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IMPLEMENTATION OF NON-REFOULEMENT PRINCIPLE IN TURKEY IN LIGHT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Master's Thesis

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Tallinn

2020

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INTRODUCTION

During the history of humanity, immigration has been a part of life; people have tried to migrate to new places in order to escape from war, violence, persecution etc. Therefore, regulation of refugee law has become one of the most important issues in international law. Especially after World War II, millions of people were displaced or became stateless. This big refugee movement created a need for comprehensive international human rights instruments for refugees.

When the improvement of international human rights law was examined; the first global inter-governmental organisation, the League of Nations, was founded on 10 January 1920 in order to provide and achieve international unity, peace and security after World War I (hereinafter WWI).[1] Millions of people had been forced to displace because of WWI and there were no effective regulations about the rights and movements of displaced people, therefore, states had been obliged to make regulations about refugees and migrants.

The League of Nations adopted the Convention Relating to the International Status of Refugees on 28 October 1933 (hereinafter the 1933 Convention) to regulate the rights of refugees. The 1933 Convention created global obligations and responsibilities on states about the rights of refugees for the first time. The non-refoulement principle had been regulated in Article 3 of the 1933 Convention; the article says that contracting countries have to accept refugees at the frontiers and shall not apply expulsion or non-admittance for the authorised refugees unless it is necessary for national security or public order.[2] Moreover, Article 3 regulates internal measures which are "necessary to refugees who, having been expelled for reasons of national security or public order, are unable to leave its territory because they have not received, at their request or through the intervention of institutions dealing with them, the necessary authorisations and visas permitting them to proceed to another country."[3]

After the dissolution of the League of Nations and World War II, a necessity for new regulations for refugees arose and the non-refoulement principle has been more improved than the 1933 Convention. In 1951 the United Nations General Assembly (hereinafter UNGA) adopted the Convention Relating to the Status of Refugees (hereinafter

[1] Covenant of the League of Nations. Versailles 28 June 1919, e.i.f. 10.01.1920
[2] Convention Relating to the International Status of Refugees. Geneva 28.10.1933, Article 3.
[3] Ibid.

the 1951 Convention), which is one of the most important instruments in international refugee law and the Convention entered into force on 22 April 1954.[4] This Convention is based on Article 14 of the Universal Declaration of Human Rights (hereinafter UNDA) which bestows people the right to seek asylum from persecution in other countries.[5]

The 1951 Convention defines a refugee as a person who cannot go to his/her home country due to a reasonable fear of being subject of torture or ill-treatment because of his/her religion, political opinions, race, nationality, being a part of a specific social group.[6] Moreover, the 1951 Convention reinforces the non-refoulement principle, which means that any refugee cannot be forced to return to a country where her or his life or freedom is under threat.[7] However, according to Article 33/2 of the 1951 Convention, a refugee who is a danger to the security of the host country or who has been sentenced for a serious crime cannot claim to benefit from non-refoulement principle.[8]

Refoulement means deportation of a foreign person by a country with a legal reason without his/her will. Deportation should be carried out under certain conditions pursuant to international law because results of deportation of people might cause violations of some human rights such as the right to life, the right to a fair trial, the right to personal security and so on.

The principle of national sovereignty entitles countries to determine entry and exit conditions in their countries for foreigners. Therefore, people are obliged to observe these conditions and obtain permission to enter and stay in the territories of other countries. However, this sovereignty is not limitless. W. Michael Reisman emphasises that human rights have priority within the scope of sovereignty and describes the new concept of international sovereignty as "the new constitutive, human rights-based conception of popular sovereignty."[9] Therefore, sovereignty does not provide a limitless authority to accept or deport people in the country. As it is seen in the development of international law, human rights have priority in terms of implementation and regulation of rules.

[4] Convention Relating to the Status of Refugees. Geneva 28 July 1951, e.i.f. 22.04.1954.
[5] Universal Declaration of Human Rights. Paris 10.12.1948. Article 14.
[6] 1951 Convention Relating to the Status of Refugees, op. cit., Article 1.
[7] Introductory Note by the Office of the United Nations High Commissioner for Refugees (UNHCR).
[8] 1951 Convention, op. cit., Article 33.
[9] W. M. Reisman. Sovereignty and Human Rights in Contemporary International Law. American Journal of International Law, October 1990, Vol. 84, between 866-876, p.870.

According to the 1951 Convention, the non-refoulement principle is one of the main principles of international refugee law together with non-discrimination and non-penalization. Although there are some disputes about the force and quality of the principle, it can be said that non-refoulement principle is a *jus cogens* norm, as the Executive Committee of the High Commissioner emphasised many times that "principle of non-refoulement is not subject to derogation".[10]

It is surely beyond doubt that both world wars also affected Continental Europe and led to the improvement of human rights therein. The Council of Europe (hereinafter the CoE) was founded in 1949 in order to safeguard human rights, the rule of law and democracy after World War II which caused great destruction and grave human rights violations in Europe. As explained in the status of the Council of Europe, all member states shall accept the rule of law and ensure the enjoyment of all human rights and freedoms by all human beings regardless of their nationalities in their jurisdiction.[11]

In the light of the rights of Universal Declaration of Human Rights and in order to secure human rights and fundamental freedoms in Europe; members of the Council of Europe adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR or European Convention on Human Rights). The convention entered into force on 3 September 1953.[12] ECHR established the European Court of Human Rights (hereinafter ECtHR) where a case can be filed by an individual, a group of people or one or more of the other contracting countries by allegation of violation of right or rights in the Convention and in the protocols of it.[13] Even though the ECHR does not include specific articles about refugees, it is a crucial instrument due to the fact that it applies to all people at the jurisdiction of party states, regardless of applicants' international protection status or eligibility of their position to apply for international protection.

Turkey signed the ECHR in 1950 and it entered into force in Turkey on 18 May 1954. Turkey also accepted the individual application procedure to the ECtHR in 1987 and recognised the

[10]General Conclusion on International Protection No. 79 (XLVII).(i).1996. A/AC.96/878 and Document No. 12A (A/51/12/Add.1).
[11] Statute of the Council of Europe. London, 05.05.1949, e.i.f. 03.08.1949, Article 3.
[12]Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, 04.11.1950, e.i.f. 03.09.1953.
[13] Ibid.

compulsory jurisdiction of the ECtHR in 1990.[14] When we look at the Turkish law, Article 10 of the Constitution of Turkey says that all people are equal before the law without any discrimination such as race, nation, religion, philosophical belief, political opinion etc.[15] Hence, it can be said that Turkish citizens and foreigners should be considered equals in terms of having rights and freedoms.[16] Nevertheless, Article 16 of the Constitution of Turkey explains that domestic law can restrict the fundamental rights and freedoms of non-citizens, pursuant to international law.[17]

Turkey did not have many legal regulations about the entrance, staying, leaving and deportation of foreigners, refugees, and migrants in the past. Firstly, there was a Law Related to Residence and Travel of Foreigners in Turkey, and deportation has been regulated as that foreigners whose residence is dangerous in terms of public safety, political or governmental issues can be called to leave the country, if they do not leave, they can be deported.[18] There was no regulation about the non-refoulement principle in this law.

Apart from this law, there was no national legislation about refugees in Turkey until the year of 1994; therefore, the 1951 Convention was the sole source for refugees in Turkey. The 1951 Convention entered into force on 5 September 1961 in Turkey[19] and the 1967 Protocol relating to the Status of Refugees entered into force on 31 July 1968 in Turkey.[20] The absence of national legislation in Turkey resulted in several decisions of violation by Turkey in international courts.

Turkey adopted the Regulation on the Procedures and Principles related to Possible Population Movements and Aliens Arriving in Turkey either as Individuals or in Groups Wishing to Seek Asylum either from Turkey or Requesting Residence Permission in order to Seek Asylum From Another Country (hereinafter the 1994 Regulation) in 1994.[21] It was not adequate and had many inconsistencies in terms of international protection but it was

[14]Treaty list for a specific State. Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/country/TUR
[15] Constitution of the Republic of Turkey. Adopted 18.10.1982, e.i.f. 9.11.1982, Article 10.
[16]Ibid. Article 10.
[17] Ibid. Article 16.
[18]Law Related to Residence and Travel of Foreigners in Turkey.Adopted 15.07.1950,e.i.f. 24.07.1950,Article 19.
[19] Turkish Official Gazette. 05.09.161. Available at: https://www.resmigazete.gov.tr/arsiv/10898.pdf
[20]UN Treaty Collection. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5
[21]Turkey: Regulation No. 1994/6169 on the Procedures and Principles related to Possible Population Movements and Aliens Arriving in Turkey either as Individuals or in Groups Wishing to Seek Asylum either from Turkey or Requesting Residence Permission in order to Seek Asylum From Another Country, 19 January 1994, available at: https://www.refworld.org/docid/49746cc62.html [accessed 8 April 2020]

significant progress in terms of the development of Turkish Refugee Law. It will be analysed in detail in the second chapter of this thesis.

The humanitarian crisis in the Syrian Civil War, which was started as part of "Arab Spring" in 2011, has evolved into one of the biggest crises in the history of the world. According to the Syria-World Report 2018, results of the Syrian Civil War were explained thus: "More than 400,000 have died because of the Syrian conflict since 2011, according to the World Bank, with 5 million seeking refugee status abroad and over 6 million displaced internally, according to UN agencies. By June 2017, the UN also estimated that 540,000 people were still living in besieged areas..."[22]

According to the United Nations High Commissioner for Refugees (hereinafter the UNHCR) report, there are 70.8 million people (25.9 million are refugees) who were forcibly displaced and 6.7 million of the refugees are from the Syrian Arab Republic; according to the report, Turkey hosted the greatest number of refugees in the world with 3.7 million people.[23]

The 2011 Syrian Civil War has created a great requirement for refugee and asylum legislation in Turkey. Law No 6458 on Foreigners and International Protection (hereinafter the LFIP) was adopted on 4 April 2013. There have been numerous cases where the ECtHR has found violations in Turkey before the LFIP came into force, due to the fact that there was no adequate national legislation and implementation system in Turkish refugee law. The LFIP has filled this deficiency and provided provisions regarding the international protection, the non-refoulement principle, deportation conditions, people who shall not be deported, the deportation process, etc.

The law to making amendments on some laws and Decree Law No. 375 was accepted in Turkey on 6 December 2019 and there are new amendments concerning deportation and the-non-refoulement principle in the LFIP.[24] The research problem is that new amendments of LFIP on December 2019 created legal gaps and inconsistencies in terms of the non-refoulement principle in Turkish Refugee Law in comparison to ECHR and ECtHR case law. Especially abstract terms and provisions in the amendments made new disputes about the

[22]Human Rights Watch, '*Syria - World Report 2018: Syria | Human Rights Watch'*, available at https://www.hrw.org/world-report/2018/country-chapters/syria
[23]2018 Global Trends Report. Produced And Printed By UNHCR on 20 June 2019. Available at: https://www.unhcr.org/5d08d7ee7.pdf
[24] Law No. 7196 to making amendments on some laws and Decree Law No. 375, e.i.f. 6 December 2019.

non-refoulement principle, thus, these inconsistencies should be eliminated in order to prevent the arbitrary implementation of the law. Hence, the objective of this thesis is to assess the effect of new amendments of the LFIP on 6 December 2019 and compliance of Turkish Refugee law regarding the non-refoulement principle under the standards set out by the ECHR and ECtHR case law. This research aims to show inconsistencies and make recommendations for the regulation and application of the non-refoulement principle in Turkish Refugee Law in the light of ECHR and ECtHR case law. This thesis is important because there are no sufficient analyses about the effect of new amendments published on 6 December 2019 on the implementation of the non-refoulement principle in Turkey in the light of ECHR and ECtHR case law. It is also important to make new recommendations to eliminate the inconsistencies regarding the regulation and application of the non-refoulement principle in Turkey.

The hypothesis of this thesis is that even the regulation of the non-refoulement principle in Turkey is, with some deficiencies, in compliance with the non-refoulement principle and ECHR; the new amendments published on 6 December 2019 made some discrepancies with the standards of the ECHR and ECtHR case law. Moreover, there are some deficiencies in the Administrative Court and Constitutional Court judgments, even though the application of the non-refoulement principle in courts generally complies with ECtHR standards.

Since 1954, Turkey has been a state party to ECHR that aims to protect and promote human rights and fundamental freedoms. However, Turkey is far and away the greatest violator country, according to statistics published by the ECtHR. There were 3,128 violations of the ECHR articles by Turkey between 1959 and 2018; the second greatest violator State, the Russian Federation, has 2,365 violations.[25] Therefore, even though Turkey is a party to international human rights instruments and makes legislation according to international covenants; the implementation of law does not comply with international standards in every case.

The following research questions will help to establish the truthfulness of the hypothesis:

- How has the non-refoulement principle been regulated and improved in international instruments?

[25]Violations by Article and by State 1959-2018(ECtHR). Available at: https://www.echr.coe.int/Documents/Stats_violation_1959_2018_ENG.pdf

- How does ECtHR approach and assess the non-refoulement principle in deportation cases?
- Does regulation of non-refoulement principle in Turkish Refugee Law comply with the ECHR and ECtHR case law? How did last amendments of the LFIP on 6 December 2019 affect the regulation of non-refoulement principle in Turkish Refugee Law?
- Does the Turkish Refugee law need any changes in order to meet the international standards of non-refoulement principle according to ECtHR case law?
- Does the implementation of the non-refoulement principle in Turkish legal practice comply with the ECtHR case law? What are the contradictions between case law in Turkey and in the ECtHR?

To answer these questions, the paper carries out an analytical and comparative method from the perspective of human rights. The thesis comprehensively analyses Turkish Refugee law and Turkish Constitutional Court and the Administrative Court judgments (between 2000 and 2020) regarding thesis topic within the frame of ECHR. Therefore, ECtHR case law regarding the non-refoulement principle is also examined to assess the conformity of Turkish Refugee law regarding the non-refoulement principle. Analytical legal methods will be used to examine and find out the contradictions and legal gaps in the regulation and implementation of non-refoulement principle in Turkish Domestic Law in comparison with ECHR and ECtHR case law, by taking the new amendments of LFIP on December 2019 into account. The comparative method will be used to compare the implementation of non-refoulement principle in the Turkish domestic law and judgments in comparison with ECHR and ECtHR case law and references and recommendations will be made within the scope of this comparison. The national and international law instruments, judgments, reports related to the non-refoulement principle, books, articles and studies will be examined about the research topic in this thesis.[26]

[26] In 2013, the EU and Turkey signed an agreement which regulates that Turkey will readmit irregular migrants who went to EU member states via Turkey, and similarly EU Member States will readmit irregular migrants who went to Turkey via an EU member state.(Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, OJ L 134, 7.5.2014.) However, Turkey suspended the agreement because of the non-fulfilment of a visa-free regime for Turkish citizens and EU sanctions on Turkey's gas drilling operations in the Mediterranean Sea.(Turkey suspends deal with the EU on migrant readmission, translated by Daniel Eck,available at: https://bit.ly/3cZOuPh) This agreement is arguable in terms of the non-refoulement principle but it is not examined in this thesis because of the suspension.

The thesis consists of three chapters in line with research questions. The first chapter will explain the non-refoulement principle in international law and ECHR. It will also analyse ECtHR case law in order to assess the application of the principle in Turkish Refugee Law. The approach and assessment of ECtHR in the application of the non-refoulement principle is significant to analyse other research questions. Evolution of Turkish Refugee Law regarding the non-refoulement principle will be clarified in the second chapter. This chapter will also examine the compliance of Turkish Refugee law with the non-refoulement principle in ECHR. The third chapter deals with the Turkish Constitutional Court, Administrative Court and ECtHR judgments concerning the non-refoulement principle. Consistencies and inconsistencies of national judgments will be analysed in the light of ECtHR judgments. Standards and articles, which have been taken into consideration in ECtHR judgments, will be explored in order to explain how the non-refoulement principle is evaluated in deportation cases according to ECtHR case law.

Keywords: human rights; deportation; refugees; non-refoulement; Turkey;

1. NON-REFOULEMENT PRINCIPLE

1.1. Non-Refoulement Principle in International Refugee Law

The non-refoulement principle is one of the most important principles for international protection in international law. After the destruction caused by World War I, states had started to search the ways of preventing wars and providing international peace. Meanwhile, there was a need for a regulation for displaced and stateless people who had fled to other countries because of war and serious human rights violations.

There are numerous international and regional instruments[27], which regulate the rights of refugees and the non-refoulement principle. The main instruments and developments will be analysed in this chapter. Firstly, the 1933 Convention regulated the rights of refugees and obligations of states related to refugees and furthermore stated the non-refoulement principle in Article 3, which imposes an obligation on the contracting states to accept refugees at the frontiers and ensure not to apply expulsion or non-admittance for authorised refugees unless it is necessary for national security or public order.[28]

World War II has caused a broader necessity for regulation in the human rights field. Even though the Universal Declaration of Human Rights regulated the right to asylum, it did not include articles about the migration process, refugees and the non-refoulement principle. The 1951 Convention Relating to the Status of Refugees was established by time and geographical limit; it involved people who had fled because of circumstances that occurred before 1 January 1951 and in Europe.[29] Time and geographical limitation were removed by the 1967 Protocol; however, States could make a reservation to keep geographical limitation for state parties.[30] This convention and protocol are still primary sources for regulation at the field of refugee law and state parties have come together in order to reapprove the importance and

[27]For example; Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, The Global Compact on Refugees, European Convention on Extradition, The United Nations Convention on the Rights of the Child, Council of Europe Convention on Action against Trafficking in Human Beings, Cartagena Declaration on Refugees, Convention Governing the Specific Aspects of Refugee Problems in Africa etc.
[28] The 1933 Convention, op. cit.
[29] The 1951 Convention, op.cit.
[30] Protocol Relating to the Status of Refugees. Geneva, 31.01.1967. e.i.f. 4.10.1967.

their adherence to Convention and the 1967 Protocol. They also affirmed the non-refoulement principle as a customary international law principle.[31]

Article 33 of the 1951 Convention stated that a refugee shall not be deported or returned in any way to any country where his/her life or freedom is under threat because of five reasons; race, religion, nationality, social group or political opinion.[32] These five reasons are numerous clauses and conditions for the non-refoulement principle. If there is reasonable cause to show that the refugee is a threat for the security of the host state, or he/she has been found guilty of a serious crime which is a danger for the society of the host country, he/she cannot benefit from this principle.[33] However, a refugee status is not obligatory to benefit from non-refoulement principle according to the UNHCR handbook: "He does not become a refugee because of recognition, but is recognized because he is a refugee."[34] Therefore, the non-refoulement principle should be taken into account in terms of the conditions that the person will be facing after deportation.

As it is understood from the first paragraph of Article 33 of the 1951 Convention, the non-refoulement principle is an obligation on all contracting states. Since Article 42 of the 1951 Convention and Article 7 of the 1967 Protocol, which regulate the reservations, prohibit party states to make a reservation in Article 33 of the 1951 Convention which regulates the non-refoulement principle.[35] Therefore, it shows non-refoulement is an obligation on all contracting states without any reservation. Non-refoulement can occur in different ways such as not accepting the person at frontiers, expelling after accepting a refugee to a country etc. Article 33 prohibits all manners of refoulement in the cases listed in paragraph 1 of Article 33. 'In any manner whatsoever' term in the article means that the shape of the act, extradition, rejection at the border, expulsion etc., is not significant; undetermined terms should be interpreted in conformity with the humanitarian character of the 1951 Convention.[36]

[31]Declaration of States Parties to the 1951 Convention and its 1967 Protocol Relating to the Status of Refugees. Geneva, 16.01.2002.
[32]1951 Convention Relating to the Status of Refugees, opt. cit.
[33] Ibid.
[34]Handbook On Procedures And Criteria For Determining Refugee Status and Guidelines On International Protection Under The 1951 Convention And The 1967 Protocol Relating To The Status Of Refugees Reissued. Geneva, February 2019, p.17. Available at : https://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html
[35] The 1951 Convention. Op. cit. Article 42/1. And 1967 Protocol. Op. Cit. Article 7/1.
[36] Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, Edited by Erika Feller,Volker Türk and Frances Nicholson, Cambridge:Cambridge University Press (2003), p.112.-113.

The term *Contracting State* refers to bodies, private corporations (such as persons in charge of transit) and people who act under the authority of the state; therefore, results of their acts about exercising of non-refoulement principle are in the scope of state responsibility.[37] About the attribution of an act to a state in terms of territory, state responsibility can rise in all situations, which happen under the effective control of the state, "whether beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points, etc."[38]

According to the UNHCR *Note on the Principle of Non-Refoulement*, the principle is not based on lawful residence or international protection status; even if a person does not possess international protection status, he/she shall be protected under the non-refoulement principle.[39] However, Article 1-F of the 1951 Convention indicates some people who cannot have refugee status; accordingly a person who commits a crime against peace or humanity, a war crime or a crime defined in international instruments, or who has committed a serious non-political crime before applying for refugee status, or who has been found guilty of acts against aims and purposes of the UN may not have refugee status.[40] Therefore, a person in scope of article 1-F of the 1951 Convention may not be entitled to have protection under the non-refoulement principle.[41]

On the other hand, Article 33-2 regulates the exceptions for principle of non-refoulement, the article says that this principle shall not be applied for a refugee who is regarded a danger for the security of host country, or a refugee who has been convicted by a definitive judgment of a significant crime which is a danger for the community of host country.[42] However, a state cannot ground exceptions in Article 33/2 if there is a risk of torture or persecution in case of refoulement of a person, because the non-refoulement principle is a non-derogable right in terms of fundamental rights;[43] UNHCR addressed that the prohibition of refoulement applies "where the person concerned would face a real risk of irreparable harm such as violations of

[37] S. E. Lauterpacht and D. Bethlehem. The Scope and Content of the Principle of Non-Refoulement: Opinion. Cambridge University Press, June 2003, p. 109.
[38] Ibid. p. 111.
[39] Note on the Principle of Non-Refoulement (UNHCR). November 1997. Available at: https://www.refworld.org/docid/438c6d972.html.
[40] 1951 Convention Relating to the Status of Refugees, op.cit.
[41] Exclusion (Article 1F) and Article 33(2) of the Refugee Convention. United Kingdom: Home Office, 01.07.2016. Available at: https://www.refworld.org/pdfid/58b017e4391.pdf
[42] 1951 Convention relating to the Status of Refugees, op. cit., Article 33.
[43] Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, UNHCR, Geneva 26.01.2007.

the right to life or the right to be free from torture or cruel, inhuman or degrading treatment…"[44]

UNHCR also emphasised in its Advisory Opinion that the serious-crime exception in article 33/2 of the 1951 Convention "must be the ultima ratio (the last recourse) to deal with a case reasonably."[45] Moreover, states should apply these exceptions very carefully because irreparable consequences may occur after applying these exceptions, and all possibilities to integrate or rehabilitate a person in society should be evaluated.[46] Therefore, these exceptions in article 33/2 of the 1951 Convention do not remove entirely the responsibility of the host state to follow the non-refoulement principle.

Even the 1951 Convention includes exceptions for the non-refoulement principle; "non-refoulement is not subject to derogation".[47] While UNHCR accepts the exceptions in some situations such as terrorism, national security, etc., ECtHR, Human Rights Committee and International Covenant of Civil and Political Rights do not accept any derogation from the non-refoulement principle.[48] There are even some examples about the applying of exceptions of the non-refoulement principle; especially in Europe, there is a consensus not to return asylum seekers to dangerous places.[49]

The non-refoulement principle is regulated also in other international conventions. For instance, Article 3-1 of the European Convention on Extradition prohibits the extradition of people who have committed political offences or an offence related to political offences, and Article 3-2 explains that, if a contracting party has well-grounded reasons for believing that application for extradition for an ordinary penal offence is made in order to judge or punish someone because of his religion, race, nationality, political opinion or any related reasons, the requested party may reject the request for extradition.[50]

Moreover, the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment regulates the non-refoulement principle in Article 3, which says:

[44] Ibid. Para 20. p.10.
[45] Note on Non-Refoulement Note on Non-Refoulement EC/SCP/2, UNHCR, 23.08.1977.
[46] Ibid.
[47]General Conclusion on International Protection No. 79 (XLVII).(i).1996. A/AC.96/878 and Document No. 12A (A/51/12/Add.1).
[48]I. Holm. Non-refoulement and national security. Graduate Thesis, Faculty of Law of Lund University, Spring semester 2015, p.1.
[49] G. S. Goodwin-Gill,Clarendon. The Refugee in International Law. Oxford Press, Second Edition, 1996, p.171.
[50] European Convention on Extradition. Paris, 13.12.1957, e.i.f. 18.04.1960.

"No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[51]

Although there are different opinions and arguments about the nature of the principle of non-refoulement principle, arguments centred around customary international law and *jus cogens*. According to North Sea Continental Shelf Cases, there are three conditions to be a customary international law rule; "it would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law"[52], "it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected."[53] and "State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;- and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."[54] Therefore, Sir Elihu Lauterpacht and Daniel Bethlehem accept the non-refoulement as a customary international law principle under North Sea Continental Shelf Cases conditions and also due to the fact that there is no expressed objection by States about the "normative character of the principle of non-refoulement."[55]

However, "if a state has rejected existence or application of such customary international law consistently and repeatedly, the customary law does not bind the state."[56] Therefore, *jus cogens* norms has more strong binding force, "Unlike customary international law and treaty law, jus cogens norms abide no derivation and bind all states regardless of their willingness to be bound."[57]

[51]Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. New York, 10.12.1984, e.i.f. 26.06.1987.
[52]International Court of Justice (ICJ). North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands). 20 February 1969. Para 72.
[53] Ibid. Para 73.
[54] Ibid. Para 74.
[55] Sir Elihu Lauterpacht and Daniel Bethlehem. The Scope and Content of the Principle of Non-Refoulement: Opinion. Cambridge University Press. June 2003. Page 149.
[56]Handayani, Irawati. (2019). Concept and Position of Peremptory Norms (Jus Cogens) in International Law: A Preliminary Study. Hasanuddin Law Review. 5. 235. 10.20956/halrev.v5i2.1709. Page 244.
[57] Ibid. Page 235.

Dominant opinion about the nature of the non-refoulement principle is that the principle is a *jus cogens* norm[58]. *Jus cogens* norm has been defined in the Vienna Convention on the Law of Treaties at Article 53. The article in question explains *jus cogens* norm as "a peremptory norm" accepted by states without any permissible derogation and which can be replaced by following the same characteristic norm of international law and the article emphases that "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm…"[59]

The Executive Committee of the UNHCR's Programme emphasised that "the principle of non-refoulement is not subject to derogation" at the General Conclusion on International Protection.[60] Jean Allian states that the non-refoulement principle is a *jus cogens* norm and says that the principle is binding for all states "whether or not they are party to the 1951 Convention."[61] Exceptions at Article 33/2 of the 1951 Convention cannot be applied if there is a risk of torture or persecution,[62] therefore, it can be said that non-refoulement principle is a *jus cogens* norm in terms of fundamental rights. ECtHR also emphasised many times that there is no exception if there is a risk in the case of violation of Article 3.[63]

The *jus cogens* nature of the principle and limited exceptions in Article 33 of the 1951 Convention indicates that the principle shall not be subject to any other exception apart from the ones mentioned in the Convention, even in the case of mass influx. According to UNHCR Executive Committee Conclusion No. 19 "… the principle of non-refoulement to be scrupulously observed in all situations of large-scale influx; …(i) that in the case of large-scale influx, persons seeking asylum should always receive at least temporary refuge" and Conclusion No.21 says that states should accept asylum-seekers in case of large-scale influx, even if state cannot provide permanent protection to asylum-seekers, they should accept them for temporary protection and in all cases, the principle of non-refoulement including admission at the border must be observed.[64] It can be said that the principle shall be followed

[58]General Conclusion on International Protection No. 79 (XLVII).(i).1996. A/AC.96/878 and Document No. 12A (A/51/12/Add.1).
[59] Vienna Convention on the Law of Treaties. Vienna, 23.05.1969, e.i.f. 27.01.1980.
[60]General Conclusion on International Protection. Executive Committee of the High Commissioner's Programme. 11.10.1996. Available at: https://www.unhcr.org/excom/exconc/3ae68c430/general-conclusion-international-protection.html
[61] J. Allain. The jus cogens Nature of Non-refoulement. International Journal of Refugee Law 13(4), October 2001, pp. 533-558.
[62]Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, UNHCR, Geneva 26.01.2007.
[63] Saadi v. Italy, judgment, App. No. 37201/06, ECtHR, 28.02.2008.
[64] Conclusions Adopted By The Executive Committee On The International Protection Of Refugees 1975 – 2009(Conclusion No. 1 – 109), No. 19 Temporary Refuge∗ (1980) and No. 22 Protection Of Asylum-Seekers in Situations Of Large Scale Influx (1981), available at : https://www.unhcr.org/578371524

for every person by taking into account specific and general conditions even in the cases of mass influx.

After the big movements of migrants and refugees, the UN General Assembly gathered together all member states to improve cooperation and effectiveness between states for solving problems and challenges of migrants and refugees. As a result, 193 Member states unanimously signed up to the New York Declaration for Refugees and Migrants on 19 September 2016.[65] All states have accepted that they have a common responsibility to protect and provide human rights of refugees and migrants worldwide regardless of their international protection status. This declaration has enounced that all countries will work on two compacts regarding migration and refugee movements. Firstly, they established the Global Compact on Refugees, which is not legally binding but aims to provide a framework and international cooperation to apply legal norms in refugee instruments and protects refugees in large movements. It has been reaffirmed by 181 countries (without the United States and Hungary) on 17 December 2018.[66] Secondly, the Global Compact for Safe, Orderly and Regular Migration was established as a legally non-binding document to improve global migration governance and solidarity and to provide various principles such as people-centric international cooperation, rule of law and due process; sustainable development, human rights, gender-responsiveness, child-sensitivity and so on to protect migrants in different dimensions. It was adopted by 152 member states at UNGA, five member states (the USA, Poland, the Czech Republic, Israel and Hungary) voted against.[67] All those documents indicate that there is a substantial improvement and desire to deal with challenges presented by large-scale migration in order to ensure the protection of human rights, human dignity and equality for all migrants and refugees.

1.2. Non-Refoulement Principle in the European Convention on Human Rights

The ECHR is applicable for all people regardless of their status within the jurisdiction of contracting states, according to Article 1 of the ECHR. The ECtHR has explained the Convention's role as a "constitutional instrument of European public order" in the human

[65]UN General Assembly, New York Declaration for Refugees and Migrants : A/RES/71/1, 3 October 2016, available at: https://undocs.org/a/res/71/1
[66]UNGA Records Seventy-third Session Supplement No.12 (A/73/12(Part II),Report of the UNHCR Global compact on refugees, New York 2018,available at:https://www.unhcr.org/gcr/GCR_English.pdf
[67] Global Compact for Safe, Orderly and Regular Migration, New York, 19.12.2018.

rights area in the *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Sirketi v. Ireland* case.[68] According to case law, ECHR is a 'living instrument', which should be evaluated under present conditions.[69] The ECtHR confirmed that the ECHR is a part of the international system which should be taken into account for case law.[70] Therefore, the Convention has a big importance in terms of continuous development of human rights in the Continental Europe.

Article 1 of the ECHR obliges the contracting states to secure rights and freedoms in the Convention and Protocols to everyone in their jurisdiction. ECtHR interprets the territorial responsibility and jurisdictional link in a broad way. In the *Banković and Others v. Belgium and Others* case, the ECtHR decided that jurisdiction of State may result from its activities carried by diplomatic or consular agents abroad by the authority of State.[71] Therefore, responsibility is not limited by territorial borders: contracting parties also have responsibility on places and people that they have jurisdictional link with them. It is important because refugees generally enter the countries from the outside by sea, land or air, and states reject their responsibilities for the acts of their agents.

ECHR has no direct article related with the non-refoulement principle and ECtHR emphasises that the ECHR does not guarantee the right to seek asylum or a residence permit and underlined that the Court shall not review the application of the 1951 Convention by contracting parties in the case of *R.B.A.B. and Others v. The Netherlands*.[72] Moreover, the Court says that contracting parties have the right to control entrance, residence and expulsion of foreigners and the ECHR and protocols thereto do not include right to seek political asylum.[73] Therefore, it can be said that ECHR accepts that, whilst states have sovereignty in the area of migration and refugee law, protection of human rights is a limit of state sovereignty in refugee law.

Protocols 4 and 7 of the ECHR have regulations about the expulsion of foreigners, further to that ECtHR defines in its judgments the relation of the non-refoulement principle with other human rights regulated in the convention. Article 3 of Protocol 4 of the ECHR includes a

[68] Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland, judgment, App. No. 45036/98, ECtHR, 30.06.2005.
[69] Tyrer v. The United Kingdom, judgment, App. No. 5856/72, ECtHR, 25.04.1978, para. 31. Stafford v. The United Kingdom, judgment, App. No. 46295/99, ECtHR, 28.05.2002, para 69.
[70] M. Forowicz. The Reception of International Law in the European Court of Human Rights. Oxford University Press, First Published 2010, p.3.
[71] Banković and Others v. Belgium and Others , judgment, App. No. 52207/99, ECtHR, 12.12.2001.
[72] R.B.A.B. and Others v. The Netherlands ,judgment, App. No. 7211/06, ECtHR, 7.06.2016.
[73] Hirsi Jamaa and Others v. Italy, judgment, App. No. 27765/09, ECtHR, 23/02/2012.

prohibition of expulsion of citizens and Article 4 of Protocol 4 prohibits the collective expulsion of foreigners.[74] Article 1 of the Protocol 7 regulates the "Procedural safeguards relating to expulsion of aliens" and says that lawfully resident foreigners shall not be deported without a decision pursuant to law and foreigners shall be entitled to submit reasons against expulsion, to right to review of his case and to be represented before the competent authorities.[75]

Even though states are not under obligation to allow foreigners to enter the country, this rule has exemptions in terms of refugees in international law.[76] When ECtHR cases are taken into account, it can be said that ECtHR has firstly and primarily dealt with the non-refoulement principle in relation to Article 3 (prohibition of torture),[77] Article 2 (right to life), Article 5 (right to liberty and security), Article 6 (right to a fair trial), Article 8 (right to respect for private and family life), Article 13 (right to an effective remedy).

ECtHR was generally referring to the 1951 Convention in cases[78] but these references have reduced due the fact that ECtHR is more effective in terms of protecting the applicants; ECtHR acknowledged that the ECHR provides better protection especially for Article 3 compared to the 1951 Convention.[79] The 1951 Convention does not have an international body and individual complaint mechanism to control its application; therefore, ECtHR provides a more effective control mechanism and remedy for people who face the refoulement risk.[80] While the 1951 Convention provides protection for refugees and asylum-seekers, ECHR provides protection for everyone in the jurisdiction of contracting countries, "including failed asylum-seekers, suspected terrorists, criminals,…" and ECHR just requires the real risk for ill-treatment regardless of reasons (race, religion, nationality, membership of a particular social group or political opinion) in the Article 33 of the 1951 Convention.[81] Therefore, ECtHR extends the scope of the non-refoulement principle and increases its level of protection and effectiveness. Moreover, ECtHR can decide to apply interim measures such as

[74] Convention for the Protection of Human Rights and Fundamental Freedoms, op. cit.
[75] Ibid.
[76] H. Lambert. The Position of Aliens in Relation to the European Convention on Human Rights. Council of Europe Publishing, Human rights files, No. 8, page 15.
[77] Soering v. The United Kingdom, judgment, App. No. 14038/88, ECtHR, 7.07.1989.
[78] Chahal v. The United Kingdom, judgment, App. No. 22414/93, ECtHR, 15.11.1996; Hirsi Jamaa And Others v. Italy, judgment, App. No. 27765/09, ECtHR, 23.02.2012; etc.
[79] M. Forowicz. The Reception of International Law in the ECHR, op.cit., page 234.
[80] Ibid. Page 236
[81] Ibid. Page 237.

suspending the deportation decision in the event of real risk and irreversible damage, before adjudicating in the case according to Rule 39 of the Rules of Court.[82]

All state parties shall make their domestic law in compliance with the Convention according to Article 1 of the ECHR and party states should abide by decisions and apply measures in the cases in which they are parties, pursuant to Article 46 of the Convention.[83] Contracting parties are under obligation to "put an end to the breach and to make reparation for its consequences in such a way as to restore, to the fullest extent possible, the situation existing before the breach." by applying general or individual measures.[84] States may change legislation, make new legislation etc. as a general measure or may compensate for the damages to an applicant, redress possible effects etc. as individual measures.[85] Party states may decide how to end or restore the breach in question by considering the Court's decision. ECtHR judgments do not automatically change national legislation. Implementation and amendments are fulfilled by member states.

Turkey ratified the ECHR on 18 May 1954 and the Convention has played an essential role in terms of development of human rights in Turkey. When the Table 1 on page 69 is examined, the constitution of Turkey has provisions in compliance with articles of the ECHR; also, some articles of ECHR have corresponding regulations in other Turkish legislation.[86] It can be said that Turkish Constitution and domestic law have taken ECHR into account in general and the influence and importance of the Convention is clear in this respect.[87] Justification of some articles within the constitution have been explained as "In line with the principles of the ECHR", "In accordance with the ECHR", "bringing the article into conformity with ECHR" etc.[88] Therefore ECHR and ECtHR case law have had a strong effect on Turkish laws in comparison to the 1951 Convention.

Article 90 of the Constitution of Turkey says that international agreements, which have duly entered into force, have the force of law and it is not possible to apply to the Constitutional Court on the grounds that these agreements are unconstitutional; and further to that "in the case of a conflict between international agreements, duly put into effect, concerning

[82] Rules of European Court of Human Rights. 9 September 2019. Rule 39.
[83] Maestrı v. Italy , judgment, App. No: 39748/98, ECtHR, 17.02.2004, para 47.
[84] Abuyeva And Others v. Russia , judgment, App. No: 27065/05, ECtHR, 2.12.2010, para 236.
[85] Ibid.
[86]Table 1, on page 69. (N. Gündoğdu. Turkey and the ECHR Is there a Cultural Relativism concerning Human Rights in Turkey, 2018.)
[87] Turkish Grand National Assemby. Justification of the Constitution of the Republic of Turkey. Ankara 2008.
[88] Ibid.

fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."[89] This article prevents the controversy between international human rights agreements and domestic law. This provision places an obligation on all executive, legislative and judicial powers that international agreements concerning fundamental rights and freedoms prevail over domestic law.[90] In the case of *Unal Tekeli v. Turkey*, the ECtHR also emphasised that "in the proceedings before them, the domestic courts could have directly applied the provisions of the Convention, which forms an integral part of the domestic law by virtue of Article 90 of the Constitution."[91] Therefore, ECtHR case law and judgments are effective on the improvement of Turkish domestic law in terms of human rights and so forth, for migration and refugee law.

To exemplify and understand ECtHR's approach to the non-refoulement principle, the following will analyse the Court's case law regarding specific articles of the ECHR which the ECtHR has dealt with in cases where the non-refoulement principle has come into play.

1.2.a. Assessment of the Documents, Reliability and Conditions of Applications

One of the most significant requirements in refoulement cases is individual assessment. "Collective expulsion of aliens is prohibited." according to Article 4 of Protocol No. 4 of the ECHR.[92] Therefore, every person in expulsion orders should be assessed individually and has the right to object to the decision to be examined by the competent authorities. The ECtHR emphasises that personal circumstances, situation of asylum request, effective remedy against expulsion decision should be taken into consideration in expulsion cases. The Court decided that an expulsion decision without considering and completing an asylum process of applicants, without the right to have a lawyer and acceptable, neutral examination of each applicant's circumstances, without reasonable measures is a violation of Article 4 of Protocol No. 4.[93]

The Court respecified and cited that expulsion of numerous foreigners in the same conditions does not, of itself, mean collective expulsion, if each person has the right and opportunity to

[89] Constitution of the Republic of Turkey, op.cit.
[90] M.Gülmez. Anayasa Değişikliği Sonrasinda İnsan Haklari Sözleşmelerinin İç Hukuktaki Yeri Ve Değeri (The Place and Significance of Human Rights Conventions in the Domestic Law after the Constitutional Amendment). TBB Dergisi, No. 54, 2004, page 157.
[91] Unal Tekeli v. Turkey, judgment, App. No: 29865/96, ECtHR, 16.11.2004, para 38.
[92] ECHR, op.cit., Article 4 of Protocol 4.
[93] Čonka v. Belgium, judgment, App. No. 51564/99, ECtHR, 5.02.2002, para 56– 63.

put forward arguments against the expulsion decision on an individual basis; and also if the expulsion decision is not based on an individual basis because of the applicants' own culpable conduct, there is no violation of Article 4 of Protocol No.4.[94] Therefore, the ECtHR adjudged that expulsion decision without "any form of examination of each applicant's individual situation" and without any identification procedure is a violation of Article 4 of Protocol No.4.[95]

However, the Grand Chamber of ECtHR emphasised that Article 4 of Protocol No. 4 does not require a personal interview for every person, every time. If each alien has a real and effective possibility of putting forward his/her arguments and if the authorities of the respondent state examine the arguments, there is no violation of the article in question.[96]

The ECtHR ruled that "automatic returns" of migrants intercepted in ports by Italy because of the Dublin Regulation is a collective expulsion and that migrants had been deprived of the possibility of seeking asylum. Furthermore, these international regulations and treaties should comply with the ECHR: no country can rely on these regulations to justify collective or indiscriminate expulsions.[97]

The ECtHR examines international reports, UNHCR decisions about refugee status, surveys etc. when the Court reviews the real risk of refoulement, even if the formal conditions are not met. In the case of *Jabari v. Turkey*; Jabari, an Iranian citizen, had an extramarital sexual relationship and so she had to flee Iran before she was caught by the authorities. She firstly entered via Turkey and then went to Paris but she was sent back from France to Turkey because of having a false passport. She was arrested in Turkey and later applied for international protection. However, her application was rejected because she missed a five-day application period. Afterwards, a deportation decision was taken for her so she applied to ECtHR. The ECtHR took last surveys, reports and refugee status given by UNHCR into consideration and decided that there was a real risk in the case of refoulement of the applicant when the penalties such as lapidation and flagellation are taken into account.[98] Therefore, procedural rules should not restrict the assessment of risk of torture in refoulement cases.

[94] Hirsi Jamaa And Others v. Italy, judgment, App. No. 27765/09, ECtHR, 23.02.2012, para 184.
[95] Para 185.
[96] Khlaıfıa And Others v. Italy, judgment, App. No. 16483/12), 15.12.2016, para 248.
[97] Sharifi and Others v. Italy and Greece, judgment, App. No. 16643/09, ECtHR, 21.10.2014.
[98] Jabari v. Turkey, judgment, App. No. 40035/98, ECtHR, 11.07.2000, para 41.

1.2.b. Assessment of Article 2 and 3 Concerning the Non-Refoulement Principle

Article 2 includes two essential obligations on the contracting states, to protect the right to life by law and the prohibition of intentional deprivation of life.[99] Negative obligation has become absolute after publishing of Protocol 13 of the Convention (Turkey signed it on 9 January 2004 and it entered into force on 1 June 2006.[100]), which abolished the death penalty in all circumstances for all state parties.[101]

Article 2 of the Convention also includes the obligation to provide a legal framework, to apply operational appropriate measures,[102] to make an effective investigation to protect the right to life in domestic law.[103] In deportation cases, ECtHR takes into consideration the right to life broadly and searches all conditions by reports, statistics, judgments, etc. The Court generally examines the right to life under Article 3 except from death penalty cases. The ECtHR explained that if there are "substantial grounds to believe that the person in question, if extradited, would face a real risk of being liable to capital punishment" or "if an extraditing State knowingly puts the person concerned at such high risk of losing his life"; it will cause the violation of his right to life.[104] If there is no risk of the capital penalty or of death, the Court examines the case under Article 3.[105]

Prohibition of torture, inhuman or degrading treatment or punishment without exception is regulated in the Article 3 of the Convention and Article 3 is one of the non-derogable rights that are absolute in every situation, even in derogation in time of emergency according to Article 15 of the ECHR.[106]

Even if states have the right to control and decide about the entry and residence of foreigners; if expulsion of a foreigner causes violation of Article 3, it creates the state responsibility.[107] The ECtHR emphasises that the prohibition of torture is one the essential elements of democratic society, so the prohibition is independent of the situation of person in question;

[99] Boso v. Italy , judgment, App. No. 50490/99, ECtHR, 05.09.2002.
[100] Council of Europe. Treaty list for a specific State-Turkey. Status as of 10/04/2020. Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/country/TUR
[101] Convention for the Protection of Human Rights and Fundamental Freedoms, op. cit.
[102] Valentin Câmpeanu v. Romania, judgment, App. No. 47848/08, ECtHR, 17.07.2014.
[103] Armani Da Silva v. the United Kingdom, judgment, App. No. 5878/08, ECtHR, 30.03.2016.
[104] Kaboulov v. Ukraine, judgment, Appl. No. 41015/04, ECtHR, 19.11.2009, para 99.
[105] Ismoilov And Others v. Russia, judgment, App. No. 2947/06, ECtHR, 24.04.2008, para 119—128.
[106] ECHR, op.cit. Article 3 and 15.
[107] Hirsi Jamaa and Others v. Italy, judgment, App. No. 27765/09, ECtHR, 23.02.2012.

even if a person is a threat against state security, prohibition of torture shall not be violated.[108] Moreover, ECtHR decided that, even in the cases of risk for national security because of activities of the person in question, there is no exception and derogation from Article 3; therefore, ECtHR states that "The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the 1951 Convention".[109] Therefore, ECtHR does not accept exception for the non-refoulement principle regarding prohibition of torture; states have responsibility at least to return a person to a safe third country. If the state cannot find a safe third country for expulsion, the person should not be expelled to the place where he/she may face torture or degrading or inhuman treatment or punishment. States may nevertheless take necessary measures against these persons to provide security in their countries.

ECtHR expanded the scope of Article 3 in a broad way in the case of *Piophilid v. Belgium* for seriously ill people. The Court decided that expulsion of seriously ill people who are "not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in expectancy of life." is a violation of Article 3 in the light of "general sources such as reports of the World Health Organisation or of reputable non-governmental organisations."[110]

1.2.c. Assessment of Article 5 Concerning the Non-Refoulement Principle

Article 5 of the Convention regulates the right to liberty and security, prescribes conditions, which a person may be deprived of his/her liberty and rights of the person in this deprivation process. This article will not be mentioned in detail because it is more related to administrative detention conditions in the deportation process. However, administrative detentions are applied after deportation decisions and rights of refugees regarding non-refoulement principle are violated under detention; therefore, ECtHR case law under Article 5 will be examined regarding the topic of the thesis.

Article 5/f regulates the condition for deprivation of liberty as "to prevent his affecting an unauthorised entry into the country or of a person against whom action is being taken with a

[108] Saadi v. Italy, judgment, App. No. 37201/06, ECtHR, 28.02.2008.
[109] Chahal v. The United Kingdom, judgment, App. No. 22414/93, ECtHR, 15.11.1996, para 79-80.
[110] Paposhvili v. Belgium, judgment, App. No. 41738/10, ECtHR, 13.12.2016, para 183 and 187.

view to deportation or extradition."[111] Therefore entry into a country illegally, deportation or extradition from a country are valid confinement reasons. However, the Court clarified that "deprivation of liberty under Article 5 para. 1 (f) will be justified only for as long as deportation proceedings are in progress."[112] After finishing proceedings, the detention should be ceased; detention shall not proceed by unreasonable extension of time.[113]

Detention should be lawful, non-arbitrary, reasonable, and proportional, in good faith and a last resort, compatible with the aim of Article 5. [114] In other words, "a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty".[115]

Article 5/1-f can only be applied to a person whose "action is being taken with a view to deportation or extradition". Thus the article does not require "the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing"; any deprivation of liberty under Article 5 § 1 (f) will be reasonable "only for as long as deportation or extradition proceedings are in progress."[116] Therefore, if there is no deportation process in progress and other conditions for detention in Article 5, the detention will be unlawful and arbitrary. Furthermore, the ECtHR emphasised that there should be a realistic prospect of removal process, the process should be proceedings with due diligence by domestic authorities.[117] The Court decided that detention of a Syrian asylum-seeker for twenty-one days after submitting his Syrian passport was a violation of Article 5; it was clear that his expulsion was not practicable and would remain unlikely because of conflict in Syria, so domestic authorities should have considered alternative measures instead of detention.[118]

Therefore, if there is no deportation process in progress or if deportation is not possible because of the non-refoulement principle or another reason, asylum seekers shall not be detained.

[111] The ECHR, op.cit., Article 5.
[112] Chahal v. the United Kingdom, judgment, App. No. 22414/93, ECtHR, 15.11.1996, para 113.
[113] Ibid.
[114] Saadi v. The United Kingdom, judgment, App. No: 13229/03, ECtHR, 29.08.2008, para 70.
[115] Ibid. Para 70.
[116] S.Z. v. Greece , judgment, App. No: 66702/13, ECtHR, 21.06.2018, para 53.
[117] Para 54.
[118] Para 56—59.

The Court decided that imprisonment should not deprive asylum seekers of the right to apply for determining refugee status and deprivation without necessary legal, social and humanitarian assistance and deportation of asylum seekers after holding them in airports, refusing entry at the border etc. is a violation of Article 5 in the scope of the non-refoulement principle.[119] The court emphasised that states are responsible in the international zones over which states have control, "the international zone does not have extraterritorial status", and so even though in this case the airport was not in France territorially, France was responsible for this zone.[120] Therefore, states are under obligation to secure asylum seekers the rights to apply for international protection, to assess their situation in terms of the non-refoulement principle and to give them sufficient and effective assistance to take proceedings in this process even in airports, borders, maritime areas etc. Confinement should comply with domestic law and international law. Just to be compliant with national law does not make the detention non-arbitrary; it can be still arbitrary under Article 5.[121]

1.2.d. Assessment of Article 6 Concerning the Non-Refoulement Principle

Right to a fair trial is also one of the essential elements of a democratic society. According to Article 6, "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[122]

The ECtHR emphasised that right to fair trial is not an absolute right, "it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation."[123] However, these limitations should be compatible with Article 6 of the ECHR and "these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired."[124] In other words, if limitations "do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved", it is a

[119] Amuur v. France, judgment, App. No: 19776/92, ECtHR, 25.06.1996, para 43 and 53.
[120] Para 52.
[121] Saadi v. The United Kingdom, judgment, App. No: 13229/03, ECtHR, 29.08.2008, para 67.
[122] Convention for the Protection of Human Rights and Fundamental Freedoms, op. cit.
[123] Edificaciones March Gallego S.A. v. Spain, jugdment, App. No.28028/95, ECtHR, 19.02.1998, para 34.
[124] Ibid. Para 34.

violation of the right to fair trial.[125] Moreover, the ECtHR also takes limitations such as the term of litigation into account in the scope of Article 3.[126]

However, The European Commission of Human Rights expressed many times that "the decision whether or not to authorise an alien to stay in a country of which he is not a national does not entail any determination of his civil rights or obligations or of any criminal charge against him within the meaning of Article 6 § 1 of the Convention."[127] The reason which explained by the Commission for not applying of Article 6 in deportation proceedings was that "they do not involve a full examination of a person's guilt or innocence and therefore do not constitute a determination of a criminal charge."[128] The ECtHR also concluded that "decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1 of the Convention."[129]

Nevertheless, there are exemptions, which the ECtHR takes Article 6 into account in deportation cases. The ECtHR does not exclude Article 6 in the "circumstances where the person being expelled has suffered or risks suffering a flagrant denial of a fair trial in the receiving country."[130] Therefore, in cases where it is obvious that the person will be facing "a flagrant denial of justice", the Court explains that a deportation or a refoulement decision can cause a violation of Article 6. In these cases, states have a responsibility to protect and secure that people enjoy the right to a fair trial.[131]

The ECtHR has clarified some certain forms which cause a flagrant denial of justice; "conviction in absentia with no possibility subsequently to obtain a fresh determination of the merits of the charge, a trial which is summary in nature and conducted with a total disregard for the rights of the defence, detention without any access to an independent and impartial tribunal to have the legality the detention reviewed, deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country."[132] Applicant should adduce evidence in order to show that she/he will face to a risk of a "flagrant denial of

[125] Ibid. Para 34.
[126] Jabari v. Turkey, judgment, App. No. 40035/98, ECtHR, 11.07.2000, para 40.
[127] Maaouia v. France, judgment, App. No. 39652/98, ECtHR, 05.10.2000, para 35.
[128] Anna Petrig. Human Rights and Law Enforcement at Sea : Arrest, Detention and Transfer of Piracy Suspects. Leiden, Netherlands : Brill Nijhoff, 2014. Page 418.
[129] Maaouia v. France, judgment, App. No. 39652/98, ECtHR, 05.10.2000, para 40.
[130] F. v. the United Kingdom, judgment, App. No. 17341/03, ECtHR, 22.06.2004.
[131] Othman (Abu Qatada) v. The United Kingdom, judgment, App. No. 8139/09, ECtHR, 17.01.2012.
[132] Ibid. Para 259.

justice" in case of deportation.[133] Therefore, applicants have the burden of proof in this respect.

1.2.e. Assessment of Article 8 Concerning the Non-Refoulement Principle

ECtHR did not apply Article 8 in the non-refoulement cases in terms of private life for a long time. In Article 8, the right to respect for private and family life is related to private and/or family life, home and correspondence. The second paragraph of the article regulates the exceptions and procedures of exceptions.

The Court emphasises that the right to respect for family and private life should be taken into consideration at deportation and refoulement decisions, otherwise it could create state responsibility under Article 8.[134] Restrictions on Article 8 should be applied in accordance with paragraph 2 of the Article 8, restrictions should be made by law and necessary for a democratic society and based on one the reasons of "national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[135]

The Court assesses the presence of family and/or private life, home according to date of judgment/decision in terms of applicant and also the Court does not determine the family and/or life only based on marriage but also considers the applicant's parents, work and school life, etc. In the case of *Boujaïdi v. France*, a deportation decision was taken about the applicant and his appeal to domestic courts about violation of right to family life was rejected on the grounds that he was not married.[136] The applicant took the case to the ECtHR and the Court took into account the date of deportation decision when assessing whether the single applicant had a family life with his parents or not. The court examined that the question of "whether the applicant had a private and family life, when the exclusion order became final"[137], "applicant cannot plead his relationship and children which recognised officially after final judgment date and the fact that he is the father of her child, since these circumstances came into being long after that date".[138] However, the Court observes that "he

[133] Ibid. Para 261.
[134] Abdulaziz, Cabales and Balkandali v. The United Kingdom, judgment, App. No. 9214/80, 9473/81; 9474/81, ECtHR, 28.05.1985.
[135] Convention for the Protection of Human Rights and Fundamental Freedoms.
[136] Boujaïdi v. France, judgment, App. No. 25613/94, ECtHR, 26.09.1997.
[137] Ibid.
[138] Ibid.

arrived in France at the age of seven and lived there until 26 August 1993. He received most of his schooling there and worked there for several years. In addition, his parents, his three sisters and his brother –that he had remained in contact – live there."[139]; hence the Court decided that deportation decision was violation of the applicant's right to respect for his private and family life.[140]

In the case of *Maslov v. Austria*, the Court explained two criteria, which need to be taken into account for children and young people. They are "I) the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; II) the solidity of social, cultural and family ties with the host country and with the country of destination."[141]

1.2.f. Assessment of Article 13 Concerning the Non-Refoulement Principle

Refugees should have the right to effective remedy against decisions about expulsion, detention, international protection, etc.; otherwise, Article 13 of the Convention is violated. The ECtHR explored that remedy should be effective and accessible and it should be with automatic suspensive effect in deportation cases; also applicants should be informed about the process, remedies and given access to legal assistance.[142] In the cases of remedy without automatic suspensive effect, the ECtHR decided that Article 13 is violated, especially in conjunction with Article 2 or 3 of the Convention.[143]

Every person whose rights or freedoms have been violated shall have the right to an effective remedy before a domestic authority.[144] Remedy should be effective in real terms and the respondent state should provide an effective remedy for people in order to discharge its responsibility under Article 13.[145]

ECtHR evaluates Article 13 in the light of other articles of the Convention and Protocols thereto. The Court decided that under the threat of Article 3, the respondent state has an

[139] Boujaïdi v. France, judgment, App. No. 25613/94, ECtHR, 26.09.1997.
[140] Ibid.
[141] Maslov v. Austria, judgment, App. No. 1638/03, ECtHR, 23.06.2008, para 68(58).
[142] Abdolkhani And Karimnia v. Turkey, judgment, App. No: 30471/08, ECtHR, 22.09.2009, para 108-115.
[143] M.S.S. v. Belgium And Greece, judgment, App. No: 30696/09, ECtHR, 21.01.2011, para 293.
[144] Convention for the Protection of Human Rights and Fundamental Freedoms, op.cit.
[145] Čonka v. Belgium , judgment, App. No. 51564/99, ECtHR, 05.02.2002.

obligation to make an effective and careful investigation which should be carried out by the State, otherwise, it may cause irrecoverable results, which are a threat for a democratic society.[146]

2. ASSESSMENT OF REGULATION OF THE NON-REFOULEMENT PRINCIPLE IN TURKISH REFUGEE LAW

2.a. Turkish Refugee Law before the Syrian Civil War

Turkey has always been a migration-receiving country from time immemorial. According to reports, "800 thousand people from Balkans between the years of 1923 and 1945, …467.489 people from Iraq in 1991 after the First Gulf War"[147] migrated to Turkey and lastly over 3.6 million Syrian people fled to Turkey after Syrian Civil War started and at the present time, 4 million refugees live in Turkey.[148]

At time, Settlement Law No. 2510 defined the migrant and refugee; it says a refugee is a person who takes refugee in Turkey because of necessity.[149] There had been some other regulations about migration and refugees but, until the 1951 Convention, there was not any effective and broad legislation related to refugees in Turkish Law. International agreements, which have duly entered into force, have the force of law and "in the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."[150] This article shows the relation between international human rights agreements and domestic law in Turkey. Therefore, it can be said that the 1951 Convention which is about fundamental rights and freedoms prevail over domestic law in Turkey.

The 1951 Convention defines the refugee as "As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country

[146] De Souza Ribeiro v. France, judgment, App. No. 22689/07, ECtHR, 13.12.2012.
[147] Republic of Turkey Ministry of Interior Direstorate General of Migration Management. Available at: https://www.goc.gov.tr/kurumlar/goc.gov.tr/files/_goc_tasar%c3%a7m_%c4%b0NG%c4%b0L%c4%b0ZCE.pdf
[148] Turkey: Key Facts and Figures July 2019(UNHCR). Available at: https://www.unhcr.org/tr/wp-content/uploads/sites/14/2019/08/7.1-UNHCR-Turkey-Key-Facts-and-Figures-August-2019-1.pdf
[149] 2510 No Settlement Law. It has been abolished by 5543 No and 19.09.2006 dated Settlement Law.
[150] Constitution of the Republic of Turkey, op.cit. Article 90.

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."[151] In addition, the 1951 Convention gives contracting parties to make a selection about the scope of "events occurring in Europe before 1 January 1951" in article 1, as "or "events occurring in Europe or elsewhere before 1 January 1951".[152] Turkey has confirmed the 1951 Convention by geographical and time limitation, for "events occurring in Europe before 1 January 1951".[153]

The 1967 Protocol Relating to the Status of Refugees has removed the time limitation " As a result of events occurring before 1 January 1951 and ..." and the clause "... as a result of such events",[154] in article 1 of the 1951 Convention but kept the geographical limitation for reservations.[155] Therefore, Turkey kept the reservation for geographical limitation about refugee status so Turkey gives refugee status to people who come from member countries of the Council of Europe.[156] The Committee against Torture expressed its concern about the geographical limitation which was supported by "by several reports of expulsion, return or deportation, in violation of the non-refoulement principle…"[157] However, non-refoulement principle obtained the status of customary law and *jus cogens*, therefore, it can be said that even though there is a geographical limitation to get refugee status in Turkey, non-refoulement principle should be carried out without geographical limitation.

Wars between neighbouring countries of Turkey such as the Iran - Iraq war and the Gulf War have caused waves of migration to Turkey. Therefore, Turkey needed another regulation due to the fact that asylum-seekers from outside of Europe would not have refugee status. Turkey adopted the 1994 Regulation at which the purpose was "determine the principles and procedures and to designate the bodies competent in respect of aliens who individually seek refuge or seek residence in our country in order to seek refuge in other countries or, as a group, arrive at our borders for the purposes of refuge or asylum or possible population

[151] 1951 Convention, Op. Cit., Article 1.
[152] Ibid.
[153] 1967 Protocol Relating to the Status of Refugees, op. cit.
[154] Ibid.
[155] Ibid.
[156] Ibid.
[157] Committee against Torture. Concluding observations on the fourth periodic reports of Turkey. 2 June 2016. Para 23.

movements under the 1951 Geneva Convention relating to the Status of Refugees and the Protocol of 31 January 1967 relating to the Status of Refugees."[158]

This regulation provided clear definitions for refugee and asylum seeker. According to the regulation: "Refugee: An alien who as a result of events occurring in Europe and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is 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" and "Asylum Seeker: An alien who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is 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."[159]

This regulation also does not reference the non-refoulement principle but Article 29 of the 1994 Regulation about deportation says: "an asylum seeker who is residing in Turkey legally can only be deported by the Ministry of Interior under the terms of the 1951 Geneva Convention relating to the Status of Refugees or for reasons of national security and public order." It further states that a person may appeal against a deportation decision.[160] Therefore, it can be said that even if the 1994 Regulation is not very detailed, it takes the 1951 Convention into consideration in terms of deportation decisions both for refugees and for asylum seekers. Some amendments and improvements have been made by Regulation No. 2006; articles in Regulation No. 1994 were clarified.[161]

[158] Turkey: Regulation No. 1994/6169 on the Procedures and Principles related to Possible Population Movements and Aliens Arriving in Turkey either as Individuals or in Groups Wishing to Seek Asylum either from Turkey or Requesting Residence Permission in order to Seek Asylum from Another Country (last amended 2006), e.i.f. 19 January 1994.
[159] Ibid.
[160] Ibid.
[161] Regulation No.2006. Available at: https://www.resmigazete.gov.tr/eskiler/2006/01/20060127-2.htm

2.b. Turkish Refugee Law Since the Start of Syrian Civil War

It was clear that Turkey needed effective national legislation about migrants and refugees. Besides that, Turkey aimed to comply with the European Union requirements on migration according to the 2003 Turkish National Action Plan for the Adoption of the European Union Acquis in the Field of Asylum and Migration.[162] The migration wave arising from Syrian Civil war, the mass influx on the borders and the adaptation process to European Union has led to adoption of the LFIP. According to the law's preamble, it aims to provide a comprehensive legal framework for foreigners and refugees and make the system and application of international protection in Turkey in accordance with the European Union Legislation and international standards.[163] Afterwards, the Temporary Protection Regulation[164] and Implementation regulation on the LFIP[165] were adopted as the legal framework for asylum seekers and refugees.

There are four international protection statuses in the LFIP; these are the refugees, conditional refugees, subsidiary protection holders and temporary protection holders.[166] Article 61 of LFIP regulates refugee conditions as being the same as in the 1951 Convention by geographical limitation.[167] Article 62 regulates the status of a conditional refugee who is a refugee without geographical limitation according to the 1951 Convention and allowed to reside in Turkey until resettling to a third country.[168] Subsidiary protection is provided for a person who could neither be a refugee nor a conditional refugee, yet who has no protection of his/her country of origin or habitual residence; if he/she will face: “the death penalty or execution, torture or inhuman or degrading treatment or punishment, serious threat to his or her person by reason of indiscriminate violence in situations of international or internal armed conflict, upon return to his or her country of origin or country of habitual residence.” according to article 63.[169]

[162]2003 Turkish National Action Plan for the Adoption of the EU Acquis in the Field of Asylum and Migration, available at: http://www.madde14.org/images/0/03/Uepeng.pdf
[163]Prime Ministry of Turkish Republic, Law’s Preamble, available at: https://www2.tbmm.gov.tr/d24/1/1-0619.pdf
[164]Turkey: Temporary Protection Regulation, 22 October 2014, available at: https://www.refworld.org/docid/56572fd74.html [accessed 13 April 2020]
[165] Turkey: Implementation regulation on the Law on Foreigners and International Protection, 17 March 2016, available at: https://www.refworld.org/docid/5747fb7a4.html [accessed 13 April 2020]
[166] Turkey: LFIP of 2013 on Foreigners and International Protection, , op.cit..
[167] Ibid. Article 62.
[168] Ibid.
[169] Ibid, Article 63.

The most important current protection status in light of the Syrian Civil War is temporary protection for people who have been forced to leave their countries and cannot return, "arrived at or crossed the borders of Turkey in masses seeking emergency and temporary protection."[170] and all necessary regulations about residence, rights and responsibilities, measures on asylum seekers under temporary protection shall be made by the President.[171] International protection status cannot be individually evaluated because of mass influx in this situation, so temporary protection is provided for everyone in this mass influx.[172] Syrian refugees are under the temporary protection status at the present time.

Article 91-2 of the LFIP has stipulated the Temporary Protection Regulation. According to Article 124 of the Constitution of the Republic of Turkey, "The President of the Republic, the ministries, and public corporate bodies may issue by-laws in order to ensure the implementation of laws and presidential decrees relating to their jurisdiction, as long as they are not contrary to these laws and decrees."[173] "Primary sources of Turkish law are the constitution, laws, law amending ordinances, international treaties, regulations, by-laws in a hierarchical structure."[174] However, "in the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."[175] according to Article 90 of the Constitution of the Republic of Turkey.

The Temporary Protection Regulation also regulates the non-refoulement principle in line with 1951 Convention, Article 6 says that "no one within the scope of this Regulation shall be returned to a place where he or she may be subjected to torture, inhuman or degrading punishment or treatment or, where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion."[176]

Article 11 of the Temporary Protection Regulation says that the Ministry can make a proposal to the President to end temporary protection and temporary protection can be terminated with

[170] Ibid. Article 91.
[171] Ibid.
[172] Turkey: Temporary Protection Regulation, 22 October 2014, Article 3.
[173] Constitution of the Republic of Turkey, op. cit. article 124.
[174] Serap Yazıcı. A Guide to the Turkish Public Law Order and Legal Research. Hauser Global Law School Program, New York University School of Law. September 2006.
[175] Constitution of the Republic of Turkey, op.cit.Article 90.
[176] Turkey: Temporary Protection Regulation, 22 October 2014.

the decision of the President.[177] There are three decisions can be taken after termination of temporary protection: "a) To fully suspend the temporary protection and to return of persons benefiting from temporary protection to their countries; b) To collectively grant the status, the conditions of which are satisfied by persons benefiting from temporary protection, or to assess the applications of those who applied for international protection on an individual basis; c) To allow persons benefiting from temporary protection to stay in Turkey subject to conditions to be determined within the scope of the Law."[178] After the termination of temporary protection, temporary protected people shall exit from Turkey, according to Article 14 of Regulation.[179]

Article 54 of the LFIP regulates the situations in which foreigners will be deported. According to this article, a removal decision shall be taken regarding foreigners who "a) should be deported according to article 59 of Turkish Criminal Law[180], b) are leaders, members or supporters of a terrorist organisation or a benefit-oriented criminal organisation, c) submit untrue information and false documents during the entry, visa and residence permit application; ç) made their living from illegitimate means during their stay in Turkey; d) pose a threat to public order or public safety or public health, e) who exceed the visa or visa exemption period more than ten days or whose visa is cancelled, f) whose residence permits are cancelled, g) overstayed the expiry date of the duration of their residence permit for more ten days without an acceptable reason, i) are determined to work without a work permit h) violated provisions of the legal entry or exit from Turkey or who attempt to violate these provisions (attempt clause has been added by Law No. 7196, 6/12/2019), ı) are determined to come to Turkey despite prohibition of entry to country; i) whose international protection claim has been refused; are excluded from international protection; application is considered inadmissible; have withdrawn the application or the application is considered withdrawn; international protection status has ended or has been cancelled, provided that pursuant to the other provisions set out in this Law they no longer have the right of stay in Turkey after the final decision, j) fail to leave Turkey within ten days in cases where their residence permit renewal application has been refused, k) are evaluated as being associated with terrorist

[177] Ibid. Article 11.
[178] Ibid. Article 11.
[179] Ibid. Article 14.
[180] Penal Code of Turkey. Law No. 5237. 26 September 2004. Article 59. "The circumstances of a non-citizen who has been sentenced to a period of imprisonment, after benefiting from conditional release and, in any event, after completing his sentence, must be immediately communicated to the Ministry of Interior so the circumstances can be evaluated with respect to possible deportation."

organizations which have been defined by international institutions and organizations (added on 3/10/2016- by Emergency Decree No 676/36)."[181]

According to (h) subparagraph of the Article 54 of LFIP, foreigners who "violated the provisions of the legal entry or exit from Turkey or who attempt to violate these provisions" are subject to removal decisions. "Who attempt to violate these provisions" has been added by last amendments on December 2019.[182] Article 31/1 of 1951 Convention says that party states shall not impose penalties regarding illegal entry or presence of refugees who come from a country where their life or freedom was under threat if they apply to the authorities and state reason about their illegal entry or presence.[183] Also, Article 65/4 of the LFIP regulates illegal entrance and presence in accordance with Article 31/1 of 1951 Convention, which says that foreigners who apply to the authorities for international protection within a reasonable time shall not be subjected to penalty for violating the conditions of legal entry or staying in Turkey, if they show acceptable reasons for such illegal entry or presence.[184] Therefore, it can be said that (h) subparagraph of Article 54 which has been changed with new amendments at December 2019[185], does not comply with the non-refoulement principle and international protection standards in that respect. In addition, the term "attempt" is indefinite and abstract, thus, it may be interpreted in a broad way, which can cause arbitrary treatment of individuals. ECtHR has stated that state parties should provide "realistic and practical opportunity to submit an asylum application" at the border, otherwise it is a violation of Article 13 taken in conjunction with other articles of the Convention according to results of deportation.[186] For example, refugees generally escape from their countries without valid travel documents; therefore, it can be said that penalties regarding illegal entry may impair the essence of the non-refoulement principle and the scope of international protection.

The latest amendments of LFIP in December 2019 have made some LFIP provisions incompliance with ECtHR standards. Removal decision may be taken by instructions of the Directorate General or ex officio by the governorates and all information about results and appeal process of decision are given by the removal decision; an appeal may be made against removal decision in 7 days (it was fifteen days before 6 December 2019) in administrative

[181] Turkey: Law on Foreigners and International Protection , 29 October 2016 , article 54, available at: https://www.refworld.org/docid/5a1d828f4.html
[182] Law No. 7196 to making amendments on some laws and Decree Law No. 375, e.i.f. 6 December 2019.
[183] 1951 Convention. Article 31/1.
[184] LFIP, op.cit., Article 65.
[185] Law No. 7196 to making amendments on some laws and Decree Law No. 375, e.i.f. 6 December 2019.
[186] ECtHR. Kebe And Others v. Ukraine, judgment, App. No. 12552/12). 12/01/2017. Para 104.

courts and courts should make a judgment (which is a final decision, appeal is not possible) within fifteen days.[187] It is clear that this period is neither efficient nor adequate to suit a case in terms of a deportation decision, which can have very significant effects for a refugee or asylum seeker. ECtHR explained its approach to the period of litigation; the right to a court has some limitations, so it is not absolute; conditions of an appeal are subject to limitations because it requires the regulation of the State which has a certain margin of appreciation in this regard.[188] However, if these limitations restrict or reduce a person's access and damage the essence of the right to a court and if there is no reasonable proportionality relationship between the ways used and the purpose pursued, such limitations will not comply with Article 6-1.[189] Therefore, the Court says that a time limit should not be implied and interpreted in a strict way; otherwise, it is a violation of fair trial.[190]

The application to the administrative court against the deportation decisions is extremely important in terms of the non-refoulement principle. Therefore, a seven-day application period is insufficient in terms of the fact that refugees cannot easily comprehend the extent of the deportation decision and the importance of the objection. Furthermore, the language barrier, the obstacles to judicial assistance and the collection of documents and reports to show risks to deportation take time in terms of a refugee. Therefore, it is clear that reducing the period from fifteen days to seven days would violate the right to a fair trial. In the drafting of the amendment of article 53 of LFIP, it is said that the objection to a period of 15 days is keeping refugees in removal centres for at least 15 days and it is restricting their right to liberty as well as increasing the accommodation costs.[191] However, reducing the time of litigation such a short period to prevent the violation of right to liberty does not comply with right to fair trial. Rather than reducing the period, regulating the administrative detention conditions is needed.

There is an automatic suspension effect of remedies for every foreigner when the authority is informed about and appeal against a removal decision. Three groups were directly being deported before 6 December 2019; "1- Leaders, members or supporters of a terrorist organisation or a benefit oriented criminal, 2- Those who pose a public order or public security or public health threat, 3- Those who are evaluated as being associated with terrorist

[187] Law No 6458, op.cit., Article 53.
[188] Reisner V. Turkey, judgment, App. No: 46815/09, 21.07.2015, para 56.
[189] Ibid. Para 56.
[190] Ibid. Para 59.
[191] Law No. 7196, 6.12.2019. Para 75. Available at: https://www2.tbmm.gov.tr/d27/2/2-2368.pdf,

organizations which have been defined by international institutions and organizations."[192] These groups were removed by the amendment on 6 December 2019.[193] It can be said that this amendment is in accordance with ECtHR case law because ECtHR always emphasised that automatic suspension is one of obligations for a fair trial in terms of deportation judgments.

The timeframe to appeal against an administrative decision is sixty days in Turkish domestic law. However, for a removal decision, it was fifteen days before the latest amendment and now it is seven days.[194] The ECtHR decided that a five-day period to lodge an asylum request is a violation of the Convention: even if the applicant misses the time, domestic courts should evaluate the risk of deportation in terms of the non-refoulement principle.[195]

Before the December 2019 amendments, the Turkish Administrative Court appealed to the Turkish Constitutional Court by claiming that fifteen days to appeal against removal decision is in compliance with the Constitution of the Republic of Turkey in terms of equality before the law, freedom to claim rights and formation of courts; however the Turkish Constitutional Court decided that fifteen days is reasonable and proportional in order to clarify the legal status of the foreigner as soon as possible and does not undermine the essence of right of access to the court.[196] After amendment, seven days is not a reasonable and proportional time to access the court in terms of a foreigner who generally has neither the information nor legal assistance to appeal the decision.

According to Article 57/2, governorates shall give an administrative detention decision or alternative obligations for foreigners who have been subject to a removal decision and "who; bear the risk of absconding or disappearing; have breached the rules of entry into and exit from Turkey; have used false or fabricated documents; have not left Turkey after the expiry of the period granted to them to leave, without an acceptable excuse; or who pose a threat to public order, public security or public health."[197] In addition, Article 56/2 of the Regulation No 29656 on the Implementation of the Law on Foreigners and International Protection (hereinafter Regulation No.29656) says that foreigners may be deported directly, or he/she

[192] Law No.6458, op.cit., Article 53.
[193] Law No. 7196 to making amendments on some laws and Decree Law No. 375, e.i.f. 6 December 2019.
[194] Law No. 7196 to making amendments on some laws and Decree Law No. 375, e.i.f. 6 December 2019.
[195] ECtHR, Jabari V. Turkey , judgment, App. No: 40035/98), 11 July 2000, para40-41.
[196] The Judgment of the The Judgment of the Constitutional Court of Turkey, Case Number: 2016/37, Decision Number: 2016/135, 14 July 2016, para 17, available at:
[197] LFIP, op.cit., Article 57.

may be invited to leave Turkey or may be taken under administrative detention.[198] The duration of administrative detention shall not exceed six months.[199] If the removal cannot be carried out because of the foreigner's default of cooperation or failure to give accurate information or documents about their origin country, this duration may be prolonged for a maximum of a further six months, the need for detention shall be reviewed monthly by governorates, foreigners should be informed about results, procedure and appeal of extension and detention.[200] The person may appeal (legal assistance is provided on demand) against the administrative detention decision to the Judge of the Criminal Court of Peace (it shall judge in five days and give final decision), but appeal shall not suspend the detention; further appeal is possible if the detention conditions have changed.[201] According to Article 5/4 of the ECHR, lawfulness of detention should be speedily evaluated by a court; but according to Article 57 of the LFIP, administrative detention decisions are to be reviewed monthly by the governorates, so it does not comply with judgment standards in the ECHR. The reason why an administrative detention decision is evaluated by a criminal court has been explained that "Since the administrative detention decision is a security measure that restricts the liberty of the person, Judge of the Criminal Court of Peace is a common court for the quickest review of the decision, when it is taken into account the benefit of the foreigner who was taken into administrative detention." in the reasoning of article 57.[202]

For foreigners who are not obliged to continue with administrative detention, administrative detention is terminated immediately, and these foreigners are offered alternative obligations in accordance with Article 57/A..[203] With new amendments of LFIP on 6 December 2019, new alternative obligations instead of administrative detention have been added to law: "a) Residence at a specific address; b) Notifying public authorities regularly; c) Family-based return, ç) Return consultancy, d) Taking part in voluntary services in the public interest services; e) Caution money; f) Electronic tagging".[204] Electronic monitoring is an alternative to detention in criminal law, in order to monitor and control the convicts or suspects. It is unclear and unfair to apply this way to foreigners who did not commit an offence. In addition, it should be decided by an independent and impartial court, instead of by the governorate. Moreover, it is not clear what should be understood by "family-based return". It is not clear

[198]Turkey: Implementation regulation on the Law on Foreigners and International Protection, 17 March 2016, Article 56.
[199] LFIP Article 57.
[200] Article 57.
[201] LFIP. Article 57.
[202] Draft of Law No. 6458 of 2013 on Foreigners and International Protection. Article 57.
[203] LFIP. Article 57.
[204] LFIP. Article 57/A.

whether the family members who were not subject to a deportation decision will be deported or not. In addition, return consultancy and taking part in voluntary services for public good do not have a defined scope. These unclear definitions may cause arbitrary treatment and impair the non-refoulement principle.

Article 87 of LFIP regulates that "Material and financial support may be provided to those applicants and international protection beneficiaries who would wish to return voluntarily."[205] New amendments of LFIP on 6 December 2019 were made about voluntary return by Article 60/A which says that material or financial support can be provided to irregular migrants who have been ordered to deport and who voluntarily return to their country of origin.[206] Voluntary return is a disputable subject because it is hard and significant to determine voluntariness. There are some news and allegations about Turkey, which says that Turkey forces refugees to sign voluntary return forms.[207] Moreover, it has been reported that "315,000 Syrian nationals have left Turkey to return to their country of origin and that more are expected to return as safe zones are being established in the country. In 2018, UNHCR continued to monitor voluntary returns and observed the voluntary repatriation interviews of 10,395 families…. Persons signing voluntary return documents – often following pressure from authorities – do not undergo an interview by a panel aimed at establishing whether return is voluntary."[208] Therefore, abstract provisions about voluntary return may cause violation decisions about Turkey.

Article 55 of LFIP regulates the exemptions to removal decision; accordingly people who are under serious risk of death penalty, torture, inhuman or degrading treatment or punishment in the return country, under risk because of serious health conditions, age or pregnancy in travel, who cannot receive treatment for a life threatening health condition in the return country cannot be deported until their treatment is finished. Similarly those who are victims of human trafficking and serious psychological, physical or sexual violence cannot be deported, even if they are in the scope of Article 54 of the LFIP.[209] It can be said that exemptions comply with non-refoulement principle standards. Article 55 includes a humane approach and international

[205]LFIP. Article 87.
[206]Article 60/A.
[207]Human Rights Watch. "Turkey Forcibly Returning Syrians to Danger". 26.07.2019. Available at: https://www.hrw.org/news/2019/07/26/turkey-forcibly-returning-syrians-danger
[208]Country Report: Turkey. The Asylum Information Database (AIDA) coordinated by the European Council on Refugees and Exiles (ECRE). 2018. Page 15 and 115.
[209]LFIP. Article 55.

and European law standards have been taken into account in the drafting of the article.[210] However, it can be said that provisions regarding family life, well-being of children, family ties in the host country should be regulated regarding exemptions or removal decisions in LFIP. There are no provisions regarding right to respect for private and family life in deportation decisions.

Article 4 of Regulation No. 29656 also regulates the non-refoulement principle. It says that the that the risk of torture, inhuman or degrading punishment or treatment, case of threat to life or freedom because of nationality, race, membership of a particular social group, religion, or political opinions should be evaluated before application of deportation decisions and the principle includes all foreigners within the scope of the Law.[211] Foreigners cannot be deported or removed to a country where they may encounter threats and, if there are threats for foreigners, provisions regarding international protection, residence or deportation should be applied and Directorate General shall be informed about this.[212]

As explained above, LFIP regulates the situations in which foreigners will be deported. However, there is no provision about the collective expulsion in Turkish Refugee Law, which has been regulated by Protocol No.4 of the ECHR.[213] Turkey has signed the Protocol No.4 on 19 October 1992,[214] the Grand National Assembly of Turkey approved the Protocol No.4 on 23 February 1994,[215] and afterwards, Council of Ministers of Turkey approved the Protocol No.4 on 9 June 1994.[216] All domestic procedures were completed for ratification but documents of ratification were not submitted to the Secretary General of the Council of Europe. Protocol No.4 may enter into force after the submission of documents of ratification.[217] Therefore, Turkey is not bound by Protocol No.4 in the ECtHR. Except for the article 4 of the Protocol No.4, other articles have been regulated in the Constitution of Turkey, therefore, collective expulsion article can be seen as a reason of not putting the protocol into force.[218] The Constitutional Court dismissed individual applications regarding articles in

[210]E. Dardağan Kibar. An Overview and Discussion of the New Turkish Law on Foreigners and International Protection. Journal of International Affairs, Autumn 2013, Volume XVIII, Number 3, pp. 109-128. Page 121.
[211]Turkey: Regulation No 29656 on the Implementation of the Law on Foreigners and International Protection. 17.03.2016, available at: https://www.refworld.org/docid/5747fb7a4.html, Article 4.
[212] Ibid. Article 4.
[213] The European Convention on Human Rights, op.cit. Protocol No.4 Article 4.
[214] Council of Europe, Chart of signatures and ratifications of Treaty 046. Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/046/signatures?p_auth=CzEG88Ld
[215] Official Gazette of Turkey. 23 February 1994. Available at: https://www.resmigazete.gov.tr/arsiv/21861.pdf
[216] Official Gazette of Turkey. 9 June 1994. Available at: https://www.resmigazete.gov.tr/arsiv/21990.pdf
[217] The European Convention on Human Rights, op.cit. Protocol No.4 Article 8.
[218] Ece Göztepe Çelebi. Türkiye Avrupa İnsan Hakları Sözleşmesi'ne Ek 4. Protokolle bağlı mıdır? Anayasa Mahkemesi'ne bireysel başvuru hakkı açısından bir değerlendirme(Is Turkey bound by the Protocol No. 4 of the

Protocol No.4 on the grounds that Protocol No.4 was not entered into force in Turkey[219] and also ECtHR rejects the individual applications on the same ground.[220] Even though these applications were not about collective expulsion, this provision is of capital importance in terms of the non-refoulement principle. It is clear that collective expulsion provision may prevent many violations of human rights for refugees. Therefore, this protocol needs to be entered into force in order to provide an effective and broad protection in terms of the non-refoulement principle.

3. APPLICATION OF NON-REFOULEMENT PRINCIPLE IN TURKISH REFUGEE LAW

Besides the international agreements and conventions, court judgments are significant in order to understand the application of the law. Even though there are adequate laws that comply with international law, the application of law may not comply with international standards.

In this chapter, the Turkish Constitutional Court and the Administrative Court cases will be analysed in order to show the application of the non-refoulement principle in the deportation cases. "Everyone can apply to the Constitutional Court based on the claim that any one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights and the additional protocols thereto, to which Turkey is a party, which are guaranteed by the Constitution has been violated by public force.", after exhaustion of all domestic remedies in Turkey.[221]

Turkish Constitutional Court judgments are open to everyone via the Court website; therefore, some important decisions were examined regarding this topic, to demonstrate the approach of the Constitutional Court. Administrative court judgments are not open to everyone. However, bar associations, universities and so forth. publish some of the important judgments regarding deportation decisions. These published judgments will be analysed to show the handling of the non-refoulement principle in the administrative courts.

European Convention on Human Rights? An assessment in terms of the right to individual application to the Constitutional Court.). 2016.

[219] The Judgment of the Constitutional Court. The Case of Ömer Ulukapı, judgment, App. No: 2017/17771, 17.07.2018.para 87.

[220] Fathi v. Turkey, judgment, App. No.32598/06, ECtHR, 30.06.2009.

[221] Code No 6216 on Establishment and Rules of Procedures of the Constitutional Court. Ratified on 30/03/2011. Article 45. Available at: http://www.constitutionalcourt.gov.tr/inlinepages/legislation/LawOnConstitutionalCourt.html

It can be useful to look at information on international protection applications before starting to examine court practices. UNHCR carried out refugee status determination procedures for foreigners, except for Syrians, coming from outside Europe until 10 September 2018 in Turkey; UNHCR was receiving international protection applications and referring the foreigners to the relevant provincial immigration administrations for registration.[222] UNHCR and Turkey signed a Host Country Agreement on 1 September 2016 and it entered into force on 1 July 2018;[223] pursuant to this agreement, UNHCR started to provide service regarding "strengthening the protection environment and access to social support mechanisms", "providing humanitarian aid to refugees", "supporting and contributing to institutional and legislative capacity increasing activities for the strengthening of the national asylum system."[224] UNHCR stopped the registration procedures regarding international protection after 10 September 2018; international protection applications are made to the relevant migration management directorates in Turkey.[225]

3.a. Constitutional Court Practices of Turkey

In the case of Yusuf Ahmed Abdelazim Elsayad[226], an Egypt citizen, who was arrested for allegedly sending a group of people to Syria by unlawful ways, he was sent to the Migration Management Office of Adana. This office decided to deport the applicant on the grounds that he was involved with a criminal organization and that he was a danger to public order, security or health. The deportation order which had reasons for deportation, method of appeal, legal assistance etc. was notified to the applicant on 8 September 2015 in the presence of an interpreter. He was placed in administrative detention and afterwards sent to Istanbul, but the applicant applied for international protection on the grounds that he may be subjected to ill-treatment if he returned to his country. Officers took the applicant back to Adana. Lawyers applied to meet with applicant but officers did not permit the applicant to meet with lawyers and, after two weeks, the applicant was sent to another Migration Office in Erzurum. Lawyers again applied to talk with the applicant but again officers did not permit it. The lawyers complained to the manager of the office on the grounds that they had not been allowed to

[222]Nuray Ekşi, Activities of the United Nations High Commissioner for Refugees in Turkey and Its Changing Role in Turkish Asylum System, İstanbul Hukuk Mecmuası, 77 (1): p. 343–370. Page 362—364.
[223]UNHCR. Operational Update 2018 Highlights, Turkey 2018. Available at: https://www.unhcr.org/tr/wp-content/uploads/sites/14/2019/02/UNHCR-Turkey-Operational-Highlights-2018-Final.pdf
[224] UNHCR in Turkey, home page. Available at: https://www.unhcr.org/tr/en/unhcr-in-turkey(accessed at 18.04.2020)
[225] Nuray Ekşi, Activities of the United Nations High Commissioner for Refugees in Turkey and Its Changing Role in Turkish Asylum System, İstanbul Hukuk Mecmuası, 77 (1): p. 343–370. Page 364.
[226] The Judgment of the Constitutional Court. The Yusuf Ahmed Abdelazim Elsayad , judgment, App. No: 2016/5604, 24.05.2018.

meet with the applicant in order to prevent the prosecution of a deportation order within fifteen days. Afterwards, the applicant was sent to Edirne, which is another distant city, and a lawyer managed to meet with applicant there but again officers did not allow lawyers to examine documents of applicant.

Firstly, this case is important with regards to seeing the bureaucratic obstacles in the process of international protection and legal assistance against deportation decisions. Officers in migration offices do not allow applicants to have legal assistance even if lawyers try to meet and to obtain information from an applicant. As it is seen in this case, the applicant was sent to diverse, distant cities in Turkey to prevent him from obtaining legal assistance. Lawyers usually struggle to meet with clients in administrative detention centres and cannot examine the necessary documents even if they have the right to examine all documents of clients in courts and offices according to the Attorneyship Law of Turkey.

Afterwards, in this case, the lawyer could not be given a power of attorney because the applicant did not have an ID card or passport, so the applicant authorised lawyers to prosecute by a handwritten document. Lawyers filed a suit against the deportation case by explaining the situation of the applicant in terms of risk of his life and freedom and his missing the time limit for litigation because of the fact that the officer did not clearly inform the applicant about the deportation case and lawyers had not been allowed to meet with him. The Administrative Court rejected the case because of missing the time of litigation and the applicant took the case to the Constitutional Court. The Constitutional Court reversed the decision, based on effective remedy on the facts that the deportation case was not notified in due form and that the applicant could not meet with lawyers. The court firstly emphasised that the violation of the right to an effective remedy is not bound to the absolute violation of the prohibition of ill-treatment. The applicant's wife died during a military coup in his country in 2013; the applicant was a member of an anti-coup political party and his name was on the “wanted” list so his claims that his life could be endangered if he were sent back were reasonable. Therefore, before assessing the merits of the prohibition of ill-treatment, it is necessary to examine the complaints about violation of the right to effective remedy.

The applicant had been subject to relocation within a short period of time between the centres which were geographically remote from each other and had not been allowed to meet with lawyers; so the claim that the failure to file a case before the Administrative Court within fifteen days was due to the prohibitive attitude of the public authorities was reasonable. In the

case period, there was no suspensive effect of remedies for people who have been alleged of being a member or a supporter of a terrorist or benefit-oriented criminal organization, or a danger to public order, security or health in deportation cases. Therefore, the Court declared that there was a violation of effective remedy and sent the case to the Administrative Court for retrial and ordered a temporary injunction that the applicant not be deported until the conclusion of the retrial.[227]

This judgment of the Court is important in order to see the approach of the Constitutional Court. The Court firstly examined the right to a fair trial and stated that, even if there is no risk of ill-treatment, the right to a fair trial should be provided to the applicant and his claims should be examined in detail by the court. The application was held in 2018 and then there was no suspensive effect of remedies for a deportation decision, therefore the Court also suspended the deportation decision until final judgment. As was mentioned before in the first chapter, suspensive effect is one of the obligations of effective remedy. Turkey has removed this effect for people subject to a removal decision who " b) are leaders, members or supporters of a terrorist organisation or a benefit oriented criminal organisation; d) pose a threat to public order or public safety or public health; … k) are evaluated as being associated with terrorist organizations which have been defined by international institutions and organizations;… " but suspensive effect has been provided again for every person subject to a removal decision with the 6 December 2019 amendment.[228] Prior to this amendment, persons were applying to the Administrative Court or Constitutional Court for a suspensive effect decision and it had been argued that these exemptions were in compliance with the right to a fair trial and were an effective remedy. Therefore, new amendments of LFIP on 6 December 2019 removed the exceptions regarding the suspension effect of appeals against deportation decisions.

In the Case of A.A. and A.A.,[229] the applicants were married and citizens of Iraq. The applicants entered Turkey through legal means on 3 February 2014 with four children but made no statement about which region of Iraq they came from. The applicants applied for a residence permit before the expiration of the visa period and received an interview appointment. When they went to the Istanbul Security Directorate for the interview, the

[227] The Judgment of the Constitutional Court. The Yusuf Ahmed Abdelazim Elsayad , judgment, App. No: 2016/5604, 24.05.2018.
[228] Law No. 6458 on Foreigners and International Protection, op. cit., Article 54.
[229] The Judgment of the Constitutional Court of Turkey.A.A.and A.A.,App. No:2015/3941,01.03.2017.

applicants and their children were placed in administrative detention and sent to the Removal Centre. The decision was made to deport the applicants on the grounds that they entered Turkey despite the prohibition of entry to Turkey. The applicants appealed the administrative decision and the Court decided to terminate the administrative detention on the grounds that there were no concrete reasons for their detention.

The applicants in the case of A.A. and A.A., filed separate cases with the Administrative Court on 19 August 2014 for the annulment of the deportation order and stressed that they were opposed to the Iraqi administration, that the conflicts and operations of the ISIS terrorist organization continued in the country and that they would be killed or ill-treated if deported.[230] Moreover, they submitted some photographs stating that their Iraqi houses were bombed and destroyed.

The National Intelligence Organization of Turkey submitted the file at the first trial stage, writing that measures should be taken in the context of prevention of travelling of foreign citizens for terrorism in conflict zones in Syria via Turkey by illegal entry. The Administrative Court approved the applicants' deportation on the grounds that they constituted a danger to public security. No assessment was made in respect of the applicants' allegations that they would be killed or ill-treated in their countries. Individual applications were subsequently made to the Constitutional court.[231]

The Constitutional Court referred to the articles about deportation in domestic law and in the ECtHR decisions. According to ECtHR case law, the Constitutional Court reiterated the obligation not to expel persons to the country at risk of torture and ill-treatment and no exception could be made to this obligation.[232] This obligation also applies to persons who pose a risk to public order or public security. Torture and ill-treatment allegations should be examined thoroughly and meticulously and also the Constitutional Court stated that the applicants had an obligation to explain and prove in detail their allegations regarding their personal circumstances and the risks they would face in the country of return.[233] It can be seen that the Court approaches pursuant to ECtHR case law and assesses the non-refoulement principle even if the persons are a risk to public order or security.

[230] Ibid.
[231] Ibid.
[232] Ibid.
[233] Ibid.

The Constitutional Court also examined the reports about Iraq by Amnesty International, Human Rights Watch, and UNHCR. The Court emphasised that protection against ill-treatment includes procedural safeguards and a fair review but it does not require that any investigation be carried out in great detail for each deportation process In order for this obligation to arise, a claim which can be defended, searchable, debatable, worthy of investigation, which raises reasonable suspicion must be put forward by the applicant and applicant should reasonably explain what the risk of ill-treatment is, provide information and documents (if any), and make these allegations at a certain level of seriousness.[234] However, since a defensible claim may differ in every event, each case should be assessed separately and, as a rule, the conditions should be taken into account at the time of the deportation decision but if there are significant developments in the return country, the new situation should be considered.[235] Therefore, applicants may provide recent information and documents regarding their situation and risk of ill-treatment in the process.

According to international reports on the overall security situation in Iraq, it is seen that the ISIS terrorist organization has committed serious human rights violations in Iraq. However, it is clear from the same reports that the terrorist organization is not effective in all regions of Iraq; it is effective in particular parts.[236] Moreover, the reports did not include an assessment that the Iraqi administration was inadequate to ensure the safety of its citizens in the areas under control. The fact that the applicants refrained from giving information about from which region of Iraq they came and it made it difficult to verify the credibility of their allegations. Therefore, the Constitutional Court decided by majority of votes that the applicants' allegations that they could be subjected to ill-treatment in their countries if deported were not defensible and there is no violation of ill treatment.[237] It is clear that there is no obligation to examine the risk of ill-treatment just on courts, but also applicants should provide necessary information which reasonably explains the risk and can be searchable, worthy of investigation and raises reasonable suspicion in the courts.[238] According to Article 2 of the 1951 Geneva Convention, “Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.”[239] Therefore, it can be said that the approach of the Constitutional Court complies with international law and ECtHR case law.

[234] Ibid.Para 63.
[235] Ibid.Para 63 and 71.
[236] Ibid.
[237] Ibid.Para 78—82.
[238] Ibid.
[239] 1951 Geneva Convention, op. cit., Article 2.

ECtHR also emphasised that "…it is frequently necessary to give asylum-seekers the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof. …"[240] However, the ECtHR also stated that "It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *N. v. Finland*, no. 38885/02, § 167, 26 July 2005). Where such evidence is adduced, it is for the Government to dispel any doubts about it."[241] Therefore, it can be said that ECtHR also gives asylum-seekers a responsibility to substantiate their claims.

In the case of Mir Ahmed[242], an applicant who was a citizen of the Islamic Republic of Afghanistan, he came to Turkey but he did not provide any information about how and when he entered Turkey. The applicant started living in Turkey after applying for international protection. A judicial action was taken against the applicant for migrant smuggling; the applicant was then held at the removal centre. He was notified that he should apply to the Sinop Provincial Police Department as soon as possible and he was released on the same day. Since he left his authorized residence and did not go to the province that he was referred to within fifteen days, it was decided to deport the applicant pursuant to subparagraph (i) of paragraph (1) of Article 54 of the LFIP.

A lawsuit was filed for the annulment of the deportation decision by the applicant. It was stated in the petition that the deportation decision was against the law and procedure, that if he returned to his country, he would be subject to ill-treatment due to the conditions in Afghanistan.[243] The Administrative Court stated that "the applicant did not declare his address by appealing to the provincial official authorities in the period given to him after he was arrested and his address is still unknown, and he was deemed to have withdrawn his application for international protection pursuant to article 77 of LFIP. There is no violation of the legislation and the law in the proceedings regarding the deportation, in accordance with the article." [244] The case was dismissed, since the applicant`s case was not supported by a serious indication that he may be subjected to inhuman and degrading treatment and torture.

[240] A.A. and Others v. Sweden, judgment, App. No.14499/09, ECtHR, 28.06.2012, para 73.
[241] Case of Na. v. The United Kingdom, judgment, App. No.25904/07, ECtHR, para 111.
[242] The Judgment of the Constitutional Court of Turkey. Mir Ahmed, App. No. 2015/8021, 23.10.2019.
[243] Ibid.
[244] Ibid.

Moreover, it was not possible to interpret that being at risk in that every Afghan could be directly subjected to inhuman and degrading treatment and torture.[245]

The Constitutional Court stated that if the applicant asserts that s/he may be subjected to ill-treatment as a result of the expulsion, the administrative and judicial authorities should investigate this claim in detail whether there is a real risk in that country. However, the obligation to protect against ill-treatment does not require an investigation as described above for each deportation procedure. "In order for this obligation to emerge, a claim that can be defended (researched / discussed / worthy of investigation / reasonably suspicious) should be put forward primarily by the applicant. Accordingly, the applicant should reasonably explain what the risk of ill-treatment allegedly exists in the country to which he will be returned; provide information and documents supporting this claim (if any); these claims must be at a certain level of seriousness."[246]

The Constitutional court stated that the issues raised by the applicant pointed to the general situation of his country. The applicant did not explain how he was affected by the situation in question, and did not provide concrete information nor documents on the conditions that forced him to leave his country and what problems he had.[247] In addition, the applicant did not provide any information on which region of Afghanistan he came from, or in which region of his country he would live if sent back. As a result, it was understood that the general allegations that the applicant would be subjected to ill-treatment if he were sent back to his country are not worthy of research and qualification by domestic court, therefore it was decided that the application was inadmissible as it was manifestly ill-founded.[248] Thus, it is clear that an applicant has a significant obligation to explain his/her situation regarding the risk of deportation, otherwise, courts do not have an obligation to research and qualify the situation of the applicant. In the Case of *A.W.Q. and D.H. v. The Netherlands*, the Court stated that "…expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned", therefore the ECtHR decided that there was no violation of Article 3 because "applicant has failed to adduce evidence capable of demonstrating that there are substantial grounds for believing that he would be exposed to a

[245] Ibid. Para 14.
[246] Ibid. Para 29.
[247] Ibid.
[248] Ibid. Para 33.

real and personal risk of being subjected to treatment …if removed to Afghanistan."[249] The ECtHR explained that if there is no "general situation of violence such that there would be a real risk of ill-treatment simply by virtue of an individual being returned there.", an applicant needs to adduce evidence to substantiate the claim.[250] Therefore, it can be said that the above-mentioned decision of the Constitutional Court complies with ECtHR case law.

In the case of Abdolghafoor Rezaei,[251] the application concerns allegations of violation of the prohibition of ill-treatment and the right to respect for private and family life due to the expulsion decision to the country at risk of being killed or abused. The applicant is a citizen of Afghanistan and he left his country with his family in 2004 owing to economic problems, went to Iran illegally and afterwards entered Turkey illegally with his family in 2013.[252]

The applicant applied to the UNHCR office in Turkey and requested asylum on 24 October 2013, stating that he did not wish to return to his country on the grounds stated above. The applicant was directed to the Erzincan Governor's Office of Foreigners Department to evaluate the asylum application; he was granted a temporary residence permit until his application was concluded, with the conditions of signing in at regular intervals and residing in Erzincan. However, the applicant did not fulfil his signature obligation and left the province of residence without permission. With the decision of Erzincan Migration Management, it was decided to remove the applicant's temporary asylum seeker status and expel him for the aforementioned reasons. The applicant filed a suit at the Administrative Court for the annulment of the expulsion decision, he said that he lived with his five children in need of care in Erzincan, did not interfere with any judicial or administrative inquiries, the life and property security was not present in Afghanistan due to the Taliban terrorist organization, and the family integrity would be impaired after deportation. The case was dismissed by the Administrative Court on 9 October 2015. The Administrative court stated that there was no serious indication that the person would be subjected to death, torture, inhuman or degrading punishment or treatment in the country to which he would be deported.[253] The applicant stated in the asylum application form that he had not been subjected to ill-treatment throughout his life and that none of his family members had had problems with the authorities, that he had no affiliation with any political, religious group and

[249] A.W.Q. and D.H. v. The Netherlands, judgment, App. No. 25077/06, ECtHR, para 67 and 72.
[250] Ibid. Para 73.
[251] The Judgment of the Constitutional Court of Turkey. Abdolghafoor Rezaei. App. No. 2015/17762, 06.12.2017.
[252] Ibid.
[253] Ibid.

that he left his country owing to economic problems. As a result of all these evaluations, it was considered that the facts of the claims in the case did not concur with the application form. Therefore, the administrative court judged that the decision of the administrative office was lawful in light of the violation of the signature notification obligation and his leaving the residence without permission by acting in violation of the 77 articles of the LFIP and aforementioned reasons.[254]

After the case was taken to the Constitutional Court, the court firstly referred to all related articles of Turkish Domestic Law and ECHR and provided information about the general security situation of Afghanistan. The Court stated that firstly the applicant will be deported with his children, therefore it is not deemed necessary to make an evaluation in terms of the right to respect for private and family life within the scope of the application, although he claimed that his family integrity would be impaired if he was deported. About ill-treatment, the Court mentioned that when the 5th, 16th and 17th articles of the Constitution of the Republic of Turkey and related articles of international law and Geneva Convention have been taken into account; states have positive obligations to protect people who are under risk of ill-treatment in the case of deportation.[255] The positive obligation to protect against ill-treatment also includes procedural safeguards that allow a foreigner who has been deported to "investigate their claims" and "fairly examine" that decision.[256]

Although the applicant put forward the activities of the Taliban terrorist organization in his country, he did not explain how the situation in question affected him and his family. Moreover, no information was provided about in which region the applicant would have to live in if he were sent back. Therefore, it is clear that the applicant did not provide suitable information for conducting research into the conditions of the country to which he would be returned. Moreover, the fact that the applicant stated that he left Afghanistan for economic reasons at the stage of entry into the country casts doubt on the credibility of his claims about ill-treatment. As a result, it is understood that the general claims of the applicant that he would be subjected to ill-treatment if he were sent back to his country were not worthy of investigation and accordingly the application was inadmissible as it was clearly ill-founded.[257]

[254] Ibid.
[255] Ibid.
[256] Ibid. Para 44.
[257] Para 46—52.

In this case, it is seen that the Constitutional Court interpreted the right to family life in a narrow way. The applicant and his family left his county in 2004 and started to live in Turkey in 2013, and the expulsion decision was taken in 2015. Therefore, it is a short time to assess the relations of the applicant and his family in Turkey. However, according to ECtHR case law, interests and well-being of the children in the return country, the solidity of cultural, social, and family ties with the host country and with the country of destination should be taken into account regarding non-refoulement principle.[258] The Constitutional Court did not assess any situation regarding the interests of children and family.

Regarding social and economic reasons, ECtHR stated that "socio-economic and humanitarian considerations to the issue of forced returns of rejected asylum seekers to a particular part of their country of origin, such considerations do not necessarily have a bearing, and certainly not a decisive one, on the question whether the persons concerned would face a real risk of ill-treatment within the meaning of Article 3."[259] Therefore, The ECtHR examines whether there are "very exceptional circumstances" regarding socio-economic reasons regarding non-refoulement principle.[260] If applicant and circumstances cannot prove that the case is "a very exceptional one where the humanitarian grounds against removal are compelling", the ECtHR finds no violation of article 3.[261] Therefore, it can be said that the Constitutional Court complied with ECtHR case law regarding claims about economic conditions in the case of Abdolghafoor Rezaei.

Respect for the right to family and private life is one of the deficiencies in the practice and regulation regarding deportation in Turkey. Expulsion decisions are taken on the family-based return without assessing the situation of all persons in the family or their right to family or private life. Children, as a vulnerable group, need to be taken into consideration in this decision.

In the case of A.A.K.,[262] the applicant is a citizen of the Islamic Republic of Iran and came to Turkey on the grounds that he and his wife changed their religion and thus they are under the threat of punishment. He applied to UNHCR office for international protection in Turkey and in the application form, he submitted reference letters from different churches stating that he

[258] Maslov v. Austria, judgment, App. No. 1638/03, ECtHR, 23.06.2008, para 68(58).
[259] Salah Sheekh V. The Netherlands, judgment, App. No. 1948/04, ECtHR, 11.01.207, para 141.
[260] S.H.H. v. The United Kingdom, judgment, App. No.60367/10, ECtHR, 29.01.2013, para 92.
[261] Ibid. Para 95.
[262] The Judgment of the Constitutional Court of Turkey. A.A.K., App. No. 2015/17761, 08.05.2019.

belonged to the Christian religion. UNHCR directed the applicant to Bilecik, which he designated as his city of residence; the applicant was supposed to reside in this province and sign in at the police department every week until the international protection application was concluded. The applicant moved to Sakarya without notification for economic reasons but went to Bilecik to sign in every week. The applicant's wife started working at a hairdresser; a judicial investigation was launched after a complaint at her workplace, on the grounds that she committed the crime of defamation while she was making Christian propaganda. The Provincial Directorate of Migration decided to deport the applicant on the grounds that he left the province of residence without permission. The applicant and his wife were taken to the airport to be deported on 11 May 2015 but the deportation could not happen owing to the intervention of UNHCR and because the applicant`s wife fainted at the airport. In the meantime, the applicant's request for international protection was accepted by the UNHCR office but the Provincial Directorate of Migration of Ankara also decided to deport the applicant on the grounds that he poses a threat to public order and public safety.[263]

The applicant filed a lawsuit for annulment of deportation decision through the lawyer in Ankara Administrative Court against his final expulsion decision. The Administrative Court asked the applicant to submit a power of attorney within five days. Since no documents could be obtained from the Bar Association regarding the assignment of a lawyer within five days, the applicant filed a case for the second time without a lawyer. The applicant's first case was duly dismissed on the grounds of the document deficiencies regarding power of attorney and the second case dismissed because the case had not been filed during the term of litigation.[264]

The applicant took the case to the Constitutional Court and the court handled the case in terms of the prohibition of ill-treatment and the right to effective remedy. Both of these cases brought by the applicant were dismissed on procedural grounds without researching his allegations that he would be subjected to ill-treatment if he were sent back to his country.

The Constitutional Court stated the fact that the applicant had filed a lawsuit twice and had made an individual application within the period proves that he showed the effort and care expected from him.[265] In contrast, the Administrative Court did not evaluate allegations of ill-treatment due to the strict interpretation of the rules of procedure and thus restricted his right

[263] Ibid.
[264] Ibid.
[265] Ibid.

to an effective remedy. Therefore, it should be decided that the right to effective remedy, which is guaranteed in Article 40 (Protection of fundamental rights and freedoms) of the Constitution in connection with Article 17(Personal inviolability, corporeal and spiritual existence of the individual) of the Constitution, has been violated.[266] With the decision of violation of the right to effective remedy, the possibility of investigating the allegations about ill-treatment has emerged by the Administrative Court. Therefore, the Constitutional Court decided that there is no need for further investigation in terms of the ill-treatment under the principle of subsidiarity.[267] Moreover, it was decided to pay the applicant a net compensation of 10,000 Turkish Liras (€1,325) for non-pecuniary damages which cannot be compensated just by reversal of the decision.[268] The compensation decision complies with ECtHR case law because ECtHR also emphasised that non-pecuniary damage should be compensated where "in the circumstances of the case the applicant must have experienced genuine distress and uncertainty which cannot be compensated solely by the finding of a violation."[269]

This case demonstrated that the Constitutional Court does not take the procedural conditions in strict way. However, it is seen that procedural rules are interpreted in a stricter way in the lower courts in contrast to the Constitutional Court in Turkey. The Constitutional Court stated that, even if the applicant could not provide documents for power of attorney in the limited time, he exercised due diligence to sue. Therefore, his claims and case are worth investigating in terms of the non-refoulement principle.[270] Moreover, the Court judged non-pecuniary damages on the grounds that reversal of the decision was not sufficient to recover non-pecuniary damages. This judgment complies with ECtHR case law because ECtHR also emphasised many times that procedural rules should not impair the essence of the case. The ECtHR stated that "strict application of a procedural rule may sometimes impair the very essence of the right of access to a court."[271]

In the case of A.D.,[272] the applicant is of Somali ethnicity, a citizen of the Kingdom of the Netherlands, and the grandson of the president who ruled Somalia between 1969 and 1991. The applicant lived in England for two years for university education in 2006. The applicant stated that the UK Secret Intelligence Service offered him to act as an agent in Somalia in

[266] Ibid.
[267] Ibid. Para 42—48.
[268] Ibid.Para 64.
[269] Souza Ribeiro v. France, judgment, App. No. 22689/07, ECtHR, 13.12.2012, para 107.
[270] The Judgment of the Constitutional Court of Turkey. A.A.K., App. No. 2015/17761, 08.05.2019.
[271] ECtHR. Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (criminal limb) Updated on 31 December 2019(Labergère v. France, § 23).
[272] The Judgment of the Constitutional Court of Turkey. A.D., App. No. 2014/19506, 03.04.2019.

2008, pressured him to leave England because of his refusal, and all subsequent events were linked to his refusal.[273] The applicant received a written notification stating that he was banned from entering the UK to marry when he was in Germany in 2011 and that he then went to Egypt with his wife for economic reasons. Three years later, he decided to return to the Netherlands due to the fact that his wife was pregnant but was arrested shortly after receiving her return ticket and was held in prison in Cairo for seven months. The applicant stated that he had been tortured and threatened by the UK Secret Intelligence Service during this period and he stated that he was later released by the Ministry of Internal Affairs of Egypt.[274]

The applicant claimed that, although there was a direct flight between Cairo and Amsterdam, he was misled by the Consular official of Netherlands to be arrested in Istanbul. The applicant was taken into custody on the grounds that he was sought by the International Criminal Police Organization (INTERPOL) and he will be sent to the United States of America (USA). Applicant alleged that he was forced to enter Turkey. The USA officially requested that the applicant be returned for the prosecution of terrorism.[275]

The Criminal Court rejected the request of extradition because sufficient documents and evidence have not been submitted for a terror crime and released the applicant. Afterwards, the Istanbul Directorate of Migration took decision of deportation and administrative detention on the grounds that the applicant poses a threat to public safety.[276]

Applicant stated that if he were deported to the Netherlands, he would be extradited to the United States where he had never been during his life and also his life, material and moral integrity and freedom would be endangered if he were extradited. The case brought by the applicant was dismissed by the decision of the Administrative Court on the grounds that applicant was a threat to public order and public safety and so the deportation decision is in compliance with the LFIP, without making any assessment of the complaints about ill-treatment.[277]

[273] Ibid.
[274] Ibid.
[275] Ibid.
[276] Ibid.
[277] Ibid.

The applicant took the case to the Constitutional Court. The Court firstly explained the view of ECtHR in this subject that party state has responsibility when it makes an indirect dispatch to another party state[278] and also it decided that the state should not transfer the person if there are strong reasons to believe that it would be treated contrary to Article 3 of the Convention.[279]

The Constitutional Court stated that a "state's positive obligation under the prohibition of ill-treatment requires not only judicial protection against the risk of ill-treatment in the return country, but also indirect protection against the risks that he may face indirectly; therefore, public authorities should consider the possibility of being sent directly or indirectly to the country they claim may be subjected to ill-treatment when making a decision about deportation. The fact that the returned country as a member of the Council of Europe or a party to the Convention does not exclude the obligation to investigate allegations of the risk of ill-treatment."[280]

It appears that the Administrative Court did not fulfil its obligation to conduct research and evaluation under the prohibition of ill-treatment in connection with the allegations that the applicant was highly likely to be returned to the USA if he was deported to the Netherlands.[281] Therefore, the Constitutional Court decided that prohibition of ill-treatment had been violated by the expulsion decision. The Constitutional Court ordered a retrial of the deportation decision in the Administrative Court, not to expel the applicant until the retrial was complete, and to pay the applicant 10,000 TL (€1,325) for non-pecuniary damages. It is clear that the Administrative Court did not research the claims of the applicant regarding ill-treatment and the situation of the return country about extraditions in case. However, the Constitutional Court took the ECtHR case law[282] into consideration and said that even if the return country is a CoE member, risk of extraditing an applicant to the return country is highly likely. Therefore, states have responsibility in indirect dispatches.

[278] M.S.S. v. Belgium and Greece, judgment, App. No. 30696/09, ECtHR, 21.01.2011.
[279] The Judgment of the Constitutional Court of Turkey. A.D., App. No. 2014/19506, 03.04.2019, para 34-36. (M.S.S. v. Belgium and Greece, judgment, App. No. 30696/09, ECtHR, 21.01.2011.)
[280] The Judgment of the Constitutional Court of Turkey. A.D., App. No. 2014/19506, 03.04.2019, para 55.
[281] Ibid.
[282] M.S.S. v. Belgium and Greece, judgment, App. No. 30696/09, ECtHR, 21.01.2011.

3.b. Administrative Court Practices of Turkey

In this part, Administrative Court decisions which have been published by bar associations, universities etc. will be examined in order to show the approach and judgment of the non-refoulement principle in administrative courts. Administrative Court judgments are not accessible to the public, therefore there is no information whether the cases below have reached the Constitutional Court or not.

In the Decision No. 2016/51 case of Ankara 1. Administrative Court, the plaintiff, a Syrian citizen, filed a lawsuit with the request of cancellation of the General Directorate of Migration Management regarding the denial of international protection request.[283] The plaintiff stated that he was forced to fight in the war in Syria and that he left his country because he was a humanist person who refused to fight and there was no security of life in his country of origin.

Immigration Management said that the plaintiff's main purpose is to try to prolong his residence in Turkey by using the international protection procedure. His international protection request was examined within the framework of the statements he has made that he lived in Lebanon for two and half years without conditional refugee status after leaving his country, therefore his application did not meet the necessary criteria and so the case should be rejected.[284]

The Administrative Court primarily addressed the non-refoulement principle in the Geneva Convention and right to life in the ECHR. The Administrative Court explained that international protection is the status provided to stateless persons who may not benefit from the protection of the origin country due to the reasons included in international and national legislation (race, religion, nationality, membership of a particular social group or political opinion) and justified reasons (the risk of persecution).[285] Therefore, in case of international protection application, it is necessary to evaluate whether there is a fear of persecution based on justified reasons and this assessment should be evaluated objectively and subjectively.[286] Objective elements are important in the concrete assessment of the conditions in the

[283]The Judgment of the Ankara 1. Administrative Court, App. No. 2015/1210, Decision No. 2016/51, 15.01.2016. Available at: http://ankarabarosu.org.tr/kurullar/mhk/doc/%C4%B0dare_mahkemesi_kararlar%C4%B1.pdf
[284] Ibid.
[285] Ibid.
[286] Ibid.

applicant's country of origin, and the objective elements in question should be identified according to subjective elements of the applicant.[287] Moreover, the concerned people should be able to demonstrate the fear of persecution at a reasonable level in the interviews. In the case, the data obtained in the interview is not sufficiently clear, a credible assessment should be done to determine whether the fear of the person is reasonable or not. Under the non-refoulement principle, according to the Geneva Convention and Article 93 of LFIP, it should be determined whether the applicant's claims are true, reasonable and within the scope of protection or not.[288] Therefore, the Court decided that the decision and procedure regarding the rejection of the international protection request of the plaintiff was unlawful in terms of national and international legislation because it was not made by fulfilling the assessing international protection claims pursuant to the article 93 of the LFIP. Thus, the deportation decision was cancelled.[289]

In this case, it is seen that Administrative Court imposes upon plaintiffs to provide sufficient and researchable information and (if any) documents to support their complaints, as in the Constitutional Court. The Administrative Court says that conditions of a plaintiff should be assessed in objective and subjective ways. Objective ways examine the general situation of the return country, but objective conditions are handled in terms of an applicant's own situation if the deportation were fulfilled.[290]

In the decision No. 2016/946 case of Istanbul 1. Administrative Court, the plaintiff, who is an Iraq citizen, came to Turkey through legal means due to the political problems and applied for asylum.[291] The Migration office accepted the asylum application of the plaintiff and imposed an obligation on him to sign in every two weeks for the evaluation of the applicant's international protection application. Since the plaintiff failed to fulfil this obligation three times, without an excuse, it was decided that the international protection application be withdrawn and the lawsuit was filed with the request of the plaintiff to cancel this decision.[292]

Administrative court stated that it may be envisaged that the foreigner may be imposed certain obligations by the administration until the application is finalized and the foreigner who

[287] Ibid.
[288] Ibid.
[289] Ibid.
[290] Ibid.
[291] The Judgment of the İstanbul 1. Administrative Court, App. No. 2016/81, Decision No. 2016/946, 22.04..2016.Available at: http://ankarabarosu.org.tr/kurullar/mhk/doc/%C4%B0dare_mahkemesi_kararlar%C4%B1.pdf
[292] Ibid.

applies for international protection should comply with these obligations. If the obligations are not fulfilled, the assessment of the application for international protection will be stopped according to article 71 and 77 of LFIP.[293] Although the defendant administration made the plaintiff obliged to sign once every two weeks, no notification was made that the international protection application would be deemed to be withdrawn if this obligation was not fulfilled. On the other hand, the defendant administration did not prove that the plaintiff had not fulfilled this obligation three times without excuse and left the address of the residence. There was no determination about this obligation, therefore, the withdrawal decision about the plaintiff's international protection application was found unlawful and the administrative decision has been cancelled.[294]

It can be said that Administrative Courts interpret the procedural rules in a strict way in favour of plaintiffs. If administration offices cannot prove their claims and their obligation of notification, it cannot be assumed that the plaintiff needs to prove he fulfilled his obligation. Therefore, administration offices should fulfil their obligations to notify that all results, context, legal remedies, term of litigation, etc. should be explained and notified to the person before a decision is taken.[295]

In the case of Ankara 1. Administrative Court, the lawsuit was filed with the request of the annulment of the transaction dated 28 October 2014 regarding the rejection of the international protection application made by the plaintiff, who is a citizen of Kazakhstan.[296]

The Administrative Court firstly addressed the relevant provisions in domestic legislation, then the non-refoulement principle in the Geneva Convention, then the right to life and the prohibition of torture in the ECHR. The Court reviewed the file; and stated that the plaintiff entered Turkey illegally and asked for help from the Van Police Department. He was judged by claiming he was a member of a terrorist organisation and his extradition was requested. However, it was refused by the High Criminal Court to return him to his country for the crime of being a member of a terrorist organization.

[293] Ibid.
[294] Ibid.
[295] Ibid.
[296] The Judgment of the Ankara 1. Administrative Court, App. No. 2014/2158, Decision No. 2015/823, 21.04.2015. Available at: http://ankarabarosu.org.tr/kurullar/mhk/doc/%C4%B0dare_mahkemesi_kararlar%C4%B1.pdf

In the meantime, his international protection application was rejected and he filed a lawsuit to cancel this rejection. The Administrative Court stated that it is necessary to evaluate whether there is a fear of persecution based on justified reasons, objectively and subjectively, in the international protection applications.[297]

The plaintiff explained that he was a member of the West Kazakhstan Muslim Nationalist Youth Group and that the Kazakhstan government was against it, so he had been detained from time to time in Kazakhstan since 2007 and he was under pressure because of his religious beliefs and of his membership of a social group while living in his country. Therefore, he went to other countries but he could not escape from this pressure.

The court said that the plaintiff's claims that, if he is sent back to his country, he will be persecuted because of his religious and political thoughts, were not examined effectively. His international protection application was rejected just because of the fact that he did not apply for international protection in the other countries where he lived before entering Turkey, without assessing the status of the plaintiff. Therefore, the decision does not comply with law and it was cancelled.[298]

Therefore, it is clear that current status of applicants should be taken into consideration in the international protection applications. Just previous experiences and residence countries cannot be taken into account in the applications without assessing current situations of applicants.[299] This judgment is in accordance with ECtHR case Law, because ECtHR also emphasised current status of applicant and present conditions should be assessed in terms of the non-refoulement principle.[300]

In the case of Ankara Administrative Court, the plaintiff who is an Iranian citizen applied to the UNHCR when he came to Turkey and was recognized as a refugee.[301] Afterwards, he filed a case regarding the rejection of his international protection application, based on the claims that he changed his religion and became Christian and that people who change religion in Iran are executed.[302]

[297] Ibid.
[298] Ibid.
[299] Ibid.
[300] Chahal v. The United Kingdom, judgment, App. No. 22414/93, ECtHR, 15.11.1996, para 86.
[301] The Judgment of the Ankara 1. Administrative Court, App. No. 2014/2016, Decision No. 2015/849, 22.04.2015.
[302] Ibid.

The defendant administration stated that the plaintiff had gone to another city by failing to fulfil his signature obligation, therefore it was decided to close his international protection file and that the UNHCR was not authorized to grant protection status on its own. The plaintiff sued against this decision.

The court firstly addressed the related articles in domestic court regarding international protection status and the non-refoulement principle and afterwards stated the concerned articles in ECHR and Geneva Convention. The Court stated that the concerned people should be able to demonstrate the fear of persecution at a reasonable level in the interviews.[303] At the same time, while examining international protection applications, current information is gathered from the UNHCR and other sources regarding origin, residence and transit countries in order to make an effective and fair decision according to article 93 of the LFIP.[304] Moreover, as the ECtHR has stated in many judgments, the situation of the return country needs to be taken into account[305] by reports of intergovernmental and non-governmental organizations etc.

The court stated that regarding the claim that the plaintiff is at risk of ill-treatment in the country of origin due to the conversion of religion, the defendant administration did not scrutinize both the accuracy of the claims and the correctness of the risk at return country (by examining Iranian Laws) in terms of the right to life and prohibition of ill-treatment. Therefore, the decision of administration was found to be unlawful in terms of national and international law and it was cancelled.[306]

According to this decision, international reports, statistics, etc. should be taken into consideration when the conditions of applicant is assessed in terms of non-refoulement principle.[307] In addition, domestic law of the origin country concerning the situation of an applicant should be considered in deportation decisions. It is clear that there are serious penalties for religious conversion in Iran; therefore, procedural obligations should not be interpreted in a strict way. Otherwise, it could cause serious results in regard to right to life or prohibition of torture.

[303] Ibid.
[304] Ibid.
[305] F.G. v. Sweden, judgment, App.No. 43611/11, ECtHR, 23.03.2016, para 112.
[306] The Judgment of the Ankara 1. Administrative Court, App. No. 2014/2016, Decision No. 2015/849, 22.04.2015.
[307] Ibid.

In the case of Ankara Administrative Court, a lawsuit was filed by the plaintiff, who is a citizen of the Russian Federation, regarding the rejection of the application of international protection application.[308] The plaintiff left his country with the worry that he would be persecuted because of his religious and political thoughts; he was harassed and repressed by the police after he escaped to Belgium. He said that both of his brothers were killed by the Russian security forces, that his cousins were kidnapped and that he would be subjected to inhuman treatment if he were deported. He requested the annulment of the rejection of international protection application, arguing that he would be deprived of his right to liberty, right to a fair trial and even his right to life.

The defendant administration claimed that the applicant's main aim was to stay in Turkey by using the international protection system; he had the G-87 (General Security) restriction code, which is done to indicate and prevent the use of the route of Turkey to transition to the conflict zone.[309] Also stated that he came from Belgium, which is a third safe country, thus his application was rejected in accordance with the legislation.

The Court requested from the administration office to send a copy of the G-87 restraint code about the plaintiff and all the relevant information documents. From the information and documents sent, it was seen that the reason for the G-87 restraint code about the plaintiff was based on the information sent from the Belgian Interpol, that the plaintiff had relations with the Chechens who attacked the Russians in the Caucasus regions.[310]

The Court said that it is seen that there is no determination by the administration office about the plaintiff using Turkey as a route for transition to conflict zones, that he is an international fighter or that he poses a security threat for Turkey.[311] Also, the claim of that the plaintiff's position in the opposition group in his country also strengthens the risk of pressure in his country.[312]

The Court explained that the defendant administration could not present any concrete information and documents about the code given to the plaintiff. If the plaintiff were deported to the Russian Federation, the claims that there are risks to his life or material and spiritual

[308]The Judgment of the Ankara 1. Administrative Court, App. No. 2015/55, Decision No. 2015/2261, 12.11.2015.
[309] Ibid.
[310] Ibid.
[311] Ibid.
[312] Ibid.

existence in that country are serious. While it is necessary to evaluate according to the objective situation of the plaintiff, the rejection decision was made without concrete justification, so it is unlawful and cancelled.[313]

This judgment also shows the comprehensive assessment of Administrative Courts in deportation cases. Administration offices sometimes can decide the expulsion based on another country's assessment without another researching or concrete document. Even if a person can be restricted in another country, the current situation of the person should be evaluated in any case.[314]

It is hard to evaluate the effectiveness of the administrative courts judgments because the first instance court judgments are not open to public. However, as it is seen from above mentioned the Constitutional Court and Administrative Court judgments, it can be said there are different assessments regarding non-refoulement principle. The European Council on Refugees and Exiles stated that "…the majority of stakeholders agreed that there is no uniform application of the non-refoulement principle in Administrative Court reviews of deportation decisions…. Especially the Administrative Courts of Ankara and Istanbul are regarded as the most expert and competent courts in refugee law issues." in the 2018 Country Report of Turkey.[315] It can be said that there are some deficiencies in the administrative court judgments regarding non-refoulement principle, therefore, the administrative court judgments need to be improved in accordance with ECtHR case law.

[313] Ibid.
[314] Ibid.
[315] The European Council on Refugees and Exiles. Country Report: Turkey 2018. Page 25 and 37. Available at: https://www.asylumineurope.org/sites/default/files/report-download/aida_tr_2018update.pdf

CONCLUSION

The purpose of this thesis is to assess and examine whether the regulation and implementation (including the Turkish Constitutional Court and Administrative Courts) of the non-refoulement principle in Turkish Refugee Law comply with ECHR and ECtHR case law and how the new amendments affected this compliance.

Refugees, displaced people, migrants have been on the world's agenda throughout history. States, international organisations have struggled to provide effective legislation conventions in order to protect human rights and freedoms of refugees who did not have the protection of their origin country. It is indisputable that the non-refoulement principle is one of the substantial principles in terms of preservation of human rights standards of refugees in international refugee law. Therefore, the first research question aimed to analyse the regulation of the non-refoulement principle in international law, ECHR and ECtHR case law in order to show the importance and scope of the principle. Even if the ECHR does not expressly include the non-refoulement principle in the convention, the relation of articles with the principle was explained to illustrate the importance of the ECHR and the ECtHR in terms of the non-refoulement principle. ECtHR took the principle into consideration in relation to many articles. Therefore, in the second research question, assessment of principle in ECtHR case law has been analysed in terms of assessment of applications, right to life, prohibition of torture, right to liberty and security, right to a fair trial, right to respect for private and family life, right to an effective remedy. Specific and important cases were indicated and important points have been enlightened in order to clearly show the approach of the ECtHR. This part has the importance in the sense of assessing compliance of regulation and implementation of Turkish Refugee Law.

Subsequently, regulation of Turkish Law in regard to the non-refoulement principle has been clarified in the second chapter with historical developments and the latest amendments. The Syrian Civil War has been a significant point in terms of the evolution of the law, therefore regulation has been explained in two parts: before and after this civil war. It is clearly seen that the evolution of Turkish Refugee Law has accelerated after the flow of migration has been increased. Turkish Constitution, Law on Foreigners and International Protection, Temporary Protection Regulation, Implementation regulation on the Law on Foreigners and International Protection have been analysed including new amendments in regard to the thesis' topic. As for the fourth research question, contradictions, deficiencies and the needs

for change have been illustrated in law in order to manifest the compliance of the regulation of the non-refoulement principle in the Turkish Refugee Law to the ECHR and ECtHR case law. In particular, the latest amendments, made in December 2019, have been clearly explained in order to show the inconsistencies within Turkish Refugee Law.

For the fifth research question, the implementation of the non-refoulement principle in Turkish legal practice has been assessed to determine whether it complies with the ECtHR case law and contradictions between case law in Turkey and in the ECtHR have been analysed to show inconsistencies. In accordance with this purpose, Turkish Constitutional Court practices and Administrative Court judgments have been examined to compare the approaches of the Turkish Courts and ECtHR.

At the present time, Turkey hosts almost four million refugees as a result of the Syrian Civil War. Therefore, especially for Turkey, regulations and judgments about refugees are essential issues. It is clear that Turkey needs to regulate the non-refoulement principle by taking into account ECtHR case law in order to meet standards of the ECHR. New amendments created inconsistencies in the provisions of the LFIP regarding non-refoulement principle. Especially voluntary return regulations made new disputes about the principle. There are some news, reports about that refugees are being forced to sign voluntary return forms or that they are being misinformed about these forms in order to coerce them to sign the forms. Therefore, the non-refoulement principle should be taken into consideration even in voluntary return applications.

The deportation decisions in Turkey are usually based on crimes related to terrorism, public security, public order etc. as it is seen from the above-mentioned cases. These terms are broad and abstract, therefore, situation of applicant and return country should be searched and examined carefully. Moreover, new amendments create ambiguity in the non-refoulement principle. In particular, there is no clear explanation about the articles on family-based return, return consultancy, material or financial support for voluntary returns. These terms make the forced return issue more disputable in terms of Turkey. Therefore, these new terms in law shall be clarified in order to prevent the misimplementation of law. Moreover, reducing the time limit from fifteen days to seven days to file a case against a deportation decision is one of the contradictions in the Turkish Refugee Law. According to ECtHR case law, a time limit to apply to the court should not violate the right to a fair trial and right to effective remedy. It is clear that seven days is not a sufficient time limit for a refugee who has numerous barriers

such as language, legal assistance etc. These practices violate the principle of non-refoulement.

Article 54-h of the LFIP, which says that foreigners who "violated the provisions of the legal entry or exit from Turkey or who attempt to violate these provisions (attempt clause has been added by new amendments on 2019)"[316] are subject to removal decisions, does not comply with the non-refoulement principle and international protection standards. Article 31/1 of 1951 Convention says that party states shall not impose penalties regarding illegal entry or presence of refugees.[317] The "attempt" is also an abstract and a broad term, therefore, this provision also should be regulated according to international standards.

Providing automatic suspensive effect for every application against a removal decision, regardless of the reason, is one of the positive developments in the latest amendments. Before this amendment, people who "1- are leaders, members or supporters of a terrorist organisation or a benefit oriented criminal, 2- pose a public order or public security or public health threat, 3- are evaluated as being associated with terrorist organizations which have been defined by international institutions and organizations"[318] were directly deported even if they applied against the decision. It was one of the disputable topics because it was creating risk in terms of the non-refoulement principle. These exemptions were making LFIP incompliance with ECHR and ECtHR case law. Only this amendment brought the non-refoulement principle in Turkish Refugee Law in compliance with ECtHR standards and prevented the irrecoverable damages regarding the practice of non-refoulement principle.

Therefore, the hypothesis of the thesis is that it has been proven that the new amendments, published on 6 December 2019, made regulation of the non-refoulement principle incompatible with the ECHR and the ECtHR case law and there is a need to make new amendments to make the regulation compatible with ECHR standards. It is clear that regulation of the non-refoulement principle has more, not fewer, deficiencies after these amendments. Amendments regarding family-based return, return consultancy, material or financial support for voluntary returns made abstract provisions and inconsistencies in the LFIP. These provisions and terms regarding voluntary return should be clarified in order to prevent arbitrary implementations. Moreover, reducing the time limit from fifteen days to

[316] Law No.6458, Op. Cit.
[317] 1951 Convention. Article 31/1.
[318] Law No. 6458, Article 53.

seven days to file a case against a deportation decision impaired the effective remedy and essence of the deportation decisions. It is clear that seven days is not an efficient time period to file a case for refugees who have a lot of barriers and need legal assistance. Therefore, it can be said that this amendment will cause numerous violation decisions about Turkey in the ECtHR. Moreover, when voluntary return reports, news are taken into account, it is clear that Protocol No.4 of the ECHR needs to be entered into force in order to provide an effective protection against collective expulsions. Otherwise, there is no an effective remedy neither in the domestic courts nor in the ECtHR in case of collective expulsions.

Moreover, the Turkish Constitutional Court and Administrative Court judgments have been examined regarding the topic. Administrative court judgments are not open to the public, therefore, significant judgments have been collected from articles, publications of Lawyer Bar Associations, universities etc. It can be said that the Constitutional Court does not take the procedural conditions regarding the power of attorney, term of litigation etc. in a strict way, even if administrative courts sometimes consider procedures in a strict way. The administrative courts in Turkey dismiss the cases on the procedural grounds such as lack of power of attorney, missing the time of litigation etc. without examining the real risks of deportation. Therefore, applicants apply to the Constitutional Court to cancel deportation decisions. Administrative courts should investigate deportation conditions in a broad way because limitations, procedures should not impair the essence of rights according to ECtHR case law.

Applicants should advance a claim on the substantial grounds to make claims searchable, discussable and reasonable in the deportation judgments in Turkey. Accordingly, the applicant should reasonably explain what the risk of ill-treatment is. Afterwards, courts examine the claims, situation of applicant and return country. This approach complies with ECtHR case law as it is explained in the third chapter; substantial grounds should be provided by applicant to show the real risks that may arise in the case of application of deportation decision. The Constitutional Court judgments comply with this approach, however, the administrative courts do not adequately evaluate the claims even on the substantial grounds, if applicant poses a risk to public security, public order etc. as it is seen in the Constitutional Court applications in the third chapter. According to the ECtHR case law, non-refoulement principle should be taken into consideration and allegations regarding ill-treatment, torture should be examined, even if the applicant poses a risk to public security, public order etc. Therefore, it can be said that the administrative courts should assess the claims and take the non-

refoulement principle into account, even if the plaintiff poses a risk to public security, public order, etc.

Right to respect for family life also is not regulated in the provisions regarding deportation in Turkey. Even if the deportation exemptions in the Article 55 of the LFIP comply with the standards of non-refoulement principle; right to respect for family life, unity of family, well-being of the children etc. should be regulated in provisions regarding deportation to comply with ECtHR case law. Moreover, it can be said that the courts in Turkey take the right to respect for family, unity of family into consideration in a narrow way, therefore, the right to family and private life should be more considered in the judgments.

In the light of the judgments, it can be said that, there are some deficiencies in the Administrative Court and Constitutional Court judgments, even though the application of the non-refoulement principle in courts complies with ECtHR standards in a broad sense. The Constitutional Court should take right to respect for private and family life, unity of family, well-being of the children etc. into account in the judgments. The Administrative Courts should not interpret the procedural rules such as term of litigation, power of attorney in a strict way in order not to impair the essence of the case. The Administrative Courts should examine the allegations regarding risks of deportation thoroughly and meticulously in order to prevent the irrecoverable damages. The latest reports, documents, news etc. should be taken into consideration when objective and subjective conditions of the deportation cases are assessed. Nonuniformity between the Administrative Court judgments should be eliminated to provide a uniform and reliable application of the non-refoulement principle.

In order to protect the principle of non-refoulement, the ECtHR provides absolute protection without observing the status of refugees or threat of certain reasons. It should also be emphasized in the light of the ECtHR case law that the conflict in Syria constitutes serious violence. Therefore, mandatory or voluntary returns are required to be stopped without an individual risk assessment.

In order for voluntary return to be considered safe, the motives for the return should be investigated; those who want to return should be given detailed information about the conflict situation in their origin countries and legal assistance should be provided for them to obtain information and support on their legal rights.

Syrians are considered under refugee status according to international refugee law and they are protected under temporary protection in Turkey. In accordance with the principle of non-refoulement, no one should be sent to the place where they will be at risk of persecution, torture or ill-treatment regardless of the international protection status. Turkey is obliged to protect refugees and asylum-seekers in the country. Therefore, deportation of refugees to an ongoing conflict environment or persuading/forcing them to return voluntarily does not comply with the non-refoulement principle.

Non-refoulement principle is one of the most important principles and essential to protect human rights in international law. Numerous international, regional and national law instruments regulate the non-refoulement principle and scope of the principle expands because of its irrecoverable results as it is seen from the judgments. The non-refoulement principle is a *jus cogens* norm, therefore every agreement, bill, regulation, in brief all legal documents should be drafted by considering the principle, otherwise, they will be void. States should apply the non-refoulement principle not only within their own territories but also in international zones, maritime areas, airports etc. over which they have jurisdiction.

Table 1 [319]

The ECHR	Constitution of Republic of Turkey
Article 1-Obligation to respect Human Rights	Article 2- Characteristics of the Republic Article 5- Fundamental aims and duties of the State Article 12- Nature of fundamental rights and freedoms
Article 2- Right to life	Article 17- Personal inviolability, corporeal and spiritual existence of the individual
Article 3- Prohibition of torture	Article 17- Personal inviolability, corporeal and spiritual existence of the individual
Article 4-Prohibition of slavery and forced labour	Article 18- Prohibition of forced labour Article 50- Working conditions and right to rest and leisure
Article 5- Right to liberty and security	Article 19- Personal liberty and security Article 38- Principles relating to offences and penalties
Article 6- Right to a fair trial	Article 36- Freedom to claim rights Article 37- Freedom to claim rights Article 38- Principles relating to offences and penalties Article 138- Independence of the courts Article 141- Publicity of hearings and the necessity of justification for verdicts
Article 7- No punishment without law	Article 38- Principles relating to offences and penalties
Article 8- Right to respect for private and family life	Article 13- Restriction of fundamental rights and freedoms Article 20- Privacy of private life

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	Article 21- Inviolability of the domicile Article 22- Freedom of communication
Article 9 Freedom of thought, conscience and religion	Article 13- Restriction of fundamental rights and freedoms Article 24- Freedom of religion and conscience Article 25- Freedom of thought and opinion
Article 10- Freedom of expression	Article 26- Freedom of expression and dissemination of thought Article 27- Freedom of science and the arts Article 28- Freedom of the press Article 29- Right to publish periodicals and non-periodicals Article 30- Protection of printing facilities Article 31- Right to use media other than the press owned by public corporations
Article 11- Freedom of assembly and association	Article 13- Restriction of fundamental rights and freedoms Article 33- Freedom of association Article 34- Right to hold meetings and demonstration marches Article 51- Right to organize unions
Article 12- Right to marry	Article 41- Protection of the family, and children's rights
Article 13- Right to an effective remedy	Article 40- Protection of fundamental rights and freedoms Article 148- (Constitutional Court) Functions and powers
Article 14- Prohibition of discrimination -Protocol no.12	Article 10- Equality before the law
Article 15- Derogation in time of emergency	Article 15- Suspension of the exercise of fundamental rights and freedoms Article 119- Administration of State of Emergency

Article 16- Restrictions on political activity of aliens	Article 16- Status of aliens
Article 17- Prohibition of abuse of rights	Article 14- Prohibition of abuse of fundamental rights and freedoms
Article 18- Limitation on use of restrictions on rights	Article 13- Restriction of fundamental rights and freedoms
Protocol No.1, Article 1- Protection of property	Article 35- Right to property
Protocol No. 1, Article 2- Right to education	Article 24- Freedom of religion and conscience Article 42- Right and duty of education
Protocol No. 1, Article 3- Right to free elections	Article 67- Right to vote, to be elected and to engage in political activity Article 77- Election term of the Grand National Assembly of Turkey and the President of the Republic Article 79- General administration and supervision of elections
Protocol No. 4, Article 1- Prohibition of imprisonment for debt	Article 38- Principles relating to offences and penalties
Protocol No. 4, Article 2- Freedom of movement	Article 23- Freedom of residence and movement
Protocol No. 4, Article 3- Prohibition of expulsion of nationals	Article 23- Freedom of residence and movement Article 38- Principles relating to offences and penalties
Protocol No. 4, Article 4- Prohibition of collective expulsion of aliens	There is no provision related to this Article.
Protocol No. 6 and Protocol No. 13- to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty	Article 38- Principles relating to offences and penalties
Protocol No. 7 , Article 1- Procedural	There is no provision related to this Article.

safeguards relating to expulsion of aliens	
Protocol No. 7 , Article 2- Right of appeal in criminal matters	Article 154- High Court of Appeals Article155- Council of State
Protocol No. 7 , Article 3- Compensation for wrongful conviction	There is no provision related to this Article.
Protocol No. 7 , Article 4- Right not to be tried or punished twice	There is no provision related to this Article.
Protocol No. 7 , Article 5- Equality between spouses	Article 41- Protection of the family, and children's rights

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