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Eligibility for subsidiary protection based on risk of serious harm to the psychological health of the applicant: case C-353/16

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Introduction

This dissertation focuses on a request for a preliminary ruling regarding the interpretation of Articles 2(e) and 15(b) of Directive 2004/83/EC, which pertains to minimum standards for the qualification and status of refugees or persons needing international protection. The request arises from proceedings between the MP and the Secretary of State for the Home Department concerning the rejection of the MP's asylum application.

The legal context of this request encompasses both international law and EU law. Regarding international law, Article 3 of the European Convention on Human Rights (ECHR) prohibits torture and inhuman or degrading treatment or punishment. Alike, the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment aims to combat torture and establish preventive measures. These international legal instruments set the foundation for protection against torture and ill-treatment.

Within the framework of EU law, Directive 2004/83 establishes standard criteria for identifying individuals needing international protection and ensuring a minimum level of benefits across Member States. The Directive defines the "person eligible for subsidiary protection" and outlines the criteria for such eligibility. It also addresses serious harm, including torture or inhuman or degrading treatment or punishment. Directive 2008/115 complements these standards by emphasizing the child's best interests, family life, the state of health of the third-country national, and the principle of *non-refoulement.*

The specific case at hand involves MP, a national of Sri Lanka, who seeks asylum in the United Kingdom. MP claims to have been detained and tortured by the Sri Lankan security forces due to his association with the "Liberation Tigers of Tamil Eelam." In the course of the legal proceedings surrounding MP's asylum claim, compelling medical evidence has been presented that sheds light on the gravity of the physical and psychological trauma he has endured as a direct result of the torture inflicted upon him. It underscores the urgent need for a compassionate and just resolution to his predicament. He argues that returning to Sri Lanka would expose him to further ill-treatment.

The question at the center of this case is whether MP is entitled to subsidiary protection under Directive 2004/83, given the risk of serious harm to his physical or psychological health if returned to his country of origin.

This dissertation explores and analyzes the legal framework provided by Directive 2004/83, international human rights law, and relevant case law to address the question raised by the referring court. By examining the interpretation and application of Articles 2(e) and 15(b) of the Directive, this study seeks to contribute to the understanding of the scope of subsidiary protection in cases where an applicant has suffered previous torture or inhuman treatment and the risk of serious harm persists in their physical or psychological health. Furthermore, it aims to examine the potential implications of this case for the development and harmonization of asylum and refugee law within the European Union.

CHAPTER 1: Legal Background

1.1 The European Union and its Competences

Following World War II, the push for European unification reemerged. It reached its pinnacle in 1948 at the Congress of Europe, an event that brought together more than 600 notable Europeans from sixteen different nations and was held in The Hague in May of that year. Nevertheless, the Schuman Declaration of 1950, which gave rise to the European Coal and Steel Community (ECSC), was born behind the constrained walls of the French economic planning office, led by Jean Monnet, rather than in the fervor of the European movement.

In 1951, with the adoption of the Geneva Convention Relating to the Status of Refugees, asylum and refugee protection became an integral part of the international law system. The rights set by the Refugee Convention include several critical protections which speak to the most fundamental aspects of the refugee experience, including the need to escape, to be accepted, and to be sheltered. While falling short of the comprehensive list of civil rights promoted by the Universal Declaration of Human Rights, the Refugee Convention nonetheless pays significantly more attention to defining a sphere of personal freedom for refugees than any of the earlier refugee agreements. The inability of States to make any reservations to their obligations to avoid *refoulement* and to guarantee protection against discrimination, religious freedom, and access to the Courts entrenches a universal minimum guarantee of fundamental liberties for refugees[1].

In the same year of the Refugee Convention, France, Germany, Italy, and the Benelux nations signed the Treaty of Paris, establishing the European Coal and Steel Community. This polity was seen by the actors and the creators of an impressive academic theoretical apparatus, who quickly perceived events as an avant-garde international organization ushering forth a new model for transnational discourse. It was lofty in its aspirations and innovative in some institutional arrangements. For most of those nations to reject their traditional nation-state goals and consent to use some of their powers in concert required a leap of faith and uncommon political daring.

European unity offered Germany, which was substantially wrecked after the war, rescue and global rehabilitation. French concern over German rearmament caused plans for the European Defense Community (EDC) to be structured similarly to the ECSC to fail, ostensibly ruining chances for future formal integration. However, the European Economic Community (EEC) quickly followed, not as a result of the type of spillover Ernst Haas foresaw in The Uniting of Europe, his groundbreaking book on the ECSC, but rather due to the attractiveness of greater economic integration at a time when intra-European commerce was intensifying. Accepting the EEC required

[1] Art. 42(1), Refugee Convention 1951, Geneva.

significantly modifying France's long-standing view of itself as a leading great power[2].

The European Economic Community reemerged in the middle of the 1980s as a solution to the issues of Eurosclerosis and the laziness of the previous decade and a means for Community members to jointly face the challenges of emerging globalization. The Single European Act (SEA), the first significant treaty change in the history of the EC, established cohesion as a fundamental Community goal and required Member States to complete the single market by 1992. It also included extensive institutional reform concerning single-market measures. It is understandable why the SEA came to be seen as a crucial turning point in the development of the European Union.

However, in the early 1990s, inflated promises of the single market's success and a severe economic collapse lowered popular confidence. The unease among the general public over the pace of European integration was stoked by the Maastricht Treaty, which established the European Union. In addition, to calm an uneasy public, Member States emphasized the idea of subsidiarity, a decentralization and quasi-federalism ideal. The three guiding principles for the establishment and execution of Union competencies are laid forth in Article 5(1) of the Treaty of the European Union (TEU). It reads:

> The limits of Union competencies are governed by the principle of conferral. The use of Union competencies is governed by the principles of subsidiarity and proportionality.

The concept of conferral is the first tenet, and it restricts the existence of Union competencies in two ways. EU competencies must have a constrained material scope in terms of quantity. However, a specific competency type establishes the Union's legal capacity to act in such a substantial sector.

On the other hand, the principles of proportionality and subsidiarity restrict the exercise of Union powers. According to the principle of subsidiarity, stated in Article 5(3) the Union must only act:

> if and in so far as the objectives of the proposed action can, by reason of the scale or effects of the proposed action, be better achieved at Union level and cannot, by the Member States, be sufficiently achieved by them, either at central level or at regional and local level.

The subsidiarity concept has traditionally served as a bulwark for liberal ideals within the Union legal system, but it now includes a federal component. This principle protects federal ideals, much like the rule of conferral. When two levels of government are equally capable, it chooses which level should exercise its authority. The third and more extensive concept of proportionality stands in opposition to this. In general, it is emphasized in Article 5(4) TEU that "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties".

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[2] HAAS (1958: ix).

The newly established European Union faced significant obstacles. With the end of the Cold War, enlargement reemerged on the Union's agenda. Prior to the newly independent nations of Central and Eastern Europe (plus Cyprus, Malta, and Turkey), membership was first sought by the European neutrals (plus Norway). In 1995, the three neutrals – Austria, Finland, and Sweden– joined without incident; Norway opted to remain outside. The Central and Eastern European nations encountered significant barriers to membership, primarily due to their low economic growth and weak administrative competence. They finally came together in two phases: the 2004 accession of the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia (together with Cyprus and Malta); the 2007 accession of Bulgaria and Romania. In 2013, Croatia, another former Yugoslav nation that had disintegrated in the 1990s like Slovenia, became a member of the EU.

Large-scale enlargement had to transform the EU, particularly when popular support for the EU was waning. National governments began a new cycle of treaty revision in 2000 after avoiding significant institutional change during earlier enlargement rounds. This new round would culminate nearly ten years later in the Lisbon Treaty.

First came the Treaty of Amsterdam in 1997, which began the deepening of the political Union, followed by the Nice Treaty of 2001, but neither was sufficient to introduce major constitutional reforms. The Treaty of Amsterdam reformed the Third Pillar (Justice and Home Affair), whose policies dealing with immigration and judicial cooperation in civil matters were transferred to the First Pillar as a more supranational approach became more favorable. Moreover, these changes granted the Community supranational powers around visas, asylum, immigration, and other policies related to the free movement of people. Additionally, this Treaty included the Schengen Agreement in the legal system of the European Union, when previously the Schengen Treaties and the regulations it established operated independently. The first set of guidelines regarding who is responsible for handling asylum claims were included in the Schengen Implementing Convention of 1990.

The Common European Asylum System (CEAS) was proposed in the 1999 European Council in Tampere and eventually entered the EU Treaties as a core legislation and a legally obligatory aim in the Lisbon Treaty. Several legislative acts were established to implement the first phase of the CEAS, which was restricted to minimal criteria at the time and in accordance with constrictive EU competencies. Numerous choices taken at that time have influenced Europe's refugee policy ever since[3]. The foundation of many successes and issues in EU asylum policy to this point can be found in the former Asylum Reception Conditions Directive 2003/9/EC, the former Asylum Qualification Directive 2004/83/EC, the former Asylum Procedure

[3] Commission Communication, COM (2000) 755; Commission Communication, COM (2003) 152.

Directive 2005/85/EC, the former Dublin II Regulation (EC) No 343/2003, and the former Eurodac Regulation (EC) No 2725/2000.

Around the same time, the Charter of Fundamental Rights of the European Union was drafted. The Charter is a legally binding document that sets out the fundamental rights and freedoms of all the people living in the European Union. It was adopted in 2000, but it became legally binding, with the entry into force of the Lisbon Treaty in 2009.

In the Lisbon Treaty, which itself had to be voted on twice before being approved in Ireland (the only Member State to have a referendum on the matter), national and EU leaders were able to rescue most of the provisions of the discredited Constitutional Treaty of 2005. The protracted and unsatisfactory experience of treaty reform over the previous decade deepened public unease with the EU. It strengthened national resistance to further big deals to advance European integration, even though the Lisbon Treaty strengthened the EU institutionally and expanded its policy scope.

One of the significant changes brought on by the Lisbon Treaty was the division of institutional provisions into two treaties, the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). In the latter, Part Three Title V contains the general provisions that concern general objectives, the role of the European Council, general security restriction, etc. One of the most fundamental articles is Article 67 (ex-61), which starts with the general proviso that "[t]he Union shall constitute an area of freedom, security, and justice with respect for fundamental rights and the different legal systems and traditions of the Member States". This new clause would place at the center of Justice and Home Affairs policy the twin obligation to respect human rights and the divergences between national laws across the EU. The following paragraph would set out the objectives of immigration and asylum law:

> It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration, and external border control based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless per- sons shall be treated as third-country nationals.

Although the new clause was still relatively vague, it offered somewhat more clarity as regards the EU's immigration and asylum objectives.

Today's European Union substantially differs from the European Communities of the 1950s; however, several characteristics continue to exist, such as the small-country syndrome, i.e., fear of hegemony among minor Member States. The EU is a political initiative that prioritizes economic integration, just like the EC did before. The EU's fundamental mission is to manage the European market, even if the shared foreign and security policy, a national defense strategy, and cooperation on justice and home affairs frequently make the news.

1.2 Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

The most significant international human rights instrument that addresses torture and calls for its complete elimination is the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), which was ratified in 1984.
Based on the 1975 Declaration, the General Assembly formally asked in 1977 that the Commission on Human Rights draft a legally enforceable Convention against Torture draft. The International Association of Penal Legislation (IAPL) and the Swedish Government had already developed draft texts with novel concepts about international human rights legislation when the Commission, in February 1978, delegated this duty to an informal, inter-sessional Working Group[4].
The IAPL Draft of 15 January 1978 focused on the need for states to outlaw torture and bring offenders to justice. It sought to make torture a crime under international law, much like the Genocide Convention of 1948 and the Apartheid Convention of 1973. In terms of global oversight, it provided the option of bringing issues before the ICJ and a state reporting process before the Human Rights Committee, aided by a Special Committee on the Prevention of Torture. The proposal exclusively addressed torture; it did not address other forms of cruel, inhuman, or humiliating treatment or punishment.
Despite significant ideological gaps between Western, Socialist, and other concepts of human rights, the inter-sessional Working Group of the Human Rights Commission, led by the Dutch diplomat Herman Burgers, was able to reach an agreement on the majority of the contentious issues, including the idea of universal jurisdiction[5], between 1978 and 1984. The Working Group suggested creating a Committee against Torture of 10 impartial experts instead of assigning the Human Rights Committee the extra duty of overseeing UNCAT compliance.
Since the majority of States wanted to ratify the Convention as soon as possible, Western States in the Third Committee of the General Assembly conceded to certain socialist States' requests. As a result, Article 28 of the UNCAT contains an opting-out mechanism, and Article 19(3) of the UNCAT contains a section addressing "general comments" on particular State reports that are highly unclear.
Twenty states signed the Convention when it was made accessible for signing on 5 February 1985, including twelve Council of Europe Member states. Exactly thirty days from the date of deposit of the twentieth instrument of ratification[6], on 26 June 1987, the Convention came into force. A total of 162 States from all corners of the globe have ratified or joined the Convention

[4] Report on the XXXIII session, Commission of Human Rights, 7 March 1978.
[5] BURGERS AND DANELIUS (1988: 34-99).
[6] Art. 27, UNCAT.

against Torture as of 31 December 2017. Of these 162 States parties, 63 have voluntarily declared their support for the inter-State complaints procedure under Article 21(1), and 69 have voluntarily declared support for the individual complaints procedure under Article 22(1). Twenty-six States parties have used the Article 28 option to opt out of the Article 20 investigation mechanism since the Convention's ratification, some of which later rescinded their initial reservations. There are currently 148 States parties, which indicates that just 14 of the 162 States have chosen to opt out of this additional monitoring method. The opting-out option under Article 30(2) concerning the dispute resolution procedure and the competence of the ICJ under Article 30(1) has been used by thirty-three States parties over time. However, once again, some have withdrawn their reservation, leaving twenty-four States parties opting out.

The Convention requires States parties explicitly to make torture a criminal offense under their domestic laws, act to investigate and punish accusations, train staff, and offer victims compensation. The enforcement of domestic institutions is crucial to outlawing and preventing torture, and this is where CTI focuses most of its efforts. The UN Committee against Torture is a global organization established by the Convention to assess how its provisions are being implemented.

1.2.1 Substantive Provision Relating Specifically to Torture

The Convention's authors refrained from repeating the prohibition against torture and other cruel, inhuman, or degrading treatment or punishment because it is recognized as a *jus cogens* principle and an absolute human right in Article 7 of the Covenant on Civil and Political Rights (CCPR) and other international and regional human rights treaties. Instead, the Convention was created with the specific goal of "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world." Three different types of measures were used to accomplish this goal: repression against individual perpetrators of torture using domestic criminal law and the universal jurisdiction principle; recognition of the right of torture victims to a remedy and adequate reparation; and extensive obligations of States parties to prevent torture and cruel, inhuman, or degrading treatment or punishment. Although the term "cruel, inhuman, or degrading treatment or punishment" and the various categories of ill-treatment have not been defined[7], Article 1 of the UNCAT is the first provision in international law to provide a legal definition of torture, which is still the subject of contentious debates in legal theory and practice. The legal distinction between torture and other types of ill-treatment is essential since most of the Convention's provisions, particularly those relating to the criminal culpability of the perpetrators, only apply to torture and not to cruel, inhuman, or degrading treatment or punishment.

[7] Art. 16, UNCAT.

Article 1(1) of the Convention states:

> For this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions.

In addition, in previous case-law, the European Court of Justice has given its own definition of "torture or inhuman or degrading treatment or punishment". Treatment has been held by the Court to be inhuman when it is premeditated, applied for hours at a stretch, and when it has caused if not actual bodily injury, at least intense physical and mental suffering[8]. The concept of torture, in its core, needs no definition. Torture, be it performed by physical or modern psychological methods, is easily recognizable. Still, the Court defines it as "deliberate inhuman treatment causing very serious and cruel suffering"[9], thus classifying it as an aggravated form of inhuman treatment. Treatment has been considered by the Court to be degrading "because it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance."[10] In addition, punishment can also be inhuman if it is out of all proportion to the offense committed or if the person concerned has, for political reasons, to face an unjustified or disproportionate sentence. Correspondingly, the notion of degrading punishment includes degrading treatment imposed as a punishment, for example, corporal punishment[11].

Most State parties' preventative responsibilities cover torture and cruel, inhuman, or degrading treatment or punishment[12]. In addition to their general duty under Articles 2 and 16 to prevent torture and other cruel, inhuman, or degrading treatment or punishment, States parties are also required by Articles 10 and 11 of the Convention to implement effective legislative, administrative, judicial, and other measures in the training curricula for law enforcement and prison staff and to conduct prompt and impartial ex officio investigations whenever there is cause. Another critical provision for the prevention of torture is the principle of *non-refoulement* in Article 3 UNCAT.

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[8] European Court of Human Rights, Application no. 14038/88, 7 July 1989, *Soering v. United Kingdom*, para.100.

[9] European Court of Human Rights judgment,18 January 1978, Application no. 5310/71, *Ireland v. United Kingdom,* para.167.

[10] Ibidem; European Court of Human Rights, Application no. 14038/88, 7 July 1989, *Soering v. United Kingdom*, para.100.

[11] European Court of Human Rights, Application no. 5856/72, 25 April 1978, *Tyrer v. United Kingdom*, paras. 31-35.

[12] Art. 16, UNCAT, which explicitly references the obligation contained in Art. 10, 11,12, and 13, in particular.

A second category of State duties refers to the right of torture victims and sufficient recompense for the harm caused in addition to these steps taken to avoid torture. According to Article 13, anyone who has experienced torture or other cruel, inhuman, or degrading treatment or punishment has the right to file a complaint with a competent domestic authority. This authority will promptly and impartially investigate every allegation and ensure that witnesses and victims are adequately shielded from intimidation and retaliation. If local remedies are ineffective, victims can file a complaint against the relevant State party with the Committee against Torture under Article 22. The right to just and sufficient monetary compensation, as well as medical, psychological, and other forms of rehabilitation, is another right granted to those who have been the victims of torture (Article 14).

1.2.2 Optional Protocol to The Convention Against Torture

The Human Rights Commission received a draft Optional Protocol to the draft Convention against Torture from Costa Rica in 1980. This document was based on the ICRC's experiences and a private Swiss proposal from Geneva-based banker Jean-Jacques Gautier. The International Commission of Jurists and the Swiss Committee against Torture endorsed the Costa Rica Draft, which sought to establish a system of preventative and unannounced visits to confinement sites.

During the Cold War, it was politically unacceptable and viewed as an excessive intrusion on state sovereignty for an international monitoring agency to conduct preemptive and unannounced missions and inspections of the territory of States parties. But the European Convention for the Prevention of Torture (ECPT), which was established in 1987[13], was based on Jean-Jacques Gautier's notion. The European Committee for the Prevention of Torture (CPT), comprised of one independent expert per State Party (currently 47), was established after this groundbreaking Convention entered into force on 1 February 1989. Its duties include planning missions to the territory of States Parties, making unauthorized visits to places of detention, and conducting private interviews with detainees. In reality, the CPT's missions, inspections, and reports to States parties with comprehensive recommendations have significantly improved detention facilities and prisoners' treatment in most Council of Europe Member states.

The UN Commission on Human Rights tasked another inter-sessional Working Group with creating an Optional Protocol for the UNCAT following the end of the Cold War. The former justice minister of Costa Rica, Elizabeth Odio Benito, served as the group's head. The Working Group's discussions were based on a revised document from Costa Rica. During the 1990s, considerable progress was stymied by the intensely contentious and political debates between most Latin American and European States and many other States, especially over state sovereignty concerns. The idea of establishing

[13] The ECPT, ETS No 126, was opened for signature on 26 November 1987.

domestic visiting commissions (also known as national preventive mechanisms) in addition to the international monitoring body (the UN Subcommittee on Prevention of Torture [SPTI])[14] was introduced by Mexico in response to the European States' suggestion of a very strong SPT with a broad mandate, and only then was a large majority formed to adopt the OP by majority vote.

The OP was approved by 127 States in favor, four against, and 42 abstentions on 18 December 2002, at a vote in the General Assembly. The OP came into effect on 22 June 2006, or thirty days after the date on which the twentieth instrument of ratification was deposited[15]. The SPT convened its first session in Geneva from 19 to 23 February 2007[16], following the election of the first ten independent experts by the States parties to the OP on 18 December 2006. 84 States parties to the UNCAT had ratified or acceded to the OP as of 31 December 2017.

1.3. The Geneva Convention of 1951

The 1951 Geneva Convention Relating to the Status of Refugees (the Refugee Convention), along with its 1967 Protocol, is the first international agreement to regulate the right to refuge. The Office of the United Nations High Commissioner for Refugees (UNCHR) has given the treaty's Articles an authoritative, though non-binding, interpretation. The Articles were drafted primarily to define persons in need of protection and give them a system of support ranging from the prohibition on *refoulement* to the right to work.

The Convention sought to address the displacement that had already occurred in Europe – more than 50 million people were forced out of their homes during the Second World War, and China had 100 million internally displaced people – by granting legal status to many thousands of refugees who were still living in tent cities six years after the conflict. It was one of a series of fundamental human rights agreements established then, along with the Genocide Convention, the twin human rights covenants, and the Universal Declaration of Human Rights. At the same time, the horrors of the war were still fresh in everyone's minds. Since relocation was impossible[17], the establishment of a formal agreement "helped to ensure that the states signing the treaty offered similar levels of protection, and thus helped to prevent further influences to those states that raised their standards."[18] International responsibility sharing relied heavily on mutual acceptance of commitments.

The reach of the Refugee Convention is restricted. It has clearly stated exclusion clauses that prevent anyone engaged in highly heinous crimes, including genocide, torture, murder, and terrorism, from being granted refugee

[14] Articles 5 to 16, Optional Protocols.
[15] Art. 28, ibidem.
[16] Art. 10, ibidem.
[17] MCADAM (2015).
[18] BATTJES (2016: 18).

status. The rationale was that States should not give sanctuary to anyone fleeing the law. Additionally, it was believed that severe criminals, like ex-Nazis, should not be sheltered alongside the individuals they had victimized. Fair and effective procedures are a crucial component of protection, ensuring that those entitled to it are appropriately recognized and those who are not are filtered out, even if the Convention is silent on the processes for recognizing refugee status. When procedures for determining refugee status are efficient and open, they "are their own deterrent of misuse."[19] In contrast to choices that have (or appear to have) been made without sufficient respect for due process and impartiality, decisions made under such practices are defendable and may survive public scrutiny and inquiry.

1.3.1 Definition of Refugee

The beneficiaries of the Refugee Convention are listed in Article 1A(2), which defines a refugee as someone who

> As a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, he who is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it[20].

It should be made clear that this definition applies solely to refugees *ipso iure*. In other words, it is widely accepted that recognizing someone's position as a refugee does not make them one; rather, it only certifies their status. A person only qualifies as a refugee after meeting the criteria outlined in Article 1A of the Refugee Convention. This brings up two issues: first, even while in principle, the finding of refugee status might seem irrelevant; in fact, it would have no bearing on the protection that the Convention grants the refugee. As a result, even though States have a great deal of discretion over how to determine whether a person is a refugee, and even though UNCHR, unlike the opposing States, has no obligation to uphold the provisions of the Convention that would eliminate or, at the very least, limit the scope of their interpretation, they still have several procedural and substantive duties intended to protect people who are already refugees even before their status is recognized. These responsibilities are primarily – though not exclusively – derived from Article 33 of the Refugee Convention, which enshrined the ban on *refoulement*[21], a principle that is rightfully regarded as one of the pillars of international law. The second argument is that the phrases used in the provisions of the Refugee Convention are not always the same. Although there is only one notion of a

[19] GOODWIN-GILL (2001: 8).
[20] GRAHL-MADSEN (1966-1972, II: 108 ff.); SCHMAHL (2011: 247).
[21] GRAHL-MADSEN (1983: 14).

refugee, the term takes on several meanings depending on the circumstances under each Article of the Convention. There are three types of refugees: refugees who are out of Court, refugees who are legally present in the nation, and refugees who reside there. The first two share a crucial characteristic: the refugees in both categories have not had their status officially and positively determined. The only distinction is that refugees who are lawfully present in the host country are doing so following the laws on foreign nationals, meaning they have an entry document and a temporary stay permit.
The protection afforded by the Convention reflects the variations among different refugee categories: the more the connection to the host nation, the greater the refugee's rights. On the other hand, refugees legally residing in the nation often have a recognized status or, if not a long-term, though not necessarily permanent, authorization to stay. As a result, all groups are protected by the ban on *refoulement.* However, only some are free to roam around the host country's territory, and even fewer have the right to association, housing, and other rights.

1.3.2 The Principle of *Non-Refoulement*

The principle of *non-refoulement,* meaning "forbidding to send back*,"* is the cornerstone of the Refugee Convention.
In the past, international associations of international attorneys have used this idea as a prerequisite. It was established at the Geneva Session of the Institut de Droit International in 1892 that a refugee should not be delivered up to another State seeking him by way of expulsion unless the guaranteed conditions for extradition were correctly observed[22].
The UN establishment following World War II provided fresh momentum for integrating this idea into international law. The 1949 Geneva Convention, relative to the Protection of Civilians Persons in Time of War's Article 45, stated that "in no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs." This was the first time the prohibition of *refoulement* was applied universally in that period of time.
The concept of *non-refoulement*, which provides more excellent protection, obtained global recognition and positive legal reinforcement through Article 33 of the 1951 Geneva Convention pertaining to the Status of Refugees, which states that:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political Opinion.

The 1984 United Nations Convention against Torture (UNCAT) stated that the *non-refoulement* commitment in a broader human rights context was

[22] Article 16, Règles internationales sur l'admission et l'expulsion des étrangers 1892.

another significant step in this direction. Article 3 of the UNCAT stipulates that no State shall extradite, repatriate, or expulse a person

> …to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violation of human rights.

Notably, the ICCPR's interpretation of the *non-refoulement* principle expands the prohibition of torture to include cruel, inhuman, and other forms of degrading treatment or punishment, whereas the UNCAT only prohibits torture. The UN has often reaffirmed how deeply the concept of *non-refoulement* is ingrained in the system of protection for human rights worldwide and how it is recognized by general international law.
In addition, it has expanded since 1951 beyond the parameters of Article 33 of the Convention so that human rights law now prohibits return to places where someone would face a real risk of being subjected to torture, cruel, inhuman, or degrading treatment or punishment, arbitrary life deprivation, a flagrant denial of the right to a fair trial, or a flagrant denial of the right to a fair trial. *Non-refoulement* is regarded as a fundamental tenet of customary international law.

1.3.3 Directive 2004/83: Criteria for Qualification

On 29 April 2004, the Council of the European Union adopted Directive 2004/83 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or persons who otherwise need international protection and the content of the protection granted.
The Preamble states that:

> The main objective of this Directive is, on the one hand, to ensure that Member states apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member states[23].

As a result, the Directive represents the first regionally focused, legally binding supranational instrument in Europe that lays out the requirements for individuals to be considered refugees or others in need of international protection and the rights associated with those statuses.
By recognizing that persecution can come from non-state actors (Article 6), as well as the recognition of gender- and child-specific forms of persecution (Article 9(2)), the Directive helps to clarify some of the elements of the refugee definition in the UN Convention of the Status of Refugees that had been interpreted differently by Member states.

[23] Recital 6, Directive 2004/83.

The Directive also includes contentious clauses, such as the idea that refugee status may not exist when an option to internal flight is available (Article 8) and when non-state actors might offer protection (Article 7(1)). Furthermore, it is sufficient for the state or non-state actors to take "reasonable steps to prevent the persecution" (Article 7(2)) in order to establish the existence of protection (and, consequently, the absence of refugee status), regardless of whether or not those actions result in the adequate protection of individuals.
The Directive is an instrument of secondary EU legislation. Given the supremacy of EU law, the need for EU law to adhere to human rights as general principles of Union law, and the requirement that Member states take all appropriate measures to eliminate conflicts between their obligations under EU law and those under public international law, including by amending or denouncing pre-existing international treaties that may be incompatible with EU law, the question of how the Directive will be implemented arises.
Any discussion of the right to seek asylum must begin with the admission that, despite being the most fundamental right for refugees, this right was not expressly recognized by any international human rights law instrument with either a universal or a European scope at the time the Directive was adopted (including the Geneva Convention).
However, regionally focused international accords had already codified the right to refuge throughout the Americas and Africa. As the first supranationally encompassing legally binding legislation in Europe that requires nations to give asylum to refugees and other people in need of protection[24], the Directive, therefore, aligns Europe with other continents. It is important to note that, despite the absence of a universally recognized right to receive asylum, approximately 100 of the 146 states that are parties to the Geneva Convention and/or its Protocol are now subject to an obligation under international law (of regional scope) to provide asylum as a result of the implementation of the Directive.
However, these words are not used in the Directive. According to Article 13, "Member states shall grant refugee status to a national of a third country or a stateless person, who qualifies as a refugee." As stated in Article 18, "Member states shall grant subsidiary protection status to a national of a third country or a stateless person eligible for subsidiary protection." Subsidiary protection is one of two types of international protection, with refugee status, that the European Union recognizes. Subsidiary protection may apply to people whose refugee status has been denied; for a person to be granted subsidiary protection, it must be determined whether there is a genuine risk that they will be subjected to severe harm upon their return, such as the death penalty, torture, or other inhuman or degrading treatment, or to indiscriminate violence as a result of an armed conflict.

[24] This obligation, which was enshrined in Art. 5 of the Commission's proposal, was immediately rejected by the Council at the beginning of the negotiations process (see Doc. 10596/02 ASILE 36, 9 July 2002), although it was later reinstated.

According to Article 2(d) of the Directive, "refugee status" refers to a Member State's recognition of a national of a third country or a stateless person as a refugee. This language is regrettable because the Directive itself acknowledges that a person is a refugee[25] within the meaning of the 1951 Convention as soon as they meet the requirements outlined in the definition[26], regardless of whether their status has been legally confirmed. According to UNHCR, the Qualification Directive employs the phrase "refugee status" to describe the collection of rights, advantages, and responsibilities resulting from a person's identification as a refugee. According to UNHCR, "asylum" better captures this second connotation. Although the word "asylum" is not mentioned in the Directive, it does have a legal foundation in Art. 63(1)(c) TEC, which relates mainly to measures on asylum.

1.4 The Charter of Fundamental Rights of the European Union

The European Court of Justice determined in Opinion 2/94[27], as it stood at the time, the EC Treaty did not give the European Community the authority to adhere to the European Convention of Human Rights (ECHR), which is where the Charter started. The Member State governments may have changed the Treaties in response to the Opinion to create a legal foundation for ratification of the Convention. However, doing so would have needed consensus, which was lacking. The German EU Presidency suggested a Charter of Fundamental Rights for the Union as an alternative to admission. According to the Presidency Conclusions of the European Council in Cologne on 4 June 1999:

> Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy [...]. There appears to be a need, at the present stage of the Union's development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens[28].

Following the conclusions of the Cologne Presidency, the European Council created a "body" whose members were chosen in the European Council in Tampere on the 15 and 16 October 1999[29] to prepare the proposed Charter. The Cologne Council also mandated that this body submit a draft text ahead of the December 2000 European Council. It anticipated that the European Council would propose to the European Parliament and the European Commission that, together with the Council,

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[25] Recital 14, Directive 2004/83.
[26] Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, 1979, para. 28.
[27] Opinion 2/94 on Accession by the Community to the EHCR (1996) ECR I-1759.
[28] Presidency Conclusions, Cologne European Council, 3 and 4 June 1999, *European Council decision on the drawing up a Charter of Fundamental Rights of the European Union*.
[29] Conclusions of the European Council in Tampere, 15 and 16 October 1999, *annex composition, method of work, and practical arrangements for the body to elaborate a draft EU Charter of Fundamental Rights, as set out in the Cologne conclusions*.

> they should solemnly proclaim on the basis of the draft document a European Charter of Fundamental Rights. It would then have to be considered whether and, if so, how the Charter should be integrated into the treaties.

Meetings of the Committee charged with creating the draft Charter, now known as the Convention, were held from December 1999 through the fall of 2000. The result was a compromise in nature. In the original French version of the initial Presidium proposal, which was made public in February 2000, the phrase "droit d'asile"[30] was employed. This proposal explicitly excluded EU nationals:

> Persons who are not nationals of the Union shall have a right of asylum in the European Union [in accordance with the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees] [under the conditions laid down in the Treaties].

The proposal aimed to consider Protocol 29 to the Treaty Establishing the European Community (TEC), which deals with asylum for citizens of the Member States of the European Union[31]. This Protocol resulted from a contentious disagreement between Spain and Belgium about the review of asylum requests submitted by members of terrorist organizations. The Protocol banned reviewing asylum claims submitted by citizens of EU Member States. Nevertheless, it permitted several exceptions, such as a Member State's unilateral choice to consider such a claim[32], which in reality, lessened the impact of the prohibition.

The Treaty of Nice did not include the Charter in the Treaties. The Charter was instead "solemnly proclaimed" on 7 December 2000, outside the Nice European Council by the presidents of the European Parliament, the Council of the European Union, and the European Commission.[33]

However, this procedure resulted from a protracted discussion over recognizing fundamental rights inside the European Union or Community that took place throughout Europe. The absence of legally stated human rights clauses in the Treaties creating the European Communities caused significant discomfort in the constitutional Courts of some Member states as early as the late 1960s, especially in the Federal Republic of Germany. The European Court of Justice's theory of the supremacy of Community law, established in the 1960s, had the logical repercussion that even Member states' constitutionally protected standards (including human rights guarantees) were subject to all Community legal requirements. The European Court of Justice established a body of legislation that required the exercise of Community

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[30] Draft Art. 17, CHARTE 4137/00 CONVENT 8, 24 February 2000.

[31] European Union, Selected Instruments taken from the Treaties, Book I, Volume I, Luxembourg, Office for Official Publications of the European Communities, 1999, 561.

[32] Para (d) of its sole Article.

[33] Charter of Fundamental Rights of the European Union, Nice, 18 December 2000.

competence to adhere to "general principles" of Community law, which the Court held comprised fundamental rights. The ECJ might consider a legislative or executive action by Community institutions unconstitutional if it violated those fundamental rights acknowledged as shared by all Member states. The European Court of Justice's designation of "fundamental rights" relies on the constitutional histories of the Member states, particularly the European Convention on Human Rights. Later, this doctrine was expanded to include the actions of Member states acting under Community law, albeit the exact scope of this was and is still up for controversy.

The European Commission and the European Parliament began to pay attention to the position of human rights in the Community in the middle of the 1970s. The European Commission failed to get the EC to ratify the European Convention on Human Rights in 1979. As a result, the EC institutions issued a joint statement on human rights in 1977. The Parliament presented further suggestions about fundamental rights in 1989 and 1996. Likewise, the intergovernmental conferences in Maastricht and Amsterdam began to address fundamental rights as a topic in the 1990s.

While ensuring that the ECJ would not have the authority to enforce these commitments in the context of the Second, namely common foreign and security policy, and the Third, namely Justice and Home Affairs, Pillars, the Maastricht Treaty of 1993 included a limited reference to human rights in the context of the European Union Treaty, adopting terminology familiar from the Court's rulings. The Amsterdam Treaty of 1997 went further by expanding the ECJ's jurisdiction over laws on the establishment of a zone of freedom, security, and justice under the EC Treaty and in the revised Third Pillar, incorporating human rights provisions into the procedures for the admission of new Member states, allowing the suspension of Member states for egregious violations of human rights (but generally without ECJ involvement in this process[34]), and enacting the Human Rights in the Process of Accession Directive.

As we have seen, one strategy used starting in 1979 to fill this alleged gap was to push for the European Community to ratify the European Convention on Human Rights. However, the ECJ ruled that a treaty modification would be required before the Community could accede to the ECHR after considering the subject in Opinion 2/94. The ECJ acknowledged that fundamental rights play a significant role in the EC legal system while refusing to permit the use of existing Treaty provisions to avoid the need for a Treaty revision, emphasizing the need for a significant political initiative and partially explaining the current debate.

Although it aims to increase rights' accessibility for European people, the Charter is not an accessible text to read or comprehend. The EU Charter's Articles 1-50 comprise what we refer to as "fundamental rights" in the title of the Charter and as "rights, freedoms, and principles" in the Preamble – a reference to Article 6(1) TEU. The rights are divided into six Titles: I: Dignity,

[34] Nice Treaty, Nice, 26 February 200.

II: Freedoms, III: Equality, IV: Solidarity, V: Citizens' Rights, and VI: Justice. Even if the overall structure is logical, the titles of the Titles do not always indicate their contents. For instance, most of the Articles in Title V: Citizens' Rights apply in some way to people who are not Union citizens. The horizontal requirements under which the rights, freedoms, and principles in the Charter must be construed are found in Title VII, "General provisions governing the interpretation and application of the Charter."[35]

The phrase "fundamental rights" is used in the title of the EU Charter, indicating that it is meant to be a catch-all term that includes not only the traditional universal guarantees of freedom from state interference but also the right to participate in some facets of political, social, and economic life as well as some rights that are exclusive to Union citizens. The Preamble and several Article titles distinguish between the terms "right" and "freedom"; for example, Articles 2, 3, 6, 9, 14, and 18 are considered to be rights, whereas Articles 10-13, 15, and 16 are stated to be freedoms. However, the Charter makes no clear or legally significant difference between right and freedom. Thus, Title II: Freedoms contains provisions for what is referred to as the "rights" to liberty and security, private and family life, education, property, and asylum. Article 11, which, like its counterparts in the Universal Declaration of Human Rights and the ECHR, protects "the right to freedom of expression,"[36] serves as an example of how the two concepts are conflated.

Article 18 of the Charter on the right to asylum, as amended by the Treaty of Lisbon, is worded as follows:

> The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and following the Treaty on European Union and the Treaty on the Functioning of the European Union.

Such a provision raises several questions, including the reference to the Geneva Convention relating to the Status of Refugees and its Protocol as the standards that must be followed in the application of this right, even though neither of these instruments expressly recognizes asylum as one of the rights to which refugees are entitled.

Although Article 18 requires the right to asylum to be guaranteed, it does not specify who is eligible for it. While the right of States to grant asylum to individuals is well established in international law, the right of individuals to receive asylum is not explicitly stated in any international instruments with universal applicability, despite being acknowledged in international treaties with regional applicability. None of the Charter's clauses mention any state rights; instead, they all uphold the rights of people. The Preamble of the Charter states that it:

> [r]eaffirms [. . .] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the

[35] Art. 6(1) TEU, third indent.

[36] Art. 19, Universal Declaration of Human Rights; Art. 10, ECHR.

> European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights [emphasis added].

Therefore, the content of the Charter, as well as the explicit reference to international human rights instruments and fundamental freedoms of constitutional rank, suggests that this instrument is concerned with the recognition of fundamental rights rather than with the rights of Member States. Therefore, it would only be reasonable to assume that despite the lack of express subject, the well-established nature of asylum as a right of States in international law, and the divergence among official languages, the right to asylum in the Charter is to be construed as a right of individuals, rather than a right of States.

The difference between "principles" and rights/freedoms – which is made in the Preamble, repeated in Article 51(1) as "respect the rights, observe the principles," and given more definite legal impact by Article 52 – may be of greater potential significance. The Charter's guiding principles may be "implemented" by Union institutions and Member states, according to Article 52(5), and "they shall be judicially cognizable only in the interpretation of such acts and in the ruling of their legality." The "rights and freedoms" or "rights" mentioned elsewhere in Article 52 are not subject to such limitations. The "explanations," an updated version of those published with the consent of the Praesidium of the Convention, provide the origins of the provisions in Titles I through VI. The European Convention on Human Rights[37], the EC and EU Treaties[38], the European Social Charter[39] and the Community Charter on the Fundamental Social Rights of Workers[40] are the sources that are most commonly used in the justifications. Other international treaty sources include the New York Convention on the Rights of the Child[41] and the Geneva Conventions governing the status of refugees. The right to good administration[42] and the freedom to conduct business are only two examples of rights for which decisions of the Court of Justice constitute a significant source. Member State constitutional traditions are mentioned several times as a secondary source.

1.4.1 European Convention on Human Rights

The European Convention for the Protection of Human Rights and Fundamental Freedoms was created immediately after World War II when the international human rights protection problem received considerable attention. The crimes of National Socialism had destroyed these rights, and

[37] 19 Articles in total, including most of the provisions of Titles II and VI.
[38] All the Title V rights, among others.
[39] 13 Articles, including all but the last two Articles of Title IV.
[40] An additional source of some Title III and many Title IV provisions.
[41] Articles 18 and 24.
[42] Articles 16 and 41.

the national-level assurance of their preservation had shown to be wholly insufficient.

After the Second World War, promoting fundamental freedoms and human rights became a United Nations (UN) goal. The Atlantic Charter, first published in 1941, introduced Churchill and Roosevelt's four freedoms: freedom of life, freedom of religion, freedom from hunger, and freedom from fear. The General Assembly's adoption of the Universal Declaration of Human Rights on 10 December 1948 marked a critical turning point in the framework.

Additionally, preliminary actions were made on a European scale. A "Congress of Europe" was held in the Hague in May 1948 under the auspices of the International Committee of the Movements for European Unity. This endeavor greatly aided the creation of the Council of Europe in 1949. The Congress passed a resolution, and its introduction runs as follows:

> The Congress
> Considers that the resultant Union or federation should be open to all European nations democratically governed, and which undertake to respect a Charter of Human Rights; Resolved that a Commission should be set up to undertake immediately the double task of drafting such a Charter and of laying down standards to which a State must conform if it is to deserve the name of democracy.

The issue was debated during the inaugural meeting of the Council of Europe's Consultative Assembly (now known as the Parliamentary Assembly) in August 1949, after the organization had been established. The Convention was drafted quickly after that short time. The Consultative Assembly endorsed the Committee's report in September of the same year, which contained ten rights that would be covered by a collective guarantee, and called for the creation of a European Commission for Human Rights and a European Court Justice. The Council of Europe's Committee of Ministers decided to form a Committee of Government Experts in November of that year, and they were given the assignment of creating a draft document based on this study.

The Committee's work was finished in the spring of 1950. Despite making significant progress, it could not resolve several political issues. Even though it agreed on most of the content of the Committee of Experts, the later-appointed Committee of Senior Officials had to defer to the Committee of Ministers on a few issues. The Committee of Ministers accepted a revised draft document on 7 August 1950, less comprehensive than the initial suggestions on several topics. The Convention was subsequently signed in Rome on 4 November 1950[43], and its Preamble states that it was created "to take the first steps for the collective enforcement of certain rights stated in the Universal Declaration." It came into effect on 3 September 1953, and as of right now, all 46 Council of Europe member nations have approved it.

[43] Council of Europe, Collected Texts, Strasbourg, 1994, pp.13-36.

Human rights are firmly enshrined in the EU Treaties' constitutional framework, which also includes EU immigration and asylum legislation. Three sections of the ECHR are particularly pertinent for immigration and asylum policy based on the broad principles governing conformity of EU law with human rights. While migrants who are living in European countries may invoke Article 8 ECHR to defend their right to a private or family life, Article 3 ECHR acts as a critical safeguard against abuse in the countries of origin or transit from which European states are requested to offer asylum, and Article 13 ECHR directs procedural and judicial decision-making.

1.4.2 Article 3: Prohibition of Torture

The prohibition against torture and other cruel, inhuman, or humiliating treatment or punishment is enshrined in Article 3 of the ECHR. The strict approach is moderated by the high threshold imposed by this absolute right. According to this provison "no one shall be subjected to torture or to inhuman or degrading treatment or punishment", the European Court of Human Rights held in its judgement in the 1989 Soering case that Article 3 prohibits the extradition of a person who is threatened with torture or inhuman or degrading treatment or punishment in the requesting country. Soering represents the first opportunity the Court has had to pass upon the Commission's developing case-law to the effect that

> "the extradiction of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3."[44]

Extradition in such circumstances would, according to the Court, "plainly be contrary to the spirit and intendment of the Article" and would "hardly be compatible with the underlying values of the Convention."[45] In fact, expulsion is incompatible with Article 3 ECHR in the case of threat of "torture or inhuman or degrading treatment or punishment".
To be covered under Article 3, the mistreatment "must attain a minimum level of severity." The European Court accepted some relativity in this assessment of Ireland v. the United Kingdom. However, it refocused the investigation on the case and the victim. It is essential to apply this idea of relativity with care since an overreliance on it might result in the conclusion that specific acts of cruelty are socially or culturally acceptable in specific situations[46]. According to the Court of Ireland, determining the degree of severity "depends on all the circumstances of the case, such as the nature and context of the treatment, its

[44] European Court of Human Rights, Application no. 14038/88, 7 July 1989, *Soering v. United Kingdom*, para. 88.
[45] Ibidem.
[46] RODLEY (1999: 104).

duration, its physical or mental effects, and, in some cases, the sex, age, and state of health of the victim."[47]

The criteria used to determine whether forms of abuse should be considered torture or inhuman or degrading treatment have kept the high threshold criterion in place. Some critics have mistaken the need for relativity with the need for proportionality[48]. When deciding whether the severity level has been fulfilled, the Court does not engage in a balancing act. It exercises relativism by concentrating on the specific circumstance and victim in the issue. The Court will consider the circumstances of the imprisonment, including whether the conditions are consistent with respect for human dignity and if the person has experienced more suffering or hardship than what is necessary for the detention[49]. The relativity component does not diminish Article 3's absolute essence because that aspect does not limit the right.

The Convention safeguards the person from graphic displays of state power abuse. Due to this Article, a State is subject to both a negative and a positive obligation. The absolute prohibition against torturing or punishing someone inhumanely is Article 3's negative obligation. The positive requirement was evolved via the Strasbourg jurisprudence: the State must take all appropriate measures to ensure that the rights and freedoms guaranteed by Article 1 ECHR are respected by everyone subject to its jurisdiction. The effectiveness of protecting the fundamental rights outlined in Article 3 would be significantly diminished or perhaps rendered useless without this "positive" component of State accountability[50].

Positive obligation develops in various settings but may be split into two significant kinds. The first is the responsibility to examine any suspected infractions thoroughly[51]. By establishing procedural protections against abuses by State officials, this component of the positive responsibility ensures that Article 3's substantive nature is upheld. Effective investigations must also be conducted to fulfill Member States' general commitment under Article 1 to "secure" Convention rights for all individuals under their authority. The Court has found a violation of this procedural responsibility even in circumstances where it was impossible to prove beyond a reasonable doubt that State authorities had mistreated the petitioners as they claimed[52]. Second, the State has a duty of protection or deterrence that requires State authorities to safeguard citizens against prohibited mistreatment from state agents and private citizens.

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[47] European Court of Human Rights judgment,18 January 1978, Application no. 5310/71, *Ireland v. United Kingdom.*

[48] MCBRIDE, (1999: 28).

[49] European Court of Human Rights judgment, Application no. 62208/00, 16 June 2005, *Labzov v. Russia.*

[50] European Court of Human Rights judgment, 11 April 2000, Application No. 32357/96, *Veznedaroğlu v. Turkey,* para. 32.

[51] e.g., European Court of Human Rights judgment, Application no. 21987/93, 18 December 19986, *Aksoy v. Turkey*.

[52] e.g., ibidem.

1.5 Directive 2008/115: Return Directive

One of the most critical pieces of legislation in the field of refugee law is EU Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member states for returning illegally residing third-country nationals (so-called "Returns Directive"). This Directive seeks, as stated in the Preamble, to create an effective European removal and repatriation policy for third-country nationals whose immigration status is irregular; such policy should be based on common standards to ensure that individuals are returned in a humane manner and with full respect for their fundamental rights and dignity[53].

However, as is clear from Article 1, the Directive's primary goal is to establish "common standards and procedures" to ensure the effective repatriation of such migrants, even though it also aims to ensure that fundamental human rights are respected by Member states carrying out removals of illegally present migrants[54]. As a result, the Directive has come under heavy fire from NGOs, non-EU States (particularly those in Latin America), and UN agencies for placing an undue emphasis on ensuring the effective removal of irregular migrants and neglecting to protect fundamental human rights, particularly the right to freedom, the rights of children, and the principle of *non-refoulement*. Critics have renamed the instrument the "expulsion Directive." When the European Parliament was given a significant role in the passage of EU law, there were unrealistic expectations about what it might do to uphold human rights. This contributed to some of the criticism the Directive received. In this instance, the Parliament's ability to fully exercise its duties has been hampered by vastly disparate national practices, the desire of States to preserve extensive discretion, and the interest of States in preserving broad powers. The European Council meeting in Brussels in 2004 requested that the Commission submit a proposal on the return and repatriation of foreign nationals who were residing there illegally; however, the Council was less willing to accept the need to adopt such a measure at the European level, depriving the Member states of their, up to that point almost unrestricted, sovereignty concerning the treaty. Thus, a plan that would have left practically all decisions to the states' discretion was put out under the German Presidency in 2007, having very little of a harmonizing impact. The decision by the European Parliament to freeze the funds for the European Return Fund until a Directive aimed at standardizing national return processes was enacted was one of the factors that ultimately led to the approval of the Directive in its final wording[55]. Thus, even while some Authors said that it could have been preferable to adopt no Directive at all due to its substance, the adoption of the Directive can be viewed as a success in and of itself.

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[53] Brussels European Council, 4 and 5 November 2004.
[54] BALDACCINI (2009: 1).
[55] PEERS, *Statewatch Analysis: the proposed EU Returns Directive*, January 2008.

The Returns Directive intends to provide common standards and practices for repatriating foreign nationals who are residing unlawfully; in particular, it lays out a complicated process that favors voluntary repatriation over forced returns. The Directive's creation of a system of EU-wide entrance bans[56]It is one of its most significant features, which applies to the whole EU's territory and is required in some circumstances. The Directive also establishes standard rules on the detention of citizens of third countries whose removal must be enforced, including limitations on the length of such detention, its requirements and conditions, and the procedural protections that must be provided to detainees. Procedural protections include the right to appeal against any return decision. However, these regulations only set "minimum" standards rather than "common" ones (as stated in Article 1)[57], leaving States with considerable latitude in implementing the Directive. For instance, Article 4(3) states that the Directive "shall be without prejudice to the right of the Member states to adopt or maintain provisions that are more favorable to persons to whom it applies provided that such provisions are compatible." Because of this, Member states are permitted to establish or retain more benevolent laws about any provision that is not required, even if they must transpose all necessary regulations of the Directive (i.e., all "shall" provisions).

The Directive's "Termination of illegal stay" Chapter II lays out the procedures to be followed for removing migrants who are in the country illegally. The process of a third-country national returning to his or her country of origin, a country of transit under Community or bilateral readmission agreements or other arrangements, or another third country to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted is referred to as a "return" according to Article 3(3). As a result, the word "return" does not always mean that the person in question will return to his or her place of origin. Instead, the migrant may be sent back to another nation, such as a transit country or, with the individual's and the State's approval, a third country.

The "procedural safeguards" the third Chapter of the Directive, which contains several provisions to ensure the legality of any act adopted under the Directive, establishes minimal formal standards and lists a number of remedies that must be made available against such acts.

The Directive's Chapter IV addresses topics about detention. Detention of third-country nationals will inevitably be ordered, as it frequently was even before the Directive came into effect, even though it is to be limited and subject to the principle of proportionality concerning the means used and objectives pursued. This is because it is necessary to prepare for the return or carry out the removal process (Preamble, para. 16). So, even if the latter seeks to ensure that detention is only used as a last option, that its duration is kept to a minimum, and that the circumstances of imprisonment are humane and

[56] SCHIEFFER (2010: 1533).
[57] Ibidem, p. 1509.

dignified, it also anticipates detention's use in a significant number of situations. The current text is, therefore, obviously better than the original Commission proposal on this point because it never calls for mandatory detention and only permits States to hold third-country nationals in detention if several conditions are met.

The Directive also contains a provision for emergencies that permits States to deviate from some of its requirements "in situations where a vast number of third-country nationals to be returned places an unforeseen heavy burden" on their detention facilities or staff, but only for as long as the exceptional situation lasts and after notifying the Commission. While States are required to inform the Commission, the latter does not have the authority to contest the State's assessment of the existence of an emergency[58]. This provision, which is entirely new as it was not included in the original proposal by the Commission, gives States much discretion to determine whether the situation is exceptional or unforeseen. This rule has also drawn criticism because it permits deviations from some of the fundamental directive provisions. In particular, it permits judicial review of administrative detention decisions not to be decided "as speedily as possible" and deviations from the obligation to keep foreign nationals separated from regular prisoners and to provide families detained separately with separate housing.

[58] SCHIEFFER (2010: 1548).

CHAPTER 2: Case 353/2016, MP v. Secretary of State for the Home Department

2.1 The Dispute in The Main Proceedings

MP v. Secretary of State for the Home Department was decided by the Court of Justice of the European Union's (CJEU) Grand Chamber on 24 April 2018[59]. The judgment considers how subsidiary protection should be interpreted and applied.

For the first time, the European Court of Human Rights (ECtHR) heard cases concerning medical difficulties, i.e., medical cases. In other words, a case concerning the application of the prohibition of torture or inhuman or degrading treatment to the case of expulsion of the sick foreign national. With its ruling in D v. the United Kingdom on 2 May 1997, the ECtHR found a violation of Article 3 of ECHR for the first time[60]. D v. United Kingdom is still the most significant case involving medical deportation. In this jurisprudence, the European Court of Human Rights (ECtHR) considered whether the return of people who have a serious illness to their place of origin, where no reliable medical care is available, might constitute a breach of Article 3 ECHR's ban on torture and other forms of inhuman or degrading treatment. Only extremely unusual circumstances, such as approaching death, according to the ECtHR, might give rise to such a finding[61].

The M'bodj[62] case was subsequently referred to the CJEU. The CJEU was questioned if a severe sickness necessitated the EU member states to give subsidiary protection, as opposed to the instances before the ECtHR, which merely looked at whether the expulsion in medical circumstances may show a breach of Article 3 ECHR. In essence, the CJEU concluded that member states are not required to provide subsidiary protection to those with serious diseases who cannot receive adequate care in their place of origin[63]. If the authorities were purposefully denying the applicant the necessary medical care, the case might be different[64].

In the crucial Paposhvili[65] case from 2016, the ECtHR modified its line of jurisprudence. The ECtHR lowered the threshold by declaring that rather than an immediate risk of death, a real risk "on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment" that causes "a serious, rapid, and irreversible decline" in the

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[59] European Court of Justice, Case C-353/16, 24 April 2018, *MP v. Secretary of State for the Home Department.*

[60] European Court of Human Rights, Application No. 30240/96, 2 May 1997, *D v. the United Kingdom.*

[61] European Court of Human Rights, Application No. 26565/05, 27 May 2008, *N v. the United Kingdom,* paras. 42–45, 51.

[62] European Court of Justice, Case C-542/13, 18 December 2014, *M'Bodj v. État Belge.*

[63] Id. para. 35.

[64] Id. para. 36.

[65] European Court of Human Rights, Application No. 41738, 13 December 2016, *Paposhvili v. Belgium.*

person's health and leads to "intense suffering or to a significant reduction in life expectancy" can also establish a violation of Article 3 ECHR[66].
By including former victims of torture or other inhuman or degrading treatment who are purposefully denied access to necessary medical care upon returning home, this judgment significantly broadens the definition and application of the concept of subsidiary protection. This is consistent with the meaning and objectives of the subsidiary protection status as stated in the Qualification Directive, which aims to provide beneficiaries with protection comparable to that provided to refugees under the Refugee Convention. *In casu* the deliberate withholding of necessary medical care, the state's activities might be compared to the crimes listed as acts of persecution under Article 9 of the Qualification Directive. Furthermore, it is logical that the CJEU uses the discriminatory policy as an example, as it aligns with the concept of a particular social group defined in Article 10 Qualification Directive.
Essentially, this judgment is a sequel to the Paposhvili judgment in which the CJEU builds further and rules that for the applicant to be eligible for subsidiary protection; he must be intentionally deprived of appropriate medical treatment in a discriminatory manner or not provided with rehabilitation. However, as regards the first situation, the question remains whether subsidiary protection must also be granted in cases where the medical situation is so severe that the applicant is "at risk of imminent death" or "suffering a serious, rapid, and irreversible decline in his state of health resulting in intense suffering or to a significant reduction in life expectancy" but this intentional deprivation of appropriate medical treatment lacks this discriminatory nature. The question of whether subsidiary protection must also be provided in the first scenario, where the applicant's medical condition is so severe that he is "at risk of imminent death"[67] or "suffering a serious, rapid, and irreversible decline in his state of health, resulting in intense suffering or to a significant reduction in life expectancy"[68] but this intentional deprivation of appropriate medical care lacks this discriminatory nature, remains.

2.1.1 First Plea in Law: Application for Asylum

The case's factual circumstances concern a Sri Lankan national who received permission to stay on British soil until 30 September 2008, so he could complete his studies. On 5 January 2009, when the period had passed, he submitted an asylum application. He claimed that as a member of the "Liberation Tigers of Tamil Eelam," a guerilla group that sought to create an independent Tamil state, he had been imprisoned and tortured by Sri Lankan authorities. He asserted that if he were sent back to Sri Lanka, he would once more be in danger of suffering more abuse for the same reason. This was

[66] Ibidem, para. 183.
[67] Ibidem, para. 178.
[68] Ibidem, para. 183.

determined not to be believable during the judicial process. On 23 February 2009, the UK immigration officials rejected his plea because they were doubtful that MP was still of interest to the Sri Lankan government and would not face further mistreatment if he returned.

2.1.2 Second Plea in Law: Subsidiary Protection Under Directive 2004/83

After the asylum application was denied, MP filed a lawsuit against the ruling before the Upper Tribunal's Immigration and Asylum Chamber, from now on Upper Tribunal. The applicant was suffering from the aftereffects of torture, had significant post-traumatic stress disorder and severe depression, showed evident suicidal inclinations, and seemed predominantly determined to commit suicide if he had to return to Sri Lanka, according to medical testimony provided to that Court.
The Upper Tribunal sided with the UK immigration authorities even though it acknowledged that the applicant had a real fear of returning to his own country and had trouble trusting authorities generally, including those in the UK.
However, the Upper Tribunal believed that the applicant's expulsion due to the lack of proper medical care in Sri Lanka would breach Article 3 of the European Convention on Human Rights (ECHR). In essence, it said that even though Sri Lanka has some specialized mental health facilities, according to an Operational Guidance Note from the United Kingdom Border Agency, the money that is spent on mental health only goes to the significant mental health institutions in major cities, with only 25 practicing psychiatrists in the whole country. It also said that if MP were to be returned to Sri Lanka, he would be under the care of the Sri Lankan health service.
The ruling of the Upper Tribunal was maintained by the Court of Appeal (England and Wales) (Civil Division), from now on Court of Appeal. According to the Court of Appeal, Directive 2004/83 was not meant to apply to situations covered by Article 3 of the ECHR in which the risk was one to one's health or suicide rather than one of persecution. MP filed an appeal with the referring Court in response to that ruling. The question of whether MP is entitled to subsidiary protection under Articles 2 and 15 of Directive 2004/83 is at the heart of the dispute, according to the Supreme Court of the United Kingdom.
MP asserts that the Court of Appeal and the Upper Tribunal adopted a too-limited interpretation of the application of Directive 2004/83. Given that his mental illness cannot be considered a naturally occurring condition because it was brought on by torture at the hands of Sri Lankan authorities, MP contends that he should have been granted subsidiary protection in light of his history of mistreatment by those authorities and the lack of medical facilities in that nation to treat the effects of such mistreatment. On the other hand, MP argues that there is no longer a threat of repeating the cruel treatment that led to his current health condition having no bearing on his right to such protection.

According to the referring Court, neither the European Court of Human Rights nor the CJEU has concluded that particular issue, not even in the M'Bodj decision from 18 December 2014.

2.2 Question Referred for Preliminary Ruling

In appeal, the UK Supreme Court decided to stay the proceedings and referred this question to the CJEU for a preliminary ruling:

> Does Article 2(e), read with Article 15(b), of Directive 2004/83 cover a real risk of serious harm to the physical or psychological health of the applicant if returned to the country of origin, resulting from previous torture or inhuman or degrading treatment for which the country of origin was responsible?

Article 2, paragraph (e) states:

> person eligible for subsidiary protection means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

Article 15 defines serious harm, namely:

> Serious harm consists of:
> (a) 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.

2.3 CJEU Judgment Of 24 April 2018

For the first time in its case law, the CJEU evaluated and interpreted the UN Convention Against Torture (CAT), since the Qualification Directive's preamble mandates that international human rights legislation be taken into consideration when interpreting and executing such Directive. The Court expressly refers to Article 14 of the Convention Against Torture (CAT), which gives torture victims the right to pursue remedy and rehabilitation[69]. Based on this, the CJEU broadens the scope of its decision in M'Bodj by giving a non-exhaustive summary, highlighted by the words "inter alia," of the instances in which an applicant is purposefully denied the necessary care by the government of the applicant's country of origin. This relates to situations in which the applicant's country of origin does not offer rehabilitative services

[69] European Court of Justice, Case C-353/16, 24 April 2018, *MP v. Secretary of State for the Home Department*, paras. 52–53.

or has implemented a discriminatory policy that denies members of particular ethnic groups access to necessary medical care[70].

MP is remarkably relevant for the study of non-removability through the lens of EU asylum law. Firstly, unlike M'Bodj, where the applicant had already been granted indefinite leave to remain in Belgium on account of his state of health, MP was concerned as 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 a 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 Article 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. Because of this, the judgment has been celebrated for "ensuring greater protection [...] for the most vulnerable migrants: torture victims and the terminally ill."[71] 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 Article 3 ECHR.

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[70] Ibidem, para. 57.

[71] PEERS (2018), *Torture Victims and EU Law*, in *EU Law Analysis*.

CHAPTER 3: Reasonings of the Court and the Advocate General

3.1 Opinion of The Advocate General Bot

To better elaborate a resolution to the referred question, in addition to the European Court of Justice's resolution, there is at hand the Advocate General Bot's Opinion[72], and thus a closer analysis of the document is deemed necessary to pave the way for an examination of the reasoning of the Court. However, it should be kept in mind that these opinions are merely advisory in character, for they express how the Advocate General believes the Court should decide on a particular case.
The concept of subsidiary protection and its scope within the context of Directive 2004/83/EC has been a subject of considerable debate. Article 15 of the Directive, which defines the conditions for subsidiary protection, has been scrutinized to determine whether it encompasses situations involving a real risk of serious harm to an applicant's physical and psychological well-being upon return to their country of origin. The first paragraph will revolve around the analysis of the application of such Directive, in particular Article 15(b), which defines serious harm as "torture or inhuman or degrading treatment or punishment of an applicant in the country of origin"; Article 2(e), regarding the qualification for subsidiary protection of third-country national; and Article 6, which lists the possible actors of serious harm.
The second paragraph will concern MP's state of health, who suffers from post-traumatic stress syndrome and depression, and how its implications may be grounds for recognizing subsidiary protection. Following, there will be an analysis of the humanitarian grounds for applying Article 3 of the ECHR in conjunction with Directive 2004/83. At the base of such analysis, there is going to be the idea that Article 15(b) of the Directive corresponds, in essence, to Article 3 of the ECHR.
The last paragraph will revolve around the comprehensive reading of Directive 2004/83 in conjunction with Article 14 of the Convention against Torture and how the inadequacies of Sri Lanka's health system may or may not be considered grounds for giving subsidiary protection.

3.1.1 Article 15 of Directive 2004/83

The Advocate General Bot begins his analysis of the case by stating that a purely literal interpretation of Article 15 of Directive 2004/83 excludes from the scope of subsidiary protection the lack of suitable care for treatment in the country of origin to which the person concerned is expected to be returned[73]. The issue of such a case is the widening of the scope of subsidiary protection, in other words, to evaluate whether or not there is a real risk of serious harm to the applicant's physical and psychological health if he is returned to his

[72] Opinion of Advocate General Bot, 24 October 2017, *Case C-353/16*.
[73] Ibidem, para. 23.

country of origin, which is likely to result from torture or inhuman or degrading treatment suffered by the applicant in the past for which the country of origin is responsible, is included in such Article.
The terms of Article 15(b) are unequivocal; in fact, they allow the granting of subsidiary protection only if there is a risk of serious harm resulting from torture or inhuman or degrading treatment or punishment of an applicant in the future, if he were returned to his country of origin. In addition, the Advocate General refers to previous case law in which the Court has held that the three types of serious harm defined in Article 15 of Directive 2004/83 constitute the conditions to be fulfilled if a person is to be eligible for subsidiary protection, when, under Article 2(e) of that Directive, substantial grounds have been shown for believing that the applicant faces a real risk of such harm if returned to the relevant country of origin[74]. Hence, Advocate General Bot interpretates it, in the present case, that MP may not claim subsidiary protection since it is common ground that he no longer runs the risk of undergoing torture if returned to his country of origin, even if it is unlikely that he could receive the necessary treatment to manage the post-traumatic stress syndrome he suffers from, owing to shortcomings in the health system, and is likely to commit suicide if he is returned to his country of origin[75].

3.1.2 Third Country National's State of Health

In case of being returned to the country of origin, MP, suffering from post-traumatic stress syndrome and depression, seemed determined to commit suicide. However, if returned, he would be in the care of the Sri Lankan health service; where even though there are some specialized mental health facilities in Sri Lanka, according to an Operational Guidance Note from the United Kingdom Border Agency, the money that is spent on mental health goes only to the significant mental health institutions in major cities, which are inaccessible and do not provide appropriate care for mentally ill people[76].
In such regards, however, the Court stated that the likelihood of deterioration in the state of health of a third country national not arising from that person being deliberately deprived of health care is not covered by Article 15 of Directive 2004/83 since it defines serious harm as the torture or inhuman or degrading treatment or punishment of a third country national in his country of origin[77]. The Advocate General refers to the judgment M'Bodj, by stating, with the interpretation of Article 6 of the Directive, that severe such harm must

[74] European Court of Justice, Case C-465/07, 17 February 2009, *Elgafaji v. Staatssecretaris van Justitie,* para. 31; European Court of Justice, Case C-285/12, 30 January 2014, *Diakité v. Commissaire général aux réfugiés et aux apatrides,* para. 18; European Court of Justice, Case C-542/13, 18 December 2014, *M'Bodj v. État Belge,* para. 30.
[75] Opinion of Advocate General Bot Case, 24 October 2017, *C-353/16,* para. 26.
[76] European Court of Justice, Case C-353/16, 24 April 2018, *MP v. Secretary of State for the Home Department,* para. 21.
[77] European Court of Justice, Case C-542/13, 18 December 2014, *M'Bodj v. État Belge,* paras. 31 and 32.

take the form of conduct by a third party and cannot simply be the result of general shortcomings in the health system of the country of origin.
Article 6 of Directive 2004/83 defines serious harm as:

> (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.

The main issue for granting subsidiary protection in such cases is the lack of the critical criteria, namely identifying those responsible for inflicting harm against whom protection is needed. In addition, there needs to be a demonstration that the risk of being exposed to inhuman or degrading treatment arises from factors that are, directly or indirectly, but always intentionally, attributable to the public authorities of that country, either because the threats to the person concerned are being made or tolerated by the authorities in the country of which that person is a national, or because those threats are made by independent groups against which the authorities of that country are unable to provide adequate protection to their citizens.

> When an individual's state of health is such that he requires medical treatment and no appropriate medical treatment is available in his country of origin, the inhuman or degrading treatment that the individual is likely to undergo if he is returned to that country does not stem from any intentional act or omission by the public authorities or bodies acting independently of the State and is not directed towards a specific individual[78].

Therefore, the protection provided by the Member States does not meet any need for international protection within the meaning of Article 2(e) of the Directive and does not, accordingly, form part of the Common European Asylum System.
Consequently, the Advocate General proposes that the Court rule that the definition appearing in Article 2(e), read in conjunction with Article 15(b) of Directive 2004/83, does not include the real risk should the applicant be returned to his country of origin, of serious harm to his psychological health resulting from torture or inhuman or degrading treatment he suffered in the past and for which that country was responsible[79].

3.1.3 Humanitarian Grounds for Article 3 of the ECHR

Following, the Advocate General considered the possibility of the Court giving a more comprehensive answer, making it possible to read the provisions of Directive 2004/83 in conjunction with Article 3 of the ECHR and Article 14(1) of the Convention against Torture.

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[78] Opinion of Advocate General Bot Case, 24 October 2017, *C-353/16,* para. 31.
[79] Ibidem, para. 36.

Before anything else, the Advocate General made a preliminary mark, i.e., the Court has already ruled that the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principle of EU law, observance of which is ensured by the Court, and that the case-law of the European Court of Human Rights must be taken into consideration when interpreting the scope of that right in the Community legal order, since Article 15(b) of Directive 2004/83 corresponds, in essence, to Article 3 of the ECHR[80].
However, the Court has held that it is apparent from recitals 5, 6, 9, and 24 of Directive 2004/83 that, while the Directive is intended to complement and add to, utilizing subsidiary protection, the protection of refugees enshrined in the Geneva Convention, through the identification of persons genuinely in need of international protection, 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. The requirement to interpret Article 15(b) of Directive 2004/83, considering Article 3 of the ECHR, is not such as to call that interpretation into question. However, following the European Court of Human Rights case law, such interpretation may lead to subsidiary protection, but only in exceptional cases and where the humanitarian grounds against removal are compelling. In MP's case, it cannot be considered corresponding to an exceptional case in which humanitarian grounds are overriding since it has not been established that the inadequacy of the health system constitutes an infringement of Article 3 of the ECHR. However, if that inadequacy worsens the health of the person concerned, it could infringe on that provision. The Advocate General states that the present case will likely fall within such a situation, considering the post-traumatic stress that MP suffers and the risk of committing suicide if he were to be returned to his country of origin.

> Indeed, the national courts of first instance and appeal are of the Opinion that there is an infringement of those provisions, and it is apparent from the documents in the file that MP will not be returned to his country of origin, a fact which is not disputed[81].

Regard that it would be contrary to the general scheme and objectives of Directive 2004/83 to apply the protections that it provides for third-country nationals in situations entirely unconnected to the rationale of that international protection if the applicant were to be granted international protection, it would be of a different kind, under Article 2(g), of that Directive. Article 2(g) defines "application for international protection" as:

> Application for international protection' means a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and

[80] European Court of Justice, Case C-465/07, 17 February 2009, *Elgafaji v. Staatssecretaris van Justitie,* para. 28.
[81] Opinion of Advocate General Bot Case, 24 October 2017, *C-353/16*, para. 44.

> who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately.

The protection would be granted for other reasons, on a discretionary basis and compassionate or humanitarian grounds, based on compliance with Article 3 of the ECHR, inter alia.
It, therefore, follows from the preceding that a combined reading of the provisions of Directive 2004/83 and of Article 3 of the ECHR does not prevent the Member States from excluding from the scope of subsidiary protection persons in a situation such as that of MP, even if they are exposed to a risk of suicide and certainly will not receive suitable treatment for their conditions. In light of this, it is solely the responsibility of the national Court to determine whether there has been a violation of Article 3 of the ECHR based on the material at its disposal.

3.1.4 Inadequacies of the Health System

As regards a comprehensive reading of the provisions of Directive 2004/83 in conjunction with Article 14 of the Convention against Torture, the Advocate General notes at the outset that the provisions of Directive 2004/83 and the other provisions forming the basis of the Common European Asylum System were adopted in order to help the competent authorities of the Member States to apply the Geneva Convention and the other relevant treaties in this area, under Article 78(1) TFEU. Therefore, the provisions of that Directive must be interpreted in the light of the general scheme and purpose of those provisions[82].
However, it is established case law that the application of EU law must be independent of international humanitarian law. In addition, it should be noted that the Court has held that international humanitarian law and the subsidiary protection regime introduced by Directive 2004/83 pursue different aims and establish distinct protection mechanisms. Nevertheless, the Advocate General states that Directive 2004/83 contains no provision similar to Article 14(1) of the Convention against Torture obliging the State Parties to provide procedures and means allowing victims of torture to obtain redress.
The Advocate General argues that the Court should only consider whether a breach of Article 14 of the Convention against Torture by a third country, of which the applicant is a national, could influence the obligations of EU Member States regarding the grant of subsidiary protection under Directive 2004/83. It suggests that the literal interpretation of Article 14(1) of the Convention indicates that the State responsible for torture within its territory should provide redress and rehabilitation. However, it raises the question of whether a breach of the Convention by a non-EU country could be interpreted as evidence of a risk of inhuman or degrading treatment if the person is

[82] European Court of Justice, Joined Cases from C-199/12 to C-201/12, 7 November 2013, *X and Others v. Minister voor Immigratie en Asiel*, paras. 39 and 40.

returned to their country of origin and whether the lack of a redress procedure could be considered a risk of serious harm.
Advocate General Bot mentions that some States might assume obligations under the Convention even if they are not responsible for the acts of torture. However, universal jurisdiction for civil liability and compensation is not ordinary. He suggests that extending the jurisdictional competence of States under the Convention could allow victims to exercise their rights to compensation and reinforce the fight against torture. However, the present case does not meet the criteria for applying Article 14(1) of the Convention since there is no evidence of an intentional breach by Sri Lanka or a complaint or legal action for redress.
The Advocate General also highlights the practical consequences of an extensive interpretation, stating that granting subsidiary protection to all ill-treatment victims would increase Member States' obligations and pose procedural and practical problems. Such an interpretation would go beyond the intentions of Directive 2004/83 and the Common European Asylum System and potentially lead to an increase in applications for international protection. Based on these arguments, the Advocate General Bot proposes that the Court rules that an applicant in the main proceedings should not be granted subsidiary protection under Article 14(1) of the Convention against Torture.
As a final statement, the Advocate General affirms:

> The definition appearing in Article 2(e), read in conjunction with Article 15(b) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, does not include the actual risk, should the applicant be returned to his country of origin, of serious harm to his physical or psychological health resulting from the torture or inhuman or degrading treatment he suffered in the past and for which that country was responsible[83].

3.2 The Court's Considerations

The following section examines the conditions for which the European Court of Justice suggest granting subsidiary protection status to third-country national in the present case, mainly under Article 18 of Directive 2004/83. The Court's interpretation of eligibility criteria, particularly concerning the real risk of suffering serious harm upon return, is analyzed. The discussion highlights the distinction between past torture and the ongoing risk of harm, emphasizing that past torture alone is insufficient grounds for eligibility.
The ECJ began its initial considerations by declaring that proof of future use of torture in the country of origin was required to establish subsidiary protection based on torture. While MP had suffered torture in Sri Lanka in the past, that was not in itself sufficient justification for him to be eligible for subsidiary protection when there is no longer a real risk that such torture will

[83] Opinion of Advocate General Bot Case, 24 October 2017, *C-353/16,* para. 66.

be repeated if he is returned to that country. However, the Qualification Directive states that severe past harm is a serious indication, of a real risk of suffering such harm in future, that does not apply where there are good reasons for believing that the serious harm previously suffered will not be repeated or continue[84].

The analysis of the Court's considerations then turns to MP's health issues, noting that he "presently continues to suffer severe psychological after-effects resulting from the torture" and that "according to duly substantiated medical evidence, those after-effects would be substantially aggravated and lead to a serious risk of him committing suicide if he were returned to his country of origin"[85]. It stated that this provision of the qualification Directive must be interpreted and applied consistently with Article 4 of the EU Charter of Fundamental Rights, which set out an "absolute" right to be free from torture or other inhuman or degrading treatment. This Charter right corresponded to Article 3 ECHR, so the meaning and scope of the rights are the same, as set out in Article 52(3) of the Charter. So, the ECJ followed the case law of the ECtHR on Article 3 ECHR, referring specifically to the revised test on "medical cases" set out in Paposhvili.

The significance of Case 542/13 M'Bodj and its implications for subsidiary protection is examined. Hence, in the final paragraph, the ECJ recalled its prior ruling that "medical cases" were not generally entitled to subsidiary protection but noted that M'Bodj was concerned a victim of assault in the host Member State. In contrast, MP was tortured in the country of origin, and the after-effects would be exacerbated in the event of a return. Although "such substantial aggravation cannot, in and of itself, be regarded as inhuman or degrading treatment inflicted on that third-country national in his country of origin, within the meaning of" the Qualification Directive, both considerations are pertinent when interpreting it.

3.2.1 Definition of Serious Harm

The Court discusses the conditions for granting subsidiary protection status to third-country nationals under Article 18 of Directive 2004/83. It begins by highlighting that eligibility for subsidiary protection requires the demonstration of substantial grounds, as stated in Article 2(e) of the Directive, indicating a real risk of suffering serious harm if the person is returned to their country of origin, as defined in Article 15 of the Directive[86]. However, it must be clarified that past torture alone is not sufficient justification for eligibility if there is no longer a real risk of such harm being repeated upon return, hence, even though MP had experienced torture in the past, there had to be a genuine threat that he would do so again in order for him to qualify for subsidiary

[84] Article 4(4), Directive 2004/83.
[85] European Court of Justice, Case C-353/16, 24 April 2018, *MP v. Secretary of State for the Home Department,* para. 35.
[86] European Court of Justice, Case C-542/13, 18 December 2014, *M'Bodj v. État Belge,* paras. 30.

protection. Following the Advocate General's Opinion, the Court affirms that subsidiary protection aims to protect individuals from real risks of serious harm they would face if returned to their country of origin, not just past torture alone, and in the present case, there are no such beliefs.
The general scheme of Directive 2004/83 supports this interpretation. Article 4(4) states that severe past harm suffered by an applicant may indicate a real risk of future harm, but it also allows for exceptions when there are good reasons to believe that the harm will not be repeated[87]. Additionally, Article 16 stipulates that subsidiary protection ceases when the circumstances that led to its grant no longer exist or have significantly changed[88].
However, the Court acknowledges that the case involves a third-country national who has been previously tortured and continues to suffer severe psychological after-effects. While there is no longer a risk of torture upon return, medical evidence substantiates that these after-effects would be substantially worsened, leading to a severe risk of suicide if the person were returned to their country of origin. Nevertheless, both the Court and the Advocate General concur that the inability to receive necessary treatment for a condition in the country of origin does not fall within the scope of Article 15 of Directive 2004/83, even if it may lead to a deterioration in health or risk of suicide.

3.2.2 Threshold of Severity to Be Met for Article 3 of the ECHR

There is a possible further interpretation and application of Article 15(b) of Directive 2004/83 considering the rights guaranteed by the Charter of Fundamental Rights of the European Union. It emphasizes the close link between Article 15(b) and the fundamental value of respect for human dignity enshrined in Article 1 of the Charter, as well as the rights guaranteed by Article 4 of the Charter, which are considered absolute and should be taken into account when interpreting and applying Article 15(b) of the Directive.
First, the Court refers to case law from the European Court of Human Rights regarding Article 3 of the ECHR. It explains that suffering caused by a naturally occurring physical or mental illness can fall under Article 3 if it is exacerbated by treatment for which the authorities can be held responsible. This is one of the primary vital criteria for granting subsidiary protection, as stated by the Advocate General Bot as well, i.e., the identification of those responsible for inflicting harm, against whom protection is needed[89].
The ECtHR has stated that removal is precluded if there is a risk of imminent death or a real risk of serious, rapid, and irreversible decline in health resulting in intense suffering or a significant reduction in life expectancy. This exact severity threshold applies when Article 3 of the ECHR is invoked to prevent the deportation of a person whose illness is not naturally occurring, even if the

[87] European Court of Justice, Case C-353/16, 24 April 2018, *MP v. Secretary of State for the Home Department,* para. 33.
[88] Ibidem, para. 34.
[89] Opinion of Advocate General Bot Case, 24 October 2017, *C-353/16,* para. 32.

authorities do not intentionally cause the lack of care in the receiving State. The same conclusion applies to the application of Article 19(2) of the Charter, which prohibits removal to a country where there is a severe risk of inhuman or degrading treatment.
In assessing the consequences of the removal, particularly in cases of severe psychiatric illness, the Court emphasizes that it is necessary to consider all significant and permanent consequences that may arise, not just the physical transport[90]. The specific vulnerabilities of individuals whose psychological suffering is a consequence of torture or inhuman or degrading treatment in their country of origin should be considered.
Therefore, Articles 4 and 19(2) of the Charter, interpreted in the light of Article 3 of the ECHR, prevent a Member State from deporting a third-country national if such removal would result in a significant and permanent deterioration of their mental health, especially if it endangers their life.
Additionally, the Court has previously held that removing a third-country national with a severe illness to a country without appropriate treatment may infringe the principle of *non-refoulement* and thus violate Article 5 of Directive 2008/115, read in conjunction with Article 19 of the Charter.
However, as the Court itself noted, the present case does not concern the protection against removal based on Article 3 of the ECHR but rather the question of whether the host Member State is required to grant subsidiary protection status to a third-country national who has been tortured and suffers severe psychological after-effects that could be substantially aggravated if returned to their country of origin. In line with its M'Bodj judgment, the Court confirms in the present case that Member States are only required to grant subsidiary protection to a seriously ill applicant for international protection if there is a real risk of intentional deprivation in his country of origin, care adapted to the management of his health condition.
Furthermore, the Court clarifies that Article 3 of the ECHR prevents, in exceptional cases, the removal of a person suffering from a severe illness to a country without appropriate treatment and does not automatically grant that person subsidiary protection under Directive 2004/83.

3.2.3 Case 542/13 M'Bodj

The Court emphasizes that the cause of MP's current health condition is the past acts of torture inflicted by the authorities of the country of origin. The medical evidence indicates that the individual continues to suffer from post-traumatic after-effects that would be significantly and permanently exacerbated, potentially endangering their life if they were to be returned to their country. However, it is clarified that the substantial aggravation of the individual's health condition, on its own, does not constitute inhuman or

[90] European Court of Justice, Case C-578/16, 16 February 2017, *C.K. and Others v. Republika Slovenija*, para. 74.

degrading treatment inflicted in the country of origin, as required by Article 15(b) of the Directive[91].

To determine whether the risk of intentional deprivation of appropriate care exists in the country of origin[92], the Court suggests considering Article 14 of the Convention against Torture, which obliges State Parties to provide redress and rehabilitation to victims of torture. Nonetheless, it points out that Directive 2004/83 pursues different aims and establishes distinct protection mechanisms compared to the Convention against Torture.

The main objective of Directive 2004/83 is to ensure standard criteria for identifying persons in need of international protection and to provide a minimum level of benefits in all EU Member States. It aims to offer subsidiary protection status similar to that of refugees, specifically to individuals at risk of being subjected to torture or inhuman or degrading treatment if returned to their country of origin.

The Court emphasizes that the eligibility for subsidiary protection cannot be based solely on violations of Article 14 of the Convention against Torture. As the Advocate General stated in its Opinion, the breach of the Convention against Torture by a country outside of the European Union might have implications for subsidiary protection but does not automatically grant eligibility. Instead, it is for the national Court to assess, considering current and relevant information such as reports from international and human rights organizations, whether there is a real risk that the individual if returned to the country of origin, would be intentionally deprived of appropriate care for the physical and mental after-effects of the torture.

If it is determined that such a risk exists, for example, if the person is at risk of committing suicide due to trauma resulting from the torture and the authorities of the country of origin are not willing to provide rehabilitation, or if there is evidence of a discriminatory policy in accessing healthcare, then the individual may be eligible for subsidiary protection.

In conclusion, Articles 2(e) and 15(b) of Directive 2004/83, read in conjunction with Article 4 of the Charter of Fundamental Rights, should be interpreted to allow for subsidiary protection if a third-country national, previously tortured by the authorities of their country of origin, faces a real risk of intentional deprivation of appropriate care for the physical and mental after-effects of the torture in their country of origin. The National Court is responsible for making this determination based on the case's specific circumstances.

On the grounds previously analyzed, the Court (Grand Chamber), going against the Advocate General Bot's Opinion, rules:

> Articles 2(e) and 15(b) of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless

[91] European Court of Justice, Case C-353/16, 24 April 2018, *MP v. Secretary of State for the Home Department,* para. 49.

[92] European Court of Justice, Case C-542/13, 18 December 2014, *M'Bodj v. État Belge,* paras. 35–36.

> persons as refugees or as persons who otherwise need international protection and the content of the protection granted, read in the light of Article 4 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a third country national who in the past has been tortured by the authorities of his country of origin and no longer faces a risk of being tortured if returned to that country, but whose physical and psychological health could, if so returned, seriously deteriorate, leading to a severe risk of him committing suicide on account of trauma resulting from the torture he was subjected to, is eligible for subsidiary protection if there is a real risk of him being intentionally deprived, in his country of origin, of appropriate care for the physical and mental after-effects of that torture, that being a matter for the national Court to determine[93].

[93] European Court of Justice, Case C-353/16, 24 April 2018, *MP v. Secretary of State for the Home Department,* para. 59.

Conclusion

In the case at hand, the main question revolves around the interpretation of Articles 2(e) and 15(b) of Directive 2004/83/EC concerning the eligibility for subsidiary protection of a third-country national who has been subjected to torture or inhuman treatment in their country of origin. The Supreme Court of the United Kingdom seeks clarification on whether a real risk of serious harm to the physical or psychological health of the applicant, resulting from previous torture or inhuman treatment for which the country of origin was responsible, falls within the scope of subsidiary protection.

Several key points emerge upon considering the legal context, including international law and EU law, as well as relevant provisions of Directive 2004/83. First, the definition of serious harm under Article 15(b) of the Directive includes torture or inhuman or degrading treatment or punishment of an applicant in the country of origin. However, the mere fact of past torture is insufficient to establish eligibility for subsidiary protection when there is no longer a real risk of its repetition upon returning to the country of origin. The focus is on protecting individuals from a real risk of serious harm if they return to their country of origin.

Second, the subsidiary protection regime aims to address present risks and protect individuals who would face a real risk of suffering serious harm upon return. While the cessation of past harm is relevant, it is essential to consider the applicant's current circumstances. In the present case, the applicant continues to suffer severe psychological after-effects resulting from the past torture, and there is substantial medical evidence supporting the claim that returning the applicant would significantly exacerbate their condition, leading to a severe risk of suicide.

Considering the specific circumstances of this case, it is necessary to adopt a nuanced approach. While there may not be a real risk of repetition of torture or inhuman treatment, the severe psychological after-effects and the risk of suicide cannot be disregarded. Denying subsidiary protection solely based on the absence of a risk of direct harm fails to address the ongoing suffering and vulnerability of the applicant. It would be contrary to human rights principles and the objective of subsidiary protection to return the applicant to their country of origin. The duty to protect individuals from inhuman or degrading treatment should extend to addressing the ongoing consequences of past harm.

Therefore, I believe that the interpretation of Articles 2(e) and 15(b) of Directive 2004/83 should encompass situations where there is a real risk of serious harm to the physical or psychological health of the applicant resulting from previous torture or inhuman treatment. The eligibility for subsidiary protection should not be solely contingent upon the risk of future persecution or harm. However, it should also consider the continued impact of past trauma on the individual's well-being.

In addition, although the Court has clarified that non-removal under Article 3 of the ECHR does not automatically lead to subsidiary protection, it has reduced the gap between the interpretations of EU law and the European

Convention on Human Rights. The Court's ruling in MP establishes a lower threshold for intentional deprivation in cases involving victims of torture, thus offering increased protection to this vulnerable group. Granting subsidiary protection in this case would be in line with the Court's efforts to bridge the gap between the two provisions and ensure consistent standards of protection. Taking these factors into account, granting subsidiary protection to MP would align with the Court's duty to safeguard the rights and well-being of individuals facing serious harm if returned to their country of origin. It would also promote the principles of non-refoulement and provide the necessary protection to those who do not meet the strict requirements of refugee status but are still in need of international protection. Therefore, it is recommended that MP be granted subsidiary protection under Articles 2(e) and 15(b) of Directive 2004/83 due to the real risk of serious harm to their psychological health if returned to their country of origin.

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Riassunto

Lo scopo di questo elaborato è di analizzare la sentenza del 24 aprile 2018, causa C-353/16, MP c. Secretary of State for Home Department della Corte di giustizia dell'Unione Europea (CGUE).
Innanzitutto, bisogna analizzare le norme riguardanti il caso, ovvero la Convenzione contro la tortura e altre pene o trattamenti crudeli, la Convenzione di Ginevra del 1951, la Carta dei diritti fondamentali dell'Unione europea, la Direttiva 2004/83 e la Direttiva 2008/115/CE.
La Convenzione contro la tortura e altre pene o trattamenti crudeli, ratificata nel 1984, rappresenta il principale strumento internazionale per affrontare la tortura e si concentra sull'eliminazione della tortura a livello mondiale. La Convenzione è stata concepita per rendere la tortura un reato ai sensi del diritto internazionale e ha istituito meccanismi di supervisione e segnalazione.
La Convenzione definisce la tortura come l'inflizione intenzionale di gravi dolori o sofferenze fisiche o mentali da parte di un pubblico ufficiale o di qualcuno che agisce in qualità ufficiale. Distingue tra tortura e altre forme di trattamento o punizione crudele, inumano o degradante. La Convenzione richiede agli Stati di considerare la tortura come un reato, indagare e punire i responsabili, fornire formazione e offrire un risarcimento alle vittime.
La Convenzione di Ginevra del 1951 relativa allo status dei rifugiati è stata istituita per affrontare il fenomeno dello sfollamento causato dalla Seconda Guerra Mondiale e ha concesso uno status legale ai rifugiati che vivevano in città di tende. La Convenzione definisce un rifugiato come una persona che, a causa di un fondato timore di persecuzione basata sulla razza, religione, nazionalità, appartenenza a un determinato gruppo sociale o opinione politica, si trova fuori dal proprio paese di origine ed è incapace o non desidera beneficiare della protezione di tale paese. La Convenzione esclude individui coinvolti in crimini efferati dallo status di rifugiato. Procedure eque ed efficaci per il riconoscimento dello status di rifugiato sono importanti per garantire la protezione. Il principio fondamentale della Convenzione è il principio del *non-refoulement*, che vieta l'espulsione o il rimpatrio di un rifugiato in un territorio in cui la sua vita o libertà sarebbero minacciate. Il principio del *non-refoulement* è stato ulteriormente rafforzato attraverso altri accordi internazionali ed è considerato un principio fondamentale del diritto internazionale consuetudinario.
La Direttiva 2004/83 adottata dal Consiglio dell'Unione europea, stabilisce standard minimi per la qualificazione e lo status dei cittadini di paesi terzi o apolidi come rifugiati o persone che necessitano di protezione internazionale. La direttiva mira a garantire criteri comuni per l'identificazione delle persone effettivamente bisognose di protezione internazionale e a assicurare un livello minimo di benefici per tali persone in tutti gli Stati membri dell'UE. Inoltre, chiarisce alcuni aspetti della definizione di rifugiato nella Convenzione di Ginevra del 1951, riconoscendo che la persecuzione può provenire da attori non statali e prendendo in considerazione forme specifiche di persecuzione legate al genere e all'infanzia. Tuttavia, contiene anche disposizioni

controverse, come la considerazione che lo status di rifugiato potrebbe non esistere quando esiste l'opzione di fuggire internamente o quando attori non statali offrono protezione.
Sebbene il diritto di cercare asilo non fosse esplicitamente riconosciuto dagli strumenti internazionali dei diritti umani al momento dell'adozione della direttiva, essa allinea l'Europa ad altre regioni in cui il diritto di rifugio era già stato codificato.
La direttiva concede lo status di rifugiato e lo status di protezione sussidiaria a coloro che si qualificano come rifugiati o sono idonei per la protezione sussidiaria. La protezione sussidiaria si applica a coloro il cui status di rifugiato è stato negato e valuta il rischio di gravi danni al loro ritorno. Il termine "status di rifugiato" utilizzato nella direttiva è stato criticato, in quanto dovrebbe comprendere i diritti e le responsabilità di un rifugiato, e il termine "asilo" è considerato più appropriato.
La Carta dei diritti fondamentali dell'Unione europea si basa su strumenti internazionali sui diritti umani, tra cui la Convenzione europea per i diritti dell'uomo, i Trattati CE ed EU e la Carta sociale europea. Fa anche riferimento alle tradizioni costituzionali degli Stati membri come fonte secondaria.
La Convenzione europea per i diritti dell'uomo, creata dopo la Seconda guerra mondiale e entrata in vigore nel 1953, ha svolto un ruolo cruciale nella promozione delle libertà fondamentali e dei diritti umani a livello globale. Serve come punto di riferimento per la protezione dei diritti umani nell'UE, in particolare per quanto riguarda le politiche di immigrazione e asilo. I diritti umani sono parte integrante dei Trattati dell'UE e specifiche sezioni della Convenzione europea per i diritti dell'uomo sono rilevanti per le politiche di immigrazione e asilo nei paesi europei, garantendo i diritti individuali alla vita privata o familiare (articolo 8), la protezione da abusi nei paesi di origine o transito (articolo 3) e l'assicurazione di diritti procedurali e giudiziari (articolo 13).
La Convenzione europea per i diritti dell'uomo vieta la tortura, i trattamenti o le punizioni crudeli, inumani o degradanti nell'articolo 3. Nel caso Soering del 1989, la Corte ha stabilito che l'articolo 3 vieta l'estradizione di una persona verso un paese in cui sarebbe sottoposta a tortura o trattamenti inumani. Questa decisione ha creato un precedente secondo il quale le estradizioni in tali circostanze sarebbero contrarie allo spirito della Convenzione.
L'articolo 3 impone agli Stati sia obblighi negativi che positivi. L'obbligo negativo vieta la tortura e i trattamenti inumani, mentre l'obbligo positivo richiede agli Stati di adottare misure appropriate per garantire il rispetto dei diritti umani nel loro territorio. Questo obbligo positivo include condurre indagini approfondite su presunte violazioni e fornire protezione contro il maltrattamento da parte di agenti statali e cittadini privati.
L'efficacia dell'articolo 3 sarebbe ridotta senza l'obbligo positivo di responsabilità dello Stato. Questo obbligo positivo garantisce l'adozione di protezioni procedurali per prevenire abusi da parte di funzionari statali e proteggere i cittadini da trattamenti vietati. La Corte ha rilevato violazioni di

questo obbligo anche nei casi in cui era difficile provare il maltrattamento al di là di ogni ragionevole dubbio.
La Direttiva UE 2008/115/CE, comunemente nota come Direttiva sul Rimpatrio, è una legislazione fondamentale nel diritto dei rifugiati. Il suo obiettivo principale è stabilire standard e procedure comuni tra gli Stati membri dell'UE per il rimpatrio di cittadini di paesi terzi che risiedono illegalmente. La Direttiva mira a garantire che le persone siano rimpatriate in modo umano, nel rispetto dei loro diritti fondamentali e della loro dignità. Tuttavia, i critici sostengono che la Direttiva ponga un eccessivo accento sul rimpatrio efficace trascurando la protezione dei diritti umani fondamentali.
La Direttiva sul Rimpatrio stabilisce standard e pratiche comuni per il rimpatrio di cittadini stranieri che risiedono illegalmente, favorendo il rimpatrio volontario rispetto ai rimpatri forzati. Essa include un sistema di divieti di ingresso a livello dell'UE e norme sulla detenzione dei cittadini di paesi terzi, specificando limiti, requisiti, condizioni e protezioni procedurali per i detenuti. Tuttavia, queste norme stabiliscono solo standard minimi, consentendo agli Stati membri un'ampia discrezionalità nella loro attuazione.
La Direttiva prevede una disposizione per le situazioni di emergenza, che consente agli Stati di deviare da alcuni requisiti in circostanze eccezionali. La Commissione deve essere informata, ma non ha il potere di contestare la valutazione dello Stato. Questa disposizione concede agli Stati una discrezionalità nel determinare l'esistenza di un'emergenza, suscitando critiche per la possibile deviazione dalle disposizioni fondamentali della direttiva.
Con la sentenza del 24 aprile 2018 nel caso MP c. Secretary of State for Home Department, causa C-353/16, la Corte di giustizia dell'Unione Europea (grande sezione) si trova ad esaminare un cosiddetto «medical case», ossia una fattispecie concernente l'applicazione del divieto di tortura o di trattamenti inumani o degradanti all'ipotesi di espulsione del cittadino straniero malato. In particolare, la Corte di giustizia ha modo di chiedersi se costituisca « tortura o [...] trattamento inumano o degradante ai danni del richiedente nel suo Paese d'origine », ai sensi dell'Articolo 15(b), della Direttiva 2004/83/UE, il rimpatrio dello straniero che, nel proprio Paese di provenienza, corra il serio rischio di non poter usufruire delle cure mediche adeguate al trattamento della patologia di cui soffre, cosicché possa ritenersi che l'individuo in questione sia ammissibile al beneficio della protezione sussidiaria.
Le circostanze di fatto del caso riguardano un cittadino dello Sri Lanka a cui era stata concessa l'autorizzazione a rimanere nel territorio britannico fino al 30 settembre 2008 per completare i suoi studi. Il 5 gennaio 2009, quando il periodo era scaduto, ha presentato una domanda di asilo. Ha affermato di essere stato imprigionato e torturato dalle autorità dello Sri Lanka in quanto membro dei "Tigri di Liberazione dell'Îlam Tamil", un gruppo guerrigliero che cercava di creare uno Stato Tamil indipendente. MP ha sostenuto che se fosse stato rispedito in Sri Lanka, sarebbe stato nuovamente in pericolo di subire ulteriori abusi per la stessa ragione. Durante il processo giudiziario

questa affermazione è stata ritenuta non credibile. Il 23 febbraio 2009, le autorità dell'immigrazione del Regno Unito hanno respinto la sua richiesta perché erano dubbie sul fatto che MP fosse ancora di interesse del governo dello Sri Lanka e non avrebbe subito ulteriori maltrattamenti se fosse tornato. Dopo il rifiuto della domanda di asilo, MP ha presentato un ricorso contro la decisione davanti all'Upper Tribunal (Immigration and Asylum Chamber) [tribunale superiore (sezione immigrazione e asilo), Regno Unito]. Il richiedente soffriva degli effetti collaterali della tortura, aveva un grave disturbo da stress post-traumatico e grave depressione, mostrava evidenti inclinazioni suicide e sembrava prevalentemente determinato a suicidarsi se fosse stato costretto a tornare in Sri Lanka, secondo le testimonianze mediche fornite a quel tribunale.

L'Upper Tribunal si è schierato con le autorità dell'immigrazione del Regno Unito anche se ha riconosciuto che il richiedente aveva una reale paura di tornare nel proprio paese e aveva difficoltà a fidarsi delle autorità in generale, comprese quelle nel Regno Unito.

Tuttavia, l'Upper Tribunal ha ritenuto che l'espulsione del richiedente a causa della mancanza di cure mediche adeguate in Sri Lanka violerebbe l'articolo 3 della Convenzione europea dei diritti dell'uomo (CEDU). In sostanza, ha affermato che anche se la Sri Lanka disponga di alcune strutture specializzate per la salute mentale, secondo una Nota di orientamento operativo dell'Agenzia delle frontiere del Regno Unito, i fondi destinati alla salute mentale vengono utilizzati solo per le principali istituzioni per la salute mentale nelle grandi città, con solo 25 psichiatri in tutto il paese. Ha anche detto che se MP fosse stato rispedito in Sri Lanka, sarebbe stato curato dal servizio sanitario dello Sri Lanka.

La sentenza dell'Upper Tribunal è stata confermata dalla Court of Appeal (England & Wales) (Civil Division) [Corte d'appello (Inghilterra e Galles) (divisione civile), Regno Unito]. Secondo la Corte d'appello, la Direttiva 2004/83 non era destinata a essere applicata alle situazioni coperte dall'articolo 3 della CEDU in cui il rischio era quello per la salute o il suicidio anziché quello di persecuzione. MP ha presentato un appello alla Corte di rinvio in risposta a tale sentenza. La questione se MP abbia diritto alla protezione sussidiaria ai sensi degli articoli 2 e 15 della Direttiva 2004/83 è al centro della controversia, secondo la Corte suprema del Regno Unito.

MP sostiene che la Corte d'appello e l'Upper Tribunal abbiano adottato un'interpretazione troppo limitata dell'applicazione della Direttiva 2004/83. MP sostiene che la Direttiva 2004/83 non richiede che il pericolo per il richiedente derivi dalla persecuzione, ma che copra anche altre situazioni in cui il richiedente rischia di subire gravi danni. Inoltre, afferma che la Direttiva 2004/83 non richiede che il pericolo derivi direttamente da azioni dello Stato, ma che possa derivare da fattori indipendenti dallo Stato.

La Corte di rinvio ritiene che la questione sollevata dall'appello di MP sollevi un problema di interpretazione del diritto dell'Unione, in particolare dell'articolo 2(e), e dell'articolo 15(b), della Direttiva 2004/83. Dato che la sua malattia mentale non può essere considerata una condizione che si verifica

naturalmente perché è stata causata dalla tortura inflitta dalle autorità dello Sri Lanka, MP sostiene che avrebbe dovuto ottenere la protezione sussidiaria alla luce del suo passato di maltrattamenti da parte di tali autorità e della mancanza di strutture mediche in quel paese per curare gli effetti di tali maltrattamenti. D'altra parte, MP sostiene che non vi è più una minaccia di ripetere il crudele trattamento che ha causato la sua attuale condizione di salute, che non ha alcuna incidenza sul suo diritto a tale protezione.
Secondo la Corte di rinvio, né la Corte europea dei diritti dell'uomo né la CJEU hanno concluso su tale questione specifica, nemmeno nella decisione M'Bodj del 18 dicembre 2014.
In appello, la Corte suprema del Regno Unito ha deciso di sospendere il procedimento e ha sottoposto questa questione alla CJEU per una pronuncia preliminare:

> Se l'articolo 2, lettera e), in combinato disposto con l'articolo 15, lettera b), della Direttiva 2004/83 contempli un rischio effettivo di danno grave alla salute fisica o psichica del richiedente in caso di ritorno nel paese di origine, derivante da precedenti episodi di tortura o di trattamento inumano o degradante imputabili a detto paese.

Ai sensi dell'articolo 18 della direttiva 2004/83, gli Stati membri riconoscono lo status di protezione sussidiaria a un cittadino di un paese terzo ammissibile a beneficiare di tale protezione.
Al riguardo, occorre ricordare che, ai sensi dell'articolo 2(e), di tale direttiva, un cittadino di un paese terzo può beneficiare della protezione sussidiaria solo ove sussistano gravi e comprovati motivi di ritenere che, nel caso di ritorno nel paese di origine, egli incorra in un rischio effettivo di subire uno dei tre tipi di danno grave definiti all'articolo 15 della direttiva suddetta. Inoltre, la direttiva 2004/83 deve essere interpretata e applicata nel rispetto dei diritti garantiti dall'articolo 4 della Carta dei diritti fondamentali dell'Unione europea , che esprime uno dei valori fondamentali dell'Unione e dei suoi Stati membri e ha un carattere assoluto in quanto è strettamente connesso al rispetto della dignità umana, di cui all'articolo 1 della Carta .
Inoltre, occorre ricordare che, ai sensi dell'articolo 52, paragrafo 3, della Carta, dal momento che i diritti garantiti dall'articolo 4 della stessa corrispondono a quelli garantiti dall'articolo 3 della CEDU, il significato e la portata di tali diritti sono uguali a quelli loro conferiti da detto articolo 3 della CEDU.
Orbene, dalla giurisprudenza della Corte europea dei diritti dell'uomo relativa all'articolo 3 della CEDU risulta che la sofferenza dovuta ad una malattia sopravvenuta per cause naturali, fisica o mentale, può ricadere nella portata di tale articolo 3 se è o rischia di essere esacerbata da un trattamento risultante da condizioni di detenzione, da un'espulsione o da altri provvedimenti, per il quale le autorità possono essere ritenute competenti, purché le sofferenze che ne conseguono raggiungano il livello minimo di gravità richiesto da tale articolo 3 .
A ciò va aggiunto, tenuto conto dell'importanza fondamentale del divieto della tortura e di trattamenti inumani o degradanti, di cui all'articolo 4 della

Carta, che un'attenzione specifica deve essere rivolta alla particolare vulnerabilità delle persone le cui sofferenze psicologiche, che potrebbero essere aggravate in caso di allontanamento, sono state causate da tortura o trattamenti disumani o degradanti subiti nel loro paese di origine.
Ne deriva che l'articolo 4 e l'articolo 19 (2), della Carta, come interpretati alla luce dell'articolo 3 della CEDU, ostano a che uno Stato membro espella un cittadino di un paese terzo qualora tale espulsione comporti, in sostanza, un aumento, in modo significativo e irrimediabile, del disturbo mentale di cui soffre, in particolare qualora, come nel caso di specie, tale deterioramento metta in pericolo la sua stessa sopravvivenza.
Del resto, la Corte ha già dichiarato che, in tali situazioni eccezionali, l'allontanamento di un cittadino di un paese terzo affetto da una malattia grave verso un paese nel quale non esistono trattamenti adeguati, potrebbe costituire una violazione del principio di *non refoulement* e, di conseguenza, una violazione dell'articolo 5 della direttiva 2008/115, interpretato alla luce dell'articolo 19 della Carta.
Ciò detto, deriva dalla domanda di pronuncia pregiudiziale che i giudici nazionali hanno dichiarato che l'articolo 3 della CEDU ostava a che MP fosse rinviato dal Regno Unito verso lo Sri Lanka. La presente causa riguarda pertanto non la tutela contro l'allontanamento, derivante, in forza dell'articolo 3 della CEDU, dal divieto di esporre una persona a trattamenti inumani o degradanti, ma la distinta questione relativa a se lo Stato membro ospitante sia tenuto a riconoscere lo status di protezione sussidiaria ai sensi della direttiva 2004/83 al cittadino di un paese terzo che sia stato torturato dalle autorità del paese d'origine e i cui postumi gravi a livello psicologico potrebbero accentuarsi in modo sostanziale, con il serio rischio che commetta suicidio, in caso di ritorno in tale paese.
Ai sensi di tale disposizione, gli Stati parte della Convenzione contro la tortura hanno l'obbligo di garantire, nei loro ordinamenti, alla vittima di un atto di tortura il diritto al risarcimento che comprenda i mezzi necessari ad una riabilitazione la più completa possibile.
A tale proposito, va tuttavia rilevato che i meccanismi attuati dalla direttiva 2004/83 perseguono scopi diversi e istituiscono sistemi di protezione chiaramente distinti da quelli della Convenzione contro la tortura.
Infatti, come risulta dal suo sesto considerando e dal suo articolo 2, l'obiettivo principale della Convenzione contro la tortura è aumentare l'efficacia della lotta contro la tortura e altre pene o trattamenti crudeli, disumani o degradanti in tutto il mondo, impedendone la commissione. Per contro, lo scopo principale della direttiva 2004/83, come enunciato al considerando 6 della stessa, è quello, da una parte, di assicurare che gli Stati membri applichino criteri comuni per identificare le persone che hanno effettivamente bisogno di protezione internazionale e, dall'altra, di assicurare che un livello minimo di prestazioni sia disponibile per tali persone in tutti gli Stati membri.
In base a quanto detto, a meno che non si ignorino gli ambiti specifici di ciascuno dei due regimi, un cittadino di un paese terzo in una situazione simile a quella di MP non può beneficiare del regime di protezione sussidiaria a causa

di una presunta violazione dell'articolo 14 della Convenzione contro la tortura da parte dello Stato di origine.

Di conseguenza, spetta al giudice del rinvio valutare, alla luce di tutte le informazioni attuali e pertinenti, inclusi i rapporti di organizzazioni internazionali e non governative per i diritti umani, se nel caso specifico MP potrebbe essere esposto a un rischio di privazione intenzionale di cure adeguate per i postumi fisici o mentali degli atti di tortura commessi dalle autorità del suo paese in caso di ritorno. Ciò potrebbe verificarsi se, come nel procedimento principale, un cittadino di un paese terzo rischia di suicidarsi a causa del trauma derivante dalle torture inflitte dalle autorità del suo paese di origine, e se è evidente che le stesse autorità non intendono fornire riabilitazione, nonostante l'obbligo previsto dall'articolo 14 della Convenzione contro la tortura. Un rischio del genere potrebbe anche sussistere se le autorità in questione discriminano nell'accesso ai servizi sanitari, rendendo più difficile per determinati gruppi etnici o categorie di persone, tra cui MP, l'accesso alle cure per i postumi fisici o mentali degli atti di tortura commessi da tali autorità.

In base a quanto precede, l'articolo 2(e), e l'articolo 15(b), della direttiva 2004/83, letti alla luce dell'articolo 4 della Carta, devono essere interpretati nel senso che un cittadino di un paese terzo che è stato torturato in passato dalle autorità del suo paese di origine e non è più esposto a un rischio di tortura in caso di ritorno in quel paese può beneficiare dello status di protezione sussidiaria, a condizione che le sue condizioni di salute fisica e mentale possano deteriorarsi gravemente in tale circostanza e ci sia un rischio effettivo di privazione intenzionale delle cure adeguate al trattamento delle conseguenze fisiche o mentali degli atti di tortura. Spetta al giudice del rinvio verificare se queste condizioni sussistano nel caso specifico.