social group or political opinion (art. 1(a)(2) of the Refugee Convention).

[31] For further insight on how the vulnerability deriving from irregularity can itself amount to inhuman or degrading treatment, read: D Acosta, 'The Charter, Detention and Possible Regularization of Migrants in an Irregular Situation under the Returns Directive: *Mahdi*' (2015) CMLRev 1361.

grant's state of destitution in the host country can in itself amount to inhuman or degrading treatment according to the ECtHR.[32]

It is precisely due to the lack of capacity of the Geneva Convention to provide a comprehensive and up-to-date response to contemporary patterns of forced migration, that this gap was filled (as this *Article* argues, only partially) by EU law through the Qualification Directive. Under this Directive, subsidiary protection aims at complementing the narrow refugee definition by granting asylum not only to refugees, but also to other persons "genuinely in need of international protection".[33]

III. The scope of subsidiary protection under the Directive 2011/95

There is, from the EU legislator, a declared intention to complement and add to the Refugee Convention.[34] According to art. 2(f) of the Qualification Directive, a person will be eligible for subsidiary protection if there are *substantial grounds* to believe that, if returned to the country of origin, he or she would face a *real risk* of suffering "serious harm". Art. 15 defines serious harm as consisting of: "(a) the death penalty or execution; or: (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or: (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict".[35]

Therefore, in arts 2(f) and 15 the Directive adopts, for subsidiary protection, Strasbourg's risk assessment criteria for non-removal cases, namely the existence of; *substantial grounds* to believe that there is a *real risk* of suffering *serious harm* in the country of origin upon removal. The criteria as to what a serious harm is also correspond, in essence, to the jurisprudence of the ECtHR, which now adopts a wide concept of inhuman or degrading treatment that not only includes art. 15(b) of the Directive, but also the death penalty (*Al-Saadoon*) and situations of generalised violence in the country of origin (*Sufi and Elmi*).

The Qualification Directive was praised by the literature as the first supranational instrument covering international protection beyond the Refugee Convention,[36] as well as a remarkable effort to afford status to many migrants in need of international protection which would otherwise become non-removable.[37] Indeed, the Directive, although less ambitious than the original proposal,[38] still provided a human rights-refugee law nexus. In this

[32] Although the case did not affect an irregular migrant buy an asylum seeker, see reasoning in *M.S.S. v Belgium and Greece* cit.

[33] Recital 12 of the Directive 2011/95 cit.

[34] *Ibid*. recital 33.

[35] *Ibid*. art. 15.

[36] H Storey, 'EU Refugee Qualification Directive: A Brave New World?' (2008) IJRL 1.

[37] C Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2005) 139.

[38] G Noll, 'Fixed Definitions or Framework Legislation? The Delimitation of Subsidiary Protection *Ratione Personae*' (2002) UNHCR Working Papers 55.

line, recital 34 enunciates that the criteria to determine an applicant's eligibility for subsidiary protection should be drawn from international obligations under human rights instruments.[39] More specifically, recital 48 suggests that the implementation of the Directive should be evaluated regularly considering the evolution of States' obligations regarding *non-refoulement*. This, together with the fact that the Directive borrowed the notion of *serious harm* and the risk-assessment criteria from the ECHR, suggests that the legislator aimed at a coherent interpretation of both provisions, particularly as to what amounts to a real risk of suffering torture or inhuman or degrading treatment, in order to fill the gap of those potentially left in a legal limbo under Strasbourg's non-removal case law. Nevertheless, the jurisprudence of the Court of Justice shows that it may not always be the case (see *infra* sections III.2 and IV).

Before the adoption of the Directive, non-removal under art. 3 ECHR did not guarantee any legal status, but it would merely classify the person, in the absence of domestic forms of protection,[40] as irregular and non-removable. Under the current framework, non-removability will depend on whether art. 15 of the Directive has a wider, narrower or equivalent scope than that of Strasbourg's jurisprudence on art. 3, as analysed above. Non-removability may thus derive (among other reasons)[41] from the interaction of EU asylum law and European Human Rights if the scope of application of subsidiary protection becomes narrower than that of art. 3 ECHR.

I hereby argue that, even if arts 15(a) and 15(c) can potentially be interpreted differently to art. 3 ECHR due to the principle of autonomy of EU law, it is the difference between Luxembourg's and Strasbourg's understandings as to what amounts to a real risk of suffering torture or inhuman or degrading treatment (art. 15(b)) that endangers a harmonised interpretation of EU asylum law and European Human Rights law the most.

III.1. Subsidiary protection under arts 15(a) and 15(c)

The situations covered by art. 15(a) and (c) QD, which provide subsidiary protection in cases of death penalty and situations of indiscriminate violence respectively, are also included under art. 3 ECHR following *Al-Saadoon* and *Sufi and Elmi* (see *supra* section II.1). The inclusion of letters (a) and (c) originally aimed to go beyond ECHR obligations, as they

[39] Recital 34 of the Directive 2011/95 cit.

[40] For an overview of domestic forms of complementary protection, see: European Migration Network, *The Different National Practices Concerning Granting of non-EU Harmonised Protection Statuses* www.refworld.org.

[41] This *Article* analyses the non-removability gap deriving from different interpretations of art. 15(b) QD and art. 3 ECHR, but it leaves aside the gap resulting from the application of the exclusion grounds found in art. 1(f) of the Refugee Convention and art. 17 of the Directive for persons who are non-removable. Neither does it analyse the non-removability gap which may derive from other human rights safeguards against deportation, most notably the right to respect for one's family and private life under art. 8 ECHR (art. 7 of the Charter).

were first introduced by the 2004 Qualification Directive, when Strasbourg's jurisprudence did not cover the death penalty and situations of indiscriminate violence, *per se*, within the scope of art. 3 ECHR. The maintenance of these provisions in the Directive's 2011 recast instead of their subsumption within art. 15(b) denotes the will of the legislator to stress the autonomy of EU law by not making it permeable to the evolutionary interpretation coming from Strasbourg, but casts doubts on their added value today.

In the case of art. 15(a), even if there is no CJEU jurisprudence to date, the fact that States are compelled to grant subsidiary protection to those facing a risk of being subjected to death penalty upon removal does not seem to leave much scope for divergent interpretations stemming from Luxembourg and Strasbourg as to what the death penalty actually means.

As regards art. 15(c), the CJEU ruled on the Qualification Directive for the first time in *Elgafaji*.[42] The Court was asked whether art. 15(c) should be interpreted as offering equal or wider protection than art. 3 ECHR and, if protection went beyond the Convention, what were the criteria determining its specific scope.[43] Firstly, the Court reaffirmed the autonomy of EU law by arguing that the content of the provision in question is different to that of art. 3 ECHR and that its interpretation must be carried out independently. In doing so, the Court did not actively engage with the ECHR to formulate its view, beyond noting that "it is [...] Article 15(b) of the Directive which corresponds, in essence, to Article 3 ECHR".[44] Whether this assertion is coherent with the Court's subsequent jurisprudence is addressed at a later stage of this *Article*.

Secondly, the Court argued that art. 15(c) covers a more general risk of harm than art. 15(a) and (b), and thus that a lesser degree of individualisation needs to be shown by the applicants.[45] Where no individualised risk is shown, the CJEU did not rule out the capacity of a situation of indiscriminate violence *per se* to trigger subsidiary protection, but it argued that the more the applicants are able to show that they are individually affected by the threat, the lower the level of indiscriminate violence it shall be required and vice versa.[46] This approach, known as the "sliding scale" test, sought to reconcile the *prima facie* irreconcilable tension between indiscriminate violence and the existence of an individualised threat which is by definition required in asylum cases.[47]

[42] For an in-depth analysis of the case, see: R Errera, 'The CJEU and Subsidiary Protection: Reflections on *Elgafaji* – and After' (2011) IJRL 93.

[43] Case C-465/07 *Elgafaji* ECLI:EU:C:2009:94 para. 26.

[44] *Ibid*. para. 28.

[45] *Ibid*. para. 33.

[46] *Ibid*. para. 39.

[47] E Tsourdi, 'What Protection for Persons Fleeing Indiscriminate Violence? The Impact of the European Courts on the EU Subsidiary Protection Regime' in D Cantor and J Durrieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff 2014) 277.

It was only after *Elgafaji* that the ECtHR afforded equivalent protection against expulsion in *Sufi and Elmi*. After conducting a thorough analysis of art. 15(c) QD,[48] the Strasbourg Court stated that, even though it was a common assumption that the Directive offered greater protection than the Convention in situations of indiscriminate violence, it was not persuaded that art. 3 of the Convention did not offer comparable protection to that afforded by the Directive.[49]

As it occurred with art. 15(a), we find again a situation in which EU asylum law once envisaged a greater degree of protection, but the ECtHR has willingly caught up, in this case explicitly incorporating references to EU law into its non-removal case law. Although the added value of the art. 15(c) (and art. 15(a)) is now unclear,[50] the emergence of situations of non-removability beyond those resulting from the exclusion grounds of art. 17 of the Directive (which fall beyond the scope of this *Article*) does not seem likely in the near future.

III.2. Subsidiary protection under art. 15(b)

Despite the fact that both the death penalty and situations of indiscriminate violence are now included under art. 3 jurisprudence, it is art. 15(b) that incorporates the clearest expression of Strasbourg's jurisprudence on *non-refoulement*. According to art. 15(b), *serious harm* consists of "torture or inhuman or degrading treatment or punishment of an applicant *in the country of origin*" (emphasis added). However, the text of the Directive becomes ambiguous in at least two of its provisions, namely art. 15(b) itself and art. 6. The wording of these articles arguably endangers the reconciliation between subsidiary protection and *non-refoulement* and can partially shed light on the restrictive understanding of subsidiary protection provided by the Court of Justice in *M'Bodj* and *MP*, according to which the Directive does not necessarily grant subsidiary protection to those protected from expulsion under art. 3 of the Convention.

a) Torture or inhuman or degrading treatment or punishment in the country of origin.

In the Commission's proposal for a Qualification Directive, art. 15(a) (now art. 15(b)), defined *serious harm* as "torture or inhuman or degrading treatment or punishment",[51]

[48] *Sufi and Elmi v the United Kingdom* cit. paras 220-226. There is, in the judgment, a full sub-section of 3 pages entitled "The relationship between Article 3 of the Convention and article 15(c) of the Qualification Directive" where the Strasbourg Court explains in detail the relationship between both provisions.

[49] *Ibid*. para. 226.

[50] E Tsourdi, 'What Protection for Persons Fleeing Indiscriminate Violence?' cit. 279. The author wonders: "Is it still the case that Article 15(b) of the Directive cannot offer this kind of protection that the CJEU in *Elgafaji* has read into Article 15(c)?".

[51] Commission Proposal COM(2001) 510 final 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, art. 15(a).

mirroring the wording of art. 3. The final version slightly departed from it and was reworded in order to include the addition "in the country of origin", casting doubts upon its scope of application.

According to McAdam, the words "in the country of origin" might indicate the intention of the legislator to obviate claims of asylum seekers which would face ill-treatment in a third country to which return may be considered.[52] Such an interpretation would mean that those TCNs sent back to a third-country in which they would suffer treatment contrary to art. 3 would still be protected from *refoulement* under the ECHR, but would fall outside of the scope of the Directive.

Conversely, Battjes argues that the reference to the country of origin was not added with the intention to restrict the geographical reach of subsidiary protection, but its substantive scope, so as to leave humanitarian cases beyond the reach of art. 15(b). According to him, a twofold distinction should be drawn in *non-refoulement* cases. On the one hand, "classic" asylum cases in which the applicant fears torture or inhuman or degrading treatment in the country of origin. On the other hand, humanitarian cases, where it is the withdrawal of medical treatment and the mere act of expulsion that triggers State liability under art. 3. The latter cases would thus be excluded for lack of serious harm in the country of origin.[53] If one looks at the micro-history of the negotiations of the Directive, the Danish Presidency of the Council seemed to support this approach in a note sent to the Strategic Committee on Immigration, Frontiers and Asylum:

> "Sub-paragraph (b), which is generally supported by Member States, is based on the obligations of Member States laid down in Article 3 of the ECHR and the jurisprudence of the ECtHR. However, if sub-paragraph (b) was to fully include the jurisprudence of ECtHR relating to Article 3 of ECHR, cases based purely on compassionate grounds as was the case in D versus UK (1997), also known as the Stt. Kitt's case, would have to be included. In the Stt. Kitts case, although the lack of access to a developed health system as well as lack of a social network in itself was not considered as torture or inhuman or degrading treatment, the expulsion to this situation, which would have been life threatening to the concerned person, was described as such".[54]

Similarly, recital 15 QD establishes that TCNs who are allowed to remain in the territory of a Member State "for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds" fall beyond the scope of the Directive. Whether this implicit dichotomy between international protection

[52] J McAdam, 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime' (2005) IJRL 478.

[53] H Battjes, *European Asylum Law and International Law* (Brill Nijhoff 2006) 236.

[54] Council Document 12148/02 of 20 September 2002 on a 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 5-6.

under EU law and discretionary non-removal (which disregards States' non-removal obligations under arts 3 and 8 ECHR) is an appropriate one will be discussed below.

The Court of Justice has not so far clarified the meaning of the "in the country of origin" addition. However, the fact that it endorsed a narrow interpretation of subsidiary protection in *M'Bodj* on the basis that "its scope does not extend to persons granted leave to reside in the territories of the Member States for other reasons, that is, on a discretionary basis on compassionate or humanitarian grounds",[55] suggests that the Court has aligned itself with this approach. And yet, by not making an explicit reference as to what "in the country of origin" actually means, if anything at all, the Court has kept the ambiguity of the provision. In this regard, it is revealing that by 2016 (two years after *M'Bodj*) 17 out of 27 Member States bound by the Directive had not transposed the "country of origin" limitation into domestic legislation.[56] Moreover, it is my view that the Directive allows for a different interpretation in light of recent developments in European Human Rights Law.

Firstly, a literal interpretation of the words "in the country of origin" does not seem to endorse the above-mentioned interpretation. Even if, in medical cases, ill-treatment is performed in two acts (the withdrawal of treatment in the host country and the conditions faced upon return), this only materialises in the country of origin, as it results from the combination of individual circumstances and country (of origin) conditions. As a result, the removal will merely be the triggering factor of a risk to suffer an art. 3 violation, the effects of which will be felt in the country of origin after removal.[57] This position is further strengthened after *Paposhvili*. Given that now ill migrants no longer have to be facing immediate death to be afforded protection against expulsion, but "only" be in a situation where expulsion would trigger a real risk of "rapid and irreversible decline in his or her state of health resulting in intense suffering or [...] a significant reduction in life expectancy",[58] the proscribed ill-treatment will take place mostly, if not completely, *in* the country of origin and not immediately following the withdrawal of protection in the host State.

Secondly, the distinction between "classic" *non-refoulement* obligations and purely humanitarian cases no longer holds after *Paposhvili*, if it ever did. Indeed, under *D* and *N* the protection against expulsion in cases of illness was rather exceptional and limited to cases of "compelling humanitarian grounds".[59] The medical cases now covered under the jurisprudence of the ECtHR are wider in scope and by no means restricted to people who remain "on a discretionary basis on compassionate or humanitarian grounds" (excluded from the Directive under recital 15), but rather remain owing to a fully-fledged *non-refoulement* obligation under the ECHR. One wonders, however, whether medical cases were ever out of the reach of the Directive on this basis, given that, even before *Paposhvili*,

[55] Case C-542/13 *M'Bodj* ECLI:EU:C:2014:2452 para. 37.
[56] C Bauloz, 'Foreigners' cit. 437.
[57] *Ibid*. 425-426, 431-432.
[58] *Paposhvili v Belgium* cit. para. 183.
[59] *D v the United Kingdom* cit. para. 54.

applicants protected under art. 3 did not remain in the territory of the host State on a discretionary basis, but owing to a legal obligation not to expel them under the ECHR – and therefore fell somewhere in between international protection and discretionary non-removal. In this line, the reasoning followed by the Court in *M'Bodj* that the applicant did not fall under the Directive because he remained in the host country "on a discretionary basis on compassionate or humanitarian grounds" is valid as long as it refers to the granting of a discretionary domestic status of protection (in *M'Bodj*, indefinite leave to remain on medical grounds), but it is invalidated from the moment that the State recognises that the applicant also has protection from expulsion under art. 3 of the Convention.

b) Serious harm and situational risks.

The second challenge comes from art. 6 of the Directive, on actors of persecution or serious harm. This provision reads: "Actors of persecution or serious harm include: (a) the State; (b) parties or organisations controlling the State or a substantial part of the territory of the State; (c) non-State actors […]".

In *M'Bodj*, the Court noted that art. 6 offers a list of those deemed responsible for inflicting the harm, supporting the view that it must necessarily derive from the conduct of an actor rather than simply resulting from general shortcomings in the health system of the country of origin.[60] According to the Court, it follows that the deterioration of the state of health of an applicant due to the absence of treatment in the country of origin will not be worthy of subsidiary protection unless he or she is "intentionally deprived" of medical care.[61]

The interpretation of this provision can however vary greatly if analysed in view of asylum law and the principle of *non-refoulement*. Firstly, the wording of art. 6 does not preclude the application of subsidiary protection to cases of illness where the risks are situational rather than coming from an identifiable actor. The list provided under this provision is merely indicative as it establishes that actors of persecution or serious harm "include" States, non-State actors, and so on. Art. 7 of the Directive on actors of protection, conversely, clearly mandates that "[p]rotection against persecution or serious harm *can only be provided by* […] the State; or […] parties or organisations […]" (emphasis added). As it was highlighted by the Commission in its proposal for the 2011 recast of the Directive, "[w]here the Directive establishes indicative lists, it uses terms such as 'include' or 'inter alia'; therefore, the absence of such terms in Article 7 is already an indication of the exhaustive character of the list".[62] Hence, the Directive offers an exhaustive list of actors of protection, but not of actors of persecution or serious harm. Neither does it mention that the risk needs to be posed by an actor at all.

Moreover, if analysed in the context of its adoption, the purpose of art. 6 was precisely to expand the scope of subsidiary protection and avoid that States opt for an "accountability" notion of asylum. As explained above, the Directive was adopted in the context of an

[60] *M'Bodj* cit. para. 35.
[61] *Ibid*. para. 36.
[62] Communication COM(2001) 510 final cit. 7.

intense debate between protective and accountability-based notions of asylum (see *supra* section II.1). Prior to the adoption of the Directive, many civil law jurisdictions, including France and Germany, opted for the "accountability theory", according to which asylum was only granted when the State of origin was directly responsible for the risk of harm.[63] The inclusion of art. 6 thus signifies the preponderance of the so-called "protection" approach in the Directive, in accordance with the Refugee Convention and art. 3 ECHR, and contrary to other instruments like the UN Convention Against Torture (UNCAT).[64]

By requiring intentionality as an intrinsic feature of *serious harm*, *M'Bodj* is arguably reminiscent of the accountability theory, as it emphasises the unwillingness of States to protect while leaving aside their inability to do so.[65] Conversely, the principle of *non-refoulement* in the context of the ECHR, on which art. 15(b) is based, prohibits expulsion regardless of the source of the risk. Making protection dependent on the subjective element of the intentionality of the State therefore misunderstands the essence on the *non-refoulement* principle, which is based on risk-assessment and absolute protection.[66] More importantly, by claiming that seriously ill applicants who are non-removable under art. 3 of the Convention are not necessarily granted residence by way of subsidiary protection,[67] the CJEU creates a category of people who cannot be returned but who, in the absence of domestic protection, are left status-less.

Lastly, the Court's argument that recital 35 of the Directive supports its *intentional deprivation* threshold rests on poor reasoning.[68] Firstly, because the provision notes that the general risks to which the population is exposed will not "normally" qualify as *serious harm*, evidently allowing for exceptions, as it was already clarified by the CJEU in *Elgafaji*. Secondly, the presence of recital 35 in the Directive arguably responds to the inclusion of situations of generalised violence in the country of origin in line with *Elgafaji* and *Sufi and Elmi* (art. 15(c) QD) and was not included with medical cases in mind. Thirdly and most importantly, the serious harm in medical cases like *M'Bodj* does not respond to general risks to which the population of a country are exposed, but rather to a combination of these and the personal circumstances deriving from the illness of the applicant.

Even though the ECtHR had always left the door open to find a breach of art. 3 in purely situational cases,[69] the fact that it virtually kept these out of its reach meant that the difference in scope between both provisions was of little relevance in practice. It must be borne in mind that *M'Bodj* came about two years before *Paposhvili*, at a time when

[63] JC Hathaway and M Foster, *The Law of Refugee Status* (Cambridge University Press 2014) 303.

[64] General Assembly, United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, UN Doc. A/RES/39/46, art. 1.

[65] T Wibault, 'Is There a Space for Humanitarian Protection within Subsidiary Protection? A Reading of M'Bodj' (5 February 2015) European Database of Asylum Law www.asylumlawdatabase.eu.

[66] C Bauloz, 'Foreigners' cit. 427.

[67] *M'Bodj* cit. para. 40.

[68] *Ibid*. para. 36.

[69] *D v the United Kingdom* cit. para. 49.

Strasbourg's protection from expulsion was only available for dying applicants. Nevertheless, by setting a higher standard of protection in *Paposhvili*, Strasbourg's revisiting of its non-removal case law again offers the dual outcome of setting a higher standard of protection against human rights violations in the country of origin while bringing to the surface a new series of challenges for those who might simply become non-removable. This is analysed through the case of *MP* in turn.

IV. Interpreting subsidiary protection after *Paposhvili*: judicial dialogue and non-removability

The above-mentioned limitations of the Court's reasoning were tested in *MP*, where the Court had its first (and so far only) opportunity to revisit its jurisprudence after *Paposhvili*. In *MP*, the applicant, a victim of torture who was no longer at risk of being tortured in his home country, was afforded protection from expulsion by domestic courts, who found that his removal would amount to a violation of art. 3 ECHR considering the lack of available treatment for the applicant's depression, post-traumatic stress, and suicidal tendencies.[70] Nevertheless, British authorities found that subsidiary protection under the Qualification Directive was not meant to cover cases within the scope of art. 3 where the risk was to health or suicide rather than one of persecution, leading to a situation in which the applicant could neither be expelled nor have access to a residence permit by means of subsidiary protection.[71] The Court of Justice first built on *M'Bodj* to affirm that the fact that art. 3 ECHR precludes the removal of a TCN suffering from a serious illness does not mean that the person should be granted subsidiary protection under the Directive.[72] On the contrary, there needs to be a real risk of being "intentionally deprived" of appropriate health care treatment by the country of origin.[73]

Whereas this reasoning might have led to the dismissal of the claims of the applicant, as AG Bot suggested,[74] the Court decided otherwise by making explicit reference to the UN Convention Against Torture. According to the Court, in cases of (previous) torture, the victim is considered to be intentionally deprived of treatment if he or she "is at risk of committing suicide because of the trauma resulting from the torture he was subjected to by the authorities of his country of origin, [and] it is clear that those authorities, notwithstanding their obligation under Article 14 of the Convention against Torture, are not prepared to provide for his rehabilitation".[75] In short, the Court extends subsidiary protection not only to those cases in which the (torturer) State of origin is unwilling to provide for rehabilitation, but also to those where it is unable to do so.

[70] *MP* cit. para. 19.
[71] *Ibid*. paras 20-21.
[72] *Ibid*. para. 101.
[73] *Ibid*. paras 51-52.
[74] Case C-353/16, *MP* ECLI:EU:C:2017:795, opinion of AG Bot.
[75] *MP* cit. para. 57.

MP is greatly relevant for the study of non-removability through the lens of EU asylum law. Firstly because, unlike *M'Bodj*, where the applicant had already been granted indefinite leave to remain in Belgium on account of his state of health, *MP* concerned a non-removable migrant, whose non-removability precisely derived from the asymmetric interaction between the ECHR and EU asylum law. It is thus a paradigmatic example of how non-removability may occur. Secondly, because *MP* has been the first judgment adopted by the Court on the scope of subsidiary protection after *Paposhvili*, offering a unique opportunity for the Court of Justice to reassess its approach in light of the evolution of the principle of *non-refoulement*. Thirdly because the CJEU has expanded the scope of subsidiary protection, which must now be granted to torture victims if removal would result in lack of available medical care in the country of origin responsible for the torture. This applies both when the State is unwilling or unable to provide such treatment. Even though the Court has made clear that non-removal under art. 3 does not necessarily lead to subsidiary protection, it has narrowed the gap between the interpretation of both provisions by offering a lower threshold of *intentional deprivation* in cases of victims of torture. It is because of this that the judgment has been celebrated for "ensuring greater protection [...] for the most vulnerable migrants: torture victims and the terminally ill".[76] Fourthly and most importantly because, far from closing the interpretative gap between both courts, the CJEU the Court upholds the standard of *intentional deprivation* and openly maintains a narrower scope for subsidiary protection than that of art. 3 ECHR.

This outcome can be better understood if analysed in light of the ambivalent approach of the CJEU towards the ECHR, where the specific position and normative value of the Convention remain ambiguous.[77] Indeed, the Court of Justice has long combined judgments which emphasised the relevance of the ECHR as interpreted by the Strasbourg Court,[78] with others that stressed that it is not formally found by it or simply ignored the role of the Convention.[79] At present, the relationship between both Courts is heavily marked by the legal bindingness of the Charter of Fundamental Rights post-Lisbon and by Opinion 2/13, whereby the Court of Justice held that the draft agreement for the EU's accession to the ECHR was incompatible with art. 6(2) TEU.[80] In this context, and despite the mutual influence of both Courts, it has been argued that the Strasbourg Court might

[76] S Peers, 'Torture Victims and EU Law' (24 April 2018) EU Law Analysis eulawanalysis.blogspot.com.

[77] F Ippolito and S Velluti, 'The Relationship Between the CJEU and the ECtHR: The Case of Asylum' in K Dzehtsiarou, T Konstadinides, T Lock and N O'Meara (eds), *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR* (Routledge 2014) 165-166.

[78] See, among others: case C-94/00 *Roquette Frères* ECLI:EU:C:2002:603; case C-400/10 *J McB* ECLI:EU:C:2010:582; joined cases C-404/15 and C-659/15 *Aranyosi and Căldăraru* ECLI:EU:C:2016:198.

[79] Joined cases C-46/87 and C-227/88 *Hoechst v Commission* ECLI:EU:C:1989:337; case C-571/10 *Kamberaj* ECLI:EU:C:2012:233.

[80] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454.

have seen the Charter as a way to show consensus and modernise the ECHR, whereas the CJEU has rather used it as a tool to legitimise its status and the autonomy of EU law.[81]

In the asylum field, and particularly after the Charter came into effect, the Court has been eager to stress the autonomy of EU law while seeking to avoid norm conflicts and reflect on the jurisprudence of the Strasbourg Court. In *N.S.*, the CJEU relied on the landmark case of *M.S.S.* in finding that art. 4 of the Charter (equivalent to art. 3 ECHR) precludes the establishment of a conclusive presumption that the responsible Member State in a Dublin transfer observes the fundamental rights of the applicant.[82] And yet, the CJEU's standard of proof was established autonomously and circumscribed to those situations where the requesting State "cannot be unaware" of the systemic deficiencies in the requested State – in contrast with Strasbourg's reference to a "shared burden of proof".[83] In *Puid*, which again scrutinised mutual trust in the context of Dublin, the Court seemed rather concerned about the consequences of a too-wide application of the *N.S.* exception, stressed the need for "systemic deficiencies" in the asylum system of the requested State, and did not include any references to the Strasbourg Court or the Convention.[84] This contrasts with Strasbourg's judgment in *Tarakhel* where the Court broke free from the "systemic deficiencies" approach, and required the requesting State to undertake a thorough and individualised examination of the circumstances the applicants would face upon their transfer to Italy – where the situation could "in no way be compared to the situation in Greece at the time of the *M.S.S.* judgment".[85]

Going back to art. 15 QD, *Elgafaji* (see *supra* section III.1) again represents the tension between the autonomy of EU law and the respect for the Convention. In *Elgafaji*, however, the Court clarified that its interpretation was not only fully compatible with that of the Strasbourg Court at the time, but even went beyond it.[86] Conversely, in *M'Bodj* and (more significantly) in *MP*, the CJEU fails to meet ECHR standards.

Whereas the ECtHR had entered an explicit and thorough dialogue with the CJEU in *Sufi and Elmi*, to the extent that it justified its evolutionary interpretation of art. 3 almost exclusively on the CJEU's interpretation of the QD in *Elgafaji*, no equivalent exercise was

[81] D Spielman, 'The Judicial Dialogue Between the European Court of Justice and the European Court of Human Rights Or How to Remain Good Neighbours After the Opinion 2/13' (27 March 2017) FRAME www.fp7-frame.eu.

[82] Joined cases C-411/10 and C-493/10 *N.S.* and *M.E.* ECLI:EU:C:2011:865 paras 88-92.

[83] S Velluti, 'Who Has the Right to Have Rights? The Judgments of the CJEU and the ECtHR as Building Blocks for a European "Ius commune" in Asylum Law' in S Morano-Foadi and L Vickers (eds), *Fundamental Rights in the EU, A Matter for Two Courts* (Hart 2015).

[84] Case C-4/11 *Kaveh Puid* ECLI:EU:C:2013:740. See further case C-394/12 *Abdullahi* ECLI:EU:C:2013:813. In *Abdullahi*, the Court clarified that the only way in which an asylum applicant can contest a Dublin transfer is by pleading systemic deficiencies in the asylum system of the requested MS, in a judgment with no references to the ECHR.

[85] ECtHR *Tarakhel v Switzerland* App n. 29217/12 [4 November 2014] para. 114.

[86] *Elgafaji* cit. para. 44.

made by the CJEU when it was EU law that fell short of protection *vis-à-vis* ECHR standards. Far from it, the Court made clear in *MP* that art. 15(b) does not go hand in hand with art. 3 of the Convention. Interestingly, when the Court of Justice refers to *Paposhvili* to argue in favour of the need of intentional deprivation for subsidiary protection to apply, it does so arguably misquoting the ECtHR and suggesting that Luxembourg's standards match those of the Strasbourg Court. According to the Court of Justice, "[i]t follows from the case-law of the European Court of Human Rights relating to Article 3 of the ECHR that the suffering caused by a naturally occurring illness, whether physical or mental, may be covered by that article if it is, or risks being, exacerbated by treatment, whether resulting from conditions of detention, removal or other measures, for which the authorities can be held responsible".[87] The Court however omits that, within the very same paragraph quoted by the CJEU, the ECtHR noted that "[the Court] is not prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country".[88]

It is not my contention that the Court has erred in its interpretation of art. 15(b) by ruling *contra legem* (as art. 52(3) of the Charter would in any event bind the Court in its interpretation of art. 4 of the Charter and not of art. 15(b) QD),[89] but rather that the Directive allowed for an interpretation that closed the existing non-removability gap arising from conflicting interpretations of human rights and asylum law provisions. As argued above, the fact that the wording and risk-assessment criteria used by the Directive in arts 15(b) and 2(f) respectively are borrowed from Strasbourg's jurisprudence on art. 3, together with the obligation to derive the scope of subsidiary protection from human rights law under recital 34, indicate a strong nexus between ECHR non-removal case law and subsidiary protection. I have argued that the wording of the Directive in arts 6 and 15(b) does not necessarily put this view into question.

Even if one accepts AG Maduro's reasoning in *Elgafaji* that a completely coherent interpretation of subsidiary protection with art. 3 is not feasible due to the non-linear, dynamic interpretation of art. 3 coming from Strasbourg,[90] the CJEU has unnecessarily departed from Strasbourg's criteria by adopting a threshold (*intentional deprivation*) that was strongly rejected by the ECtHR already in 1997.[91] It must also be borne in mind that recital 48 mandates that the implementation of the Directive be re-assessed at regular intervals taking into consideration Member States' *non-refoulement* obligations.

[87] *MP* cit. para. 38.

[88] *Paposhvili v Belgium* cit. para. 175.

[89] Art. 52(3) of the Charter establishes that the meaning and scope of the Charter rights which are also included in the ECHR must have at least the meaning and scope guaranteed by the Convention.

[90] C-465/07 *Elgafaji* ECLI:EU:C:2008:479, opinion of AG Poiares Maduro, para. 20. On the contrary, AG Trstenjak argued in *N.S.* that the reference to the ECHR in art. 52(3) is to be understood as a dynamic reference which covers the jurisprudence of the European Court.

[91] See *D v the United Kingdom* cit. para. 49.

This discrepancy becomes particularly relevant in the post-*Paposhvili* context, given that States' *non-refoulement* obligations in medical cases are now significantly widened and non-removability is therefore a more tangible reality. The CJEU's attempt to justify the standard of *intentional deprivation* by referring to the ECtHR remains particularly puzzling considering the latter Court's outright rejection of such standard. It is thus my view that the Court of Justice missed an opportunity to extend its "unwilling or unable" criteria used with victims of torture to its wider case law on subsidiary protection. This would have been consistent with the absolute nature of the *non-refoulement* principle (now an integral part of EU law under the EU Charter of Fundamental Rights), upon which art. 15(b) is based. The fact that the Court applied art. 15(b) to a purely situational risk in *MP* also confirms that a different interpretation of art. 6 of the Directive is not a no go.

As noted by Costello, the main significance of art. 15(b) is precisely found in "affording a status, rather than simply rendering non-removable, [to] persons in these circumstances".[92] The threshold of the ECtHR, significantly lowered in *Paposhvili*, requires the applicant to prove a risk of being exposed to a "serious, rapid, and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy",[93] yet no reference can be found as to the unwillingness of the State to provide for treatment. It is thus the potential violation as such, and not the (lack of) intentionality of the State of origin that matters. The CJEU, by adding intentionality as a necessary subjective element, compromises the scope of subsidiary protection, departs from the foundations of the *non-refoulement* principle, and allows non-removability inasmuch as it permits Member States to simultaneously observe that there is a real risk of inhuman or degrading treatment upon removal and that there is no such risk within the very same case.

Interestingly, the Court has so far been able to adopt a legal approach that gives rise to situations of non-removability while avoiding facing before it the practical consequences of its own approach. In *M'Bodj*, the migrant involved already had access to indefinite leave to remain in Belgium on account of his state of health which, although affording a narrower set of rights than subsidiary protection, did not leave him in a situation of irregularity and destitution. In *MP*, the interpretation of the Court seems to grant subsidiary protection to Mr. MP, but only because of his status as a former victim of torture. Nevertheless, torture victims aside, it is now clear that for all those cases where the return of a person would put the applicant under a risk of suffering a deterioration of his or her state of health provoking intense suffering or a significant reduction in life expectancy, protection from expulsion comes with a legal vacuum and, in the absence of a domestic status of protection, with rightlessness and destitution. More generally, this approach can potentially apply to any form of torture or inhuman or degrading treatment beyond medical cases, as the Court notes that arts 3 ECHR and 15(b) QD do not necessarily coincide.[94]

[92] C Costello, *The Human Rights of Migrants and Refugees in European Law* cit. 217.
[93] *Paposhvili v Belgium* cit. para. 183.
[94] C Costello, *The Human Rights of Migrants and Refugees in European Law* cit. 217.

IV. Conclusions

The ECtHR grants protection from expulsion under arts 3 and 8 of the Convention. This *Article* has explored the existing gap between art. 3 non-removal jurisprudence and EU asylum law in order to analyse the extent to which it is legally possible, under EU law, to be protected from expulsion while not being granted international protection.

Through an analysis of medical cases,[95] this *Article* has shown that, in interpreting what torture or inhuman or degrading treatment means, the Court of Justice has departed from ECHR standards by adopting a threshold (*intentional deprivation*) which was discarded by Strasbourg already in the 1990s. This leads to a situation where those TCNs who are non-deportable on account of their state of health, but who would not be intentionally deprived of treatment in the country of origin can be left in a legal limbo, with the exception of those covered under the narrow factual circumstances concurring in *MP*. This is particularly striking considering that art. 15(b) QD borrows its language from art. 3 ECHR, that art. 2(f) adopts the risk assessment tests used by the Strasbourg Court, that recital 34 explicitly mentions the need to draw the eligibility criteria for subsidiary protection from human rights law, and that recital 48 stresses the need to revisit the Directive considering the evolution of States' *non-refoulement* obligations. Both the text of the Directive and the generally ambivalent attitude of the CJEU towards the ECHR and the Strasbourg Court can partially account for the approach of the Court of Justice.

In practice, this gap is substantially widened after *Paposhvili*, where the ECtHR lowered the severity of ill-treatment required to protect seriously ill people from expulsion. The *Paposhvili* criteria therefore offer the dual outcome of granting TCNs greater human rights protection against expulsion while potentially (and involuntarily) leading to further situations of non-removability, generating a whole new set of human rights issues in the host country. This challenge is not necessarily restricted to medical cases, since the Court makes explicit that art. 3 of the ECHR and art. 15(b) QD do not necessarily go hand in hand. This *Article* has argued that, despite the arguments put forward by the CJEU, the Directive allows for a different interpretation in conformity with the basic pillars of *non-refoulement*.

[95] To date, these are the only cases dealt with by the CJEU under art. 15(b).