EXPLORING THE *NON-REFOULEMENT* PRINCIPLE IN THE ECTHR JURISPRUDENCE: SYRIANS UNDER TEMPORARY PROTECTION IN TÜRKIYE AS A CASE STUDY

BİR VAKA İNCELEMESİ OLARAK GEÇİCİ KORUMA STATÜSÜNDEKİ SURİYELİLER

Araştırma Makalesi

Oğuzhan ÖZTÜRK*

Atahan DEMİRKOL*

ABSTRACT

This paper examines whether Türkiye can legally implement a repatriation policy for SuTPs under the lex lata of the ECHR and ECtHR jurisprudence. To do so, the current paper attempts to analyze Türkiye and Syrians under Temporary Protection (SuTPs) as a case study on whether Turkish authorities can legally initiate repatriation processes for SuTPs. Indeed, the World's leading refugee hosting country, Türkiye, has implemented several policies to maintain the voluntary repatriation of SuTPs, especially after the economic, political, and social backlashes became visible. Although the jus cogens norm of non-refoulement cannot be breached, host countries are still concerned about determining when it is legal to repatriate refugees after extensive hosting periods. This research, therefore, explores the nuances of the implementation of SuTPs' repatriation by Turkish authorities without breaching the limits of the nonrefoulement principle in accordance with ECtHR jurisprudence. The paper concludes that international cooperation for peaceful solutions in conflict areas and providing reliable information for the safety of returnees to the international community are essential for initiating repatriation programs. Hence, Türkiye should cooperate with other countries to acknowledge the international community for the safety of

DOI: 10.32957/hacettepehdf.1406406

Makalenin Geliş Tarihi: 18.12.2023 **Makalenin Kabul Tarihi:** 02.05.2024

* Avukat, Leiden Üniversitesi, Ph.D. Candidate at the Grotius Centre of International Legal Studies, Leiden University; Attorney-at-law, Sakarya Bar Association; the Scholarship holder of the Ministry of National Education of Türkiye.

E-posta: o.ozturk@law.leidenuniv.nl

ORCID: 0000-0002-7585-521X

* Arş. Gör., Afyon Kocatepe Üniversitesi İktisadi ve İdari Bilimler Fakültesi

E-posta: ademirkol@aku.edu.tr

ORCID: 0000-0002-7185-5781

Bu makale Hacettepe Üniversitesi Hukuk Fakültesi Dergisi Araştırma ve Yayın Etiği kurallarına uygun olarak hazırlanmıştır.

returnees, that is, cooperation for peaceful solutions among all parties, and eliminate accusations of breaching the non-refoulement principle during the repatriation policy.

Keywords: Non-refoulement principle, Syrians under Temporary Protection, Refugees, European Court of Human Rights, European Convention of Human Rights, Repatriation, Return.

ÖZ

Bu makale Türkiye'nin geçici koruma statüsündeki Suriyelilerin uluslararası hukuka uygun geri dönüş politikası uygulayıp uygulayamayacağını Avrupa İnsan Hakları Sözleşmesi kuralları ve Avrupa İnsan Hakları Mahkemesi kararları çerçevesinde değerlendirmektedir. Bu amaçla Türkiye'nin hukuki olarak geri gönderme politikası izleyip izleyemeyeceği örnek olay olarak incelenmiştir. Özellikle dünyada en çok mülteciye ev sahipliği yapan ülke konumundaki Türkiye'de ekonomik, sosyal ve politik sorunların gündeme gelmesi sonrasında, Türkiye'nin geçici koruma statüsündeki Suriyelilerin gönüllü geri dönüşleri için çeşitli politikalar izlediği görülmektedir. Her ne kadar jus cogens kuralı niteliğindeki geri göndermeme ilkesinin ihlal edilmemesi kesin olsa da mültecilere uzun süre ev sahipliği yapan ülkeler, geri dönüş politikalarının ne zaman hukukilik kazandığını sorgulamaktadırlar. Bundan dolayı bu araştırma, AİHM içtihadına uygun olarak, geri göndermeme ilkesinin sınırlarını ihlal etmeden, geçici koruma statüsündeki Suriyelilerin kaynak ülkelerine geri dönüşlerinin Türkiye Cumhuriyeti makamları tarafından uygulanmasının mümkün olup olmadığını araştırmaktadır. Sonuç olarak, çatışma bölgelerinde barışçıl çözümler için uluslararası işbirliğinin sağlanması ve geri dönenlerin güvenliği hususunda uluslararası kamuoyuna doğru bilgi aktarılmasının, geri dönüş programlarının başlatılması için gerekli olduğu sonucuna varılmaktadır. Çalışma, Türkiye'nin geri göndermeme kuralı ihlali iddialarının önüne geçmek ve taraflar arasında barışın sağlanması için, geri dönüş yapanların güvenliği konusunda uluslararası işbirlikleriyle kamuoyunun doğru bilgilendirilmesi gerektiğini ve böylece geri göndermeme ilkesi ihlaline ilişkin iddiaların önlenebileceğini önermektedir.

Anahtar Kelimeler: Geri göndermeme ilkesi - Geçici koruma stasüsündeki Suriyeliler - Mülteciler - AİHM - AİHS - Geri Dönüş - Geri Gönderme

EXTENDED ABSTRACT

Since the Turkish Government's decision to allow Syrian civilians to enter its territory on 28 April 2011, Türkiye has been hosting 3,143,635 Syrians under Temporary Protection (SuTPs). According to the United Nations High Commissioner for Refugees (UNHCR), Türkiye became the World's leading refugee hosting country shortly after the Syrian migration flow started. In the meantime, Türkiye has been suffering an economic crisis and political tensions in the country for recent years. Accordingly, the arguments regarding refugees' impact on fostering unemployment rates via job replacement, nationalist ideas produced by far-right parties, and criticisms on social cohesion have sparked debates about SuTPs' repatriation. In line with these, in recent years, the increasing concern has been aggregating on one topic: Is SuTPs' repatriation from Türkiye legally possible under the European Convention of Human Rights (ECHR) and the European Court of Human Rights (ECtHR) jurisprudence?

Foreigners in Türkiye, but especially Syrians, have become one of the focal points of political debates because of the current economic situation. Moreover, considering the current situation in Syria, which is claimed to be less dangerous day by day, is also one of the arguments of the debates. In this sense, Türkiye's foreign policy preferences and agenda to repatriate SuTPs have been legitimized through excessive numbers of refugees in the country, uneven and unjust burden-sharing, and the establishment of safe zones. Further, on 3 May 2022, President Bashar al-Assad issued another amnesty to release thousands of Syrians, including those convicted of terrorism charges, since the Syrian Civil War. Hence, in this research, we attempt to prompt the trending question from a legal academic perspective: How can Türkiye initiate the repatriation process for SuTPs without breaching the non-refoulment principle under a legal framework that respects the international human rights law and jus cogens norms. Precisely, in this paper, we examine whether Türkiye is legally able to implement a repatriation policy to SuTPs under the lex lata of the ECHR and ECtHR jurisprudence. Throughout the paper, we focus on the issue only from the legal perspective.

The literature regarding SuTPs and Türkiye has expanded tremendously in the last few years. There is various research, which approaches the case from multiple and interdisciplinary perspectives. Although recently, a number of studies underlined the return narratives of SuTPs, the existing literature on return or repatriation policies is scarce from an international law perspective. The lack of appropriate legal debate to argue whether it is possible for host countries to initiate repatriation or when it is legally doable is still worth exploring. Given that, the limited literature and the need to provide a legal perspective on one of the essential topics for host countries have motivated us to do this research. Hence, the novelty of our study is twofold. First, we examine the legal framework for host countries to implement repatriation policies under extended periods of temporary protection. Second, we solely focus on the repatriation process from the lens of the non-refoulment principle. In the end, we aim to contribute to legal studies and international migration literature by proposing a solution to the research question and making policy recommendations to policymakers in Türkiye.

Before starting to examine the lex lata, jurisprudence, and the situation of Syria, Syrians' legal status in Türkiye should be clarified. One of the main misunderstandings is assumed that Syrians are refugees in Türkiye. Whilst Türkiye has acceded to the Refugee Convention, it acceded to the Convention with geographical limitations. According to this limitation, Türkiye declared that it would recognize refugee statutes for people who are affected by events occurring in Europe. Therefore, Syrians cannot be given refugee status in Türkiye. However, Syrians are under temporary protection.

Although temporary protection has been used before, its specific details and legal basis are still unclear; there is currently no global agreement on what temporary protection entails as a system of protection, nor is there a clear definition of it in any international legal document. The LFIP Article 91 codifies temporary protection as follows, "Temporary protection may be provided for foreigners who have been forced to leave their country, cannot return to the country that they have left, and have arrived at or crossed the borders of Türkiye in a mass influx situation seeking immediate and temporary protection." Even though the regime is called temporary protection, the LFIP was amended on the time limit, and no maximum time limit has been implemented. Syrians' temporary protection status was granted by the Cabinet in 2011, but after the referendum on amendments to the Turkish Constitution in 2016, the decision to give temporary protection status, or vice versa, to foreigners can be taken by the president.

This research is also limited. The first limitation relates to the legal framework. During the examination of the situation, the main legal subject of the argument is the non-refoulement principle in conjunction with Articles 2, 3, and 13 of the ECHR. Although Article 4 of Protocol 4 to the Convention prohibits the collective expulsion of aliens directly related to the article's focus, Türkiye did not ratify it; therefore, it will not be discussed. The second limitation is that the research only focused on SuTPs in Türkiye as a case study since they constitute the most significant portion of forced migrants.

Consequently, the article is formed as follows: In the first section, the meaning of the *non-refoulement* principle and an examination of the ECtHR and its jurisprudence on principle are provided. The second section scrutinizes the debates on the current situation in Syria regarding the safety and security of returnees and Türkiye's current attempts at repatriation. The third section is devoted to applying the ECtHR and its jurisprudence to the situation in Syria to clarify whether Türkiye can initiate return programs toward SuTPs without breaching the *non-refoulement* principle and, if so, what the requirements are. The last section concludes the research findings and summarizes the authors' novel points.

INTRODUCTION

Is SuTPs' repatriation from Türkiye legally possible under the European Convention of Human Rights (ECHR) and the European Court of Human Rights (ECtHR) jurisprudence?[1] The question regarding refugees' or asylum-seekers' repatriation under the legal framework to their country of origin in the cases of extended *temporary* protection has been on the table. Whilst International Protection (IP) is necessary for people under certain circumstances, the longer periods of large numbers of forced migrants are also challenging for host countries. Since the Turkish Government's decision to allow Syrian civilians to enter its territory on 28 April 2011, Türkiye has been hosting 3,143,635 Syrians under Temporary Protection (SuTPs).[2] According to the United Nations High Commissioner for Refugees (UNHCR), Türkiye became the World's leading refugee hosting country shortly after the Syrian migration flow started.[3] Concomitantly, the worsening economic indicators and political tensions in Türkiye have

[1] The terms "repatriation" and "return" used by the authors in this paper do not present a major difference. The authors have approached a refugee's action of being back to their home country as a "return." However, the authors have attempted to stress the "voluntary" return process when they use "repatriation." The vast majority of the existing literature does not yield a contradictory or complementary use of these terms. Nevertheless, readers may refer to James C. Hathaway, 'The Meaning of Repatriation' (1997) 9 International Journal of Refugee Law, 556 or Barry N. Stein, 'Refugee Repatriation, Return, and Refoulement During Conflict' (USAID Conference Promoting Democracy, Human Rights, and Reintegration in Post-conflict Societies, 1997) as further reading on the term "repatriation."

[2] As of 14.03.2024 according to the data from Presidency of Migration Management, https://en.goc.gov.tr/temporary-protection27 (last visit 18.03.2024).

[3] UNHCR, Global Trends Report 2021, 2; Meltem İneli-Ciğer, *Temporary Protection in Law and Practice* (1st edn, Brill | Nijhoff 2017) 168.

recently fueled the arguments regarding refugees' impact on fostering unemployment rates via job replacement, nationalist ideas produced by far-right parties, and criticisms on social cohesion. As a result, these developments have sparked debates about SuTPs' repatriation.

The debate on why to host victims of political and military turmoil who had to flee from their country of origin under certain circumstances is still a hot topic for scholars and societies. Indeed, as a provision of Article 14(1) of the Universal Declaration of Human Rights (UDHR),[4] which is considered the transformative document from the approach of domestic human rights to international,[5] "*Everyone has the right to seek and to enjoy in other countries asylum from persecution.*" However, applying this right also has crucial meanings for host communities to overcome the national socioeconomic, political, and security provisions. Against the growing academic sphere to predominantly discuss how victims should enjoy this right, a thorough examination has been less stressed regarding the practices of repatriation and return of refugees,[6] especially from the host countries' perspectives.

The literature regarding SuTPs and Türkiye has expanded tremendously in the last few years, and various research studies have been conducted from multiple and interdisciplinary perspectives. Although several studies have underlined the return narratives of SuTPs, the existing literature on the return or repatriation policies of SuTPs is scarce from an international law perspective.[7] The lack of appropriate legal debate to argue whether it is possible for host

---

4 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art. 14.

5 Şahin Eray Kırdım and Atahan Demirkol, 'Uluslararası İnsan Hakları Hukukunun Bir Kaynağı Olarak Uluslararası Örf ve Âdet Hukuku' (2021) 25 Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi 379; Selman Özdan, *Human Rights Recognised as Jus Cogens* (1st edn, Palgrave MacMillan 2022) 47.

6 Zeynep Şahin-Mencütek and Gerasimos Tsourapas, 'When Do States Repatriate Refugees? Evidence from the Middle East' (2023) 8 Journal of Global Security Studies.

7 Nawras Al Husein & Natascha Wagner, 'Determinants of intended return migration among refugees: A comparison of Syrian refugees in Germany and Turkey' (2023) 57(4) International Migration Review 1771; Jasmin Lilian Diab and Heaven Crawley, 'Safe, Voluntary, and Dignified Return for Syrian Refugees from Lebanon' (2023) United Nations University Reports; Samer Abboud, 'The Decision to Return to Syria Is Not in My Hands': Syria's Repatriation Regime as Illiberal Statebuilding' (2023) Journal of Refugee Studies, https://doi.org/10.1093/jrs/fead065; Zeynep Şahin-Mencütek, N. Ela Gökalp-Aras, Ayhan Kaya, Susan Beth Rottmann, *Syrian Refugees in Turkey: Between Reception and Integration* (1st edn, Springer 2023); Gerasimos Tsourapas & Zeynep Şahin Mencütek, 'When Do States Repatriate Refugees? Evidence from the Middle East' (2022) 8(1) Journal of Global Security Studies 1, https://doi.org/10.1093/jogss/ogac031; Ayşegül Kayaoğlu, Zeynep Şahin-Mencütek & Murat Erdoğan, 'Return aspirations of Syrian refugees in Turkey'(2022) 20(4) Journal of Immigrant & Refugee Studies 561; Zeynep Şahin Mencütek, 'The Geopolitics of Returns: Geopolitical Reasoning and Space-Making in Turkey's Repatriation Regime' (2023) 28(3) Geopolitics 1079; Zeynep Şahin Mencütek, 'The Institutionalization of "Voluntary" Returns in Turkey' (2022) 5(1) Migration and Society 43; Zeynep Şahin Mencütek, 'Voluntary and forced return migration under a pandemic crisis' in Anna Triandafyllidou (ed.) *Migration and Pandemics: Spaces of Solidarity and Spaces of Exception* (1st edn, Springer 2022) 185-206; Zeynep Şahin Mencütek, 'Governing Practices and Strategic Narratives for Syrian Refugee Returns' (2021) 34(3) Journal of Refugee Studies 2804; Zeynep Şahin Mencütek, 'Encouraging Syrian return: Turkey's fragmented approach' (2019) 62 Forced Migration

countries to initiate repatriation or when it is legally doable is still worth exploring. Given that, the limited literature and the need to provide a legal perspective on one of the essential topics for host countries have been a motivation to conduct this research. Hence, the novelty of this study is twofold. First, the research examines the legal framework for host countries to implement repatriation policies under extended periods of temporary protection. Second, the research focuses on the repatriation process from the lens of the *non-refoulement* principle.

Hence, this research attempts to prompt the trending question from a legal academic perspective: How can Turkish authorities initiate the repatriation process for SuTPs without breaching the *non-refoulement* principle under a legal framework that respects the international human rights law and *jus cogens* norms? This paper examines whether Türkiye can legally implement a repatriation policy for SuTPs under the *lex lata* of the ECHR and ECtHR jurisprudence. Hence, the research does not attempt to analyze the ECtHR jurisprudence related to the *non-refoulement* principle per se. Furthermore, this research aims to utilize jurisprudence to comprehend the limits of the *non-refoulement* from a legal perspective to prompt the research question. Ultimately, it also aims to contribute to legal studies and international migration literature.

This research is also limited. The first limitation relates to the legal framework. During the examination of the situation, the main legal subject of the argument is the *non-refoulement* principle in conjunction with Articles 2, 3, and 13 of the ECHR. Although Article 4 of Protocol 4 to the Convention prohibits the collective expulsion of aliens directly related to the article's focus, Türkiye did not ratify it; therefore, it will not be discussed. The second limitation is that the research only focused on SuTPs in Türkiye as a case study since they constitute the most significant portion of forced migrants.

Consequently, the article is formed as follows: In the first section, the meaning of the *non-refoulement* principle and an examination of the ECtHR and its jurisprudence on principle are provided. The second section scrutinizes the debates on the current situation in Syria regarding the safety and security of returnees and Türkiye's current attempts at repatriation.

Review; Zeynep Şahin Mencütek, 'Narratives on Returning Refugees, Asylum Seekers, and Irregular Migrants' (2021) Working Paper Series Ryerson Centre for Immigration and Settlement (RCIS) and the CERC in Migration and Integration at Ryerson University, No. 2021/2*;* Ahmet İçduygu & Maissam Nimer, 'The Politics of Return: Exploring the Future of Syrian Refugees in Jordan, Lebanon and Turkey' (2020) 41(3) Third World Quarterly 415; Sinem Adar, 'Repatriation to Turkey's "Safe Zone" in Northeast Syria: Ankara's Goals and European Concerns' (Stiftung Wissenschaft und Politik (SWP), German Institute for International and Security Affairs 2020) SWP Comments 1/2020; Birce Altıok & Salih Tosun, 'Understanding foreign policy strategies during migration movements: a comparative study of Iraqi and Syrian mass refugee inflows to Turkey' (2020) 21(5) Turkish Studies 684.

The third section is devoted to applying the ECtHR and its jurisprudence to the situation in Syria to clarify whether Türkiye can initiate return programs toward SuTPs without breaching the *non-refoulement* principle and, if so, what the requirements are. The last section concludes the research findings and summarizes the authors' novel points.

1. The *Non-Refoulement* Principle and Relevant the ECtHR Jurisprudence

There is wide acceptance that the regime for international protection of refugees has been established by the Refugee Convention, which poses an international law regulation.[8] One of the most concrete and powerful protection mechanisms for individuals who fled from persecution is the *non-refoulement* principle. However, the debates on this principle's content, limits, responsibility to apply, and provisions have been ongoing. As a part of the analysis in this research, this section attempts to briefly identify the notion of the principle extracted from the relevant literature. Moreover, this section builds the interpretation of the principle with reference to ECtHR jurisprudence. The *non-refoulement* principle has been codified in Article 33 of the Refugee Convention as follows, "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Additionally, the state parties ensure this principle with Article 42(1) by not allowing reservations to Article 33 of the Convention.

There is also a scholarly debate in international law whether the principle of *non-refoulment* is a *jus cogens* norm. Some academics posit the principle along with the prohibition of torture as a *jus cogens* norm.[9] This view denotes the idea that the *non-refoulement* principle is one of the core rules for the international prohibition of torture.[10] However, even though the principle may not be accepted as *jus cogens*, it should not be breached due to related rights to the action. In case of a breach of the principle, asylum-seekers may face ill-treatment or even torture, which are prohibited by *jus cogens* norms. Therefore, states must be cautious about an

[8] Maria-Teresa Gil-Bazo 'Refugee protection under international human rights law: From non-refoulement to residence and citizenship' (2015) 34(1) Refugee Survey Quarterly 11.

[9] Penelope Mathew, 'Non-refoulment' in Cathryn Castello, Michelle Foster, Jane McAdam (eds.) *The Oxford Handbook of International Refugee Law* (1st edn, OUP 2021) 905; Jean Allain, 'The jus cogens nature of non-refoulement' (2001) 13(4) International Journal of Refugee Law 533.

[10] Ibid., Allain, 533.

allegation of a potential breach of the principle. Due to the principle's relation to *jus cogens* norms, the principle applies to everyone, regardless of asylum-seekers' conduct.[11]

Besides this scholarly debate, from the drafting of the Convention till today, the limits of the *non-refoulement* principle for host countries have been an agenda.[12] The principle applies to individuals fleeing persecution whose lives will be in danger or face ill-treatment when they return to their country.[13] However, the discussions during the drafting of the principle posed concerns for the states on two issues: how to deport individuals who are dangerous to the security of the host country and how to resolve the consequences of mass movements toward the host country.[14] The principle's provisions prohibit the State from expelling refugees/asylum seekers to territories where they will face torture, persecution, or life threats. However, the Expert Roundtable Meeting by UNHCR in 2001 concluded that the principle of human rights protection may be subjected to the considerations of public interest and national security by the State's exception to the individuals that will face torture when they are subjected to refoulement action.[15] Thus, it implies that the *non-refoulement* principle and its application to the individuals in the hosting country should not pose substantial risks to host communities' economic and social security.[16]

Although the *non-refoulement* principle is not codified in the frame of the ECHR, the ECtHR often recognized the importance of the *non-refoulement* principle.[17] The debates on ECHR and *non-refoulement* arise from the lack of explicit prohibitions for refoulement. This situation escalates the weak formulation for applying the principle under the destination State's responsibilities. The criticisms gather around facilitating proper limits of *non-refoulement* as a matter of legal reasoning to establish a sound legal basis better.[18] However, the efforts of

---

[11] See, *Sufi and Elmi v. the United Kingdom* Apps nos. 8319/07 and 11449/07 (ECtHR, 28.06.2011) para. 212. Both applicants committed various crimes in the United Kingdom, which later led to UK government's removal decisions of them. However, the Court rendered that their removal to Somalia would violate Article 3 of the Convention.

[12] Clare Frances Moran, 'Strengthening the principle of non-refoulement' (2021) 25(6) The International Journal of Human Rights 1032.

[13] Tamás Molnár, 'The principle of non-refoulement under international law: Its inception and evolution in a nutshell' (2016) 1(1) Corvinus Journal of International Affairs 51.

[14] Ibid.

[15] Sigit Riyanto, 'The Refoulement Principle and Its Relevence in the International Law System' (2009) 7 Indonesian Journal of International Law 695.

[16] Lorcán Hyde, 'The principle of non-refoulement in international law' (2016) 1 Rescriptum 29.

[17] *J. K. and Others v. Sweden* App no. 59166/12 (ECtHR, 23.08.2016) para. 74.

[18] Kathryn Greenman, 'A Castle Built on Sand? Article 3 ECHR and the Source of Risk in Non-Refoulement Obligations in International Law' (2015) 27(2) International Journal of Refugee Law 264.

ECtHR can also be found in the Court's jurisprudence. As noted by judges Ziemele, De Gaetano, Pinto de Albuquerque, and Wojtyczek in their joint separate opinions, the Court implicitly recognized the principle as a binding rule of international law in the *Hirsi Jamaa and Others v. Italy* judgment.[19] In the *M. D. and Others v. Russia* judgment, the Court reiterates three main criteria for examining applications on expulsion cases to consider whether applicants' expulsion may cause violations of Articles 2 and/or 3. The Court juxtaposed these criteria as follows:

> Firstly, it has to be considered whether an applicant has presented the national authorities with substantial grounds for believing that he faces a real risk of ill-treatment in the destination country. Secondly, the Court will enquire into whether the claim has been assessed adequately by the relevant national authorities when discharging their procedural obligations under Articles 2 and 3 of the Convention and whether their conclusions were sufficiently supported by relevant material. Lastly, having regard to all of the substantive aspects of a case and the available relevant information, the Court will assess the existence of a real risk of suffering torture or treatment incompatible with Convention standards.[20]

These criteria will be explained in detail in the rest of the part. While the *non-refoulement* principle covers the protection from a death threat, torture, or ill-treatment, ECtHR jurisprudence will be examined on torture and/or ill-treatment due to *a fortiori* relationship between the right to life and the prohibition of torture.

a. Presentation of substantial grounds for believing that applicants may face a real risk of ill-treatment.

Substantial grounds refer to the threshold the Court applies in its judgments. It means the level of plausibility or seriousness of the alleged violations. Real risk refers to the 'reasonably expectedness of violation claims.[21] In the case of claiming that individuals may face a real risk of ill-treatment because of their personal circumstances, they should be able to present their claims before appropriate national authorities. The *non-refoulement* principle causes a negative

[19] *F. G. v. Sweden* App no. 43611/11 (ECtHR, 23.03.2016), Joint Separate Opinion of Judges Ziemele, De Gaetano, Pinto De Albuquerque, and Wojtyczek, para 6.

[20] *M. D. and Others v. Russia* App nos. 71321/17 and 9 others (ECtHR, 14.09.2021) para. 91.

[21] Femke Vogelaar, 'Principles Corroborated by Practice? The Use of Country of Origin Information by the European Court of Human Rights in the Assessment of a Real Risk of a Violation of the Prohibition of Torture, Inhuman and Degrading Treatment' (2016) 18(3) European Journal of Migration and Law 302, 305.

obligation for States, which means they need to refrain from doing so. In the *M. D. and Others v. Russia* judgment, the Court said that the person seeking asylum based on personal circumstances must provide evidence of such a risk.[22] However, the Court added that due to applicants' vulnerabilities and the absolute nature of Articles 2 and 3 of the ECHR, the contracting States are under obligation to "carry out an assessment of that risk on their own motion.[23] Moreover, while making the assessment, States must consider that applicants "may plausibly be a member of a group systematically exposed to the practice of ill-treatment, and there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned.[24] For a thorough and adequate assessment before national authorities, applicants should be provided with the necessary legal assistance and access to an interpreter if required. But it should be noted that in the case of *M. D. and Others v. Russia,* although the applicants did not receive legal assistance and one of them did not have access to an interpreter during the district court proceedings, they received these services during the appeals court proceedings, and the Court found the assessment to be sufficient for this criterion.[25]

Finally, the severity of the potential harm that applicants claim to face upon expulsion must meet the minimum threshold to fall within the scope of Article 3.[26] In the *Khlaifia and Others v. Italy* judgment, the Court noted that the assessment of the severity of ill-treatment is relative and depends on various circumstances of the case, including the duration of the treatment, its physical or mental effects, and the age, sex, and health condition of the victim.[27] When evaluating the severity of the ill-treatment, the Court considers factors like the motivation and intention behind it, the circumstances in which it happened, and the degree of vulnerability of the person who experienced it.[28]

---

[22] M.D. (n 20) para. 97.

[23] Ibid.

[24] F. *G.* (n 19) paras. 126-7.

[25] *M. D.* (n 20) paras. 92-96.

[26] F. G. (n 19) para. 112.

[27] *Khlaifia and Others v. Italy* App no. 16483/ 12 (ECtHR, 15.12.2016) para. 159.

[28] Ibid., para. 160.

b. Inquiry into whether national authorities have assessed the applicants' claim adequately.

The Court noted various principles and explained how it enquires about national authorities' assessment in cases related to expulsion. The main principle during the inquiry is the principle of subsidiarity. As repeated by the Court, it does not examine the asylum applications; the Court's role is to examine whether the contracting States provide effective remedies not to expel asylum seekers arbitrarily.[29] In the *M. D. and Others v. Russia* judgment, the Court noted that "[t]he national authorities are best placed to assess not just the facts but, more particularly, the credibility of witnesses since it is they who have had an opportunity to see, hear and assess the demeanor of the individual concerned."[30] The Court's task is to enquire whether the contracting States adequately assess asylum seekers' claims before appropriate national bodies.

In the *M. D. and Others v. Russia* judgment, the Court said it "must be satisfied that the assessment made by the authorities of the Contracting State concerned is adequate and sufficient."[31] To assess the claims as adequate and sufficient, the Court noted that states should consider domestic sources as well as material collected by independent international human rights bodies, such as UNCHR, Human Rights Watch, and Amnesty International.[32]

During the assessment by national authorities, if the expulsion has not occurred yet, applications should be considered based on the *ex nunc* principle, which means in their assessment, national authorities must assess the issue based on the latest information known or should have known at the time of the expulsion.[33] The Court applies this principle in its assessments of expulsion-related cases, and the Court expects that the contracting States also apply the principle in their assessments. In the *F. G. v. Sweden* judgment, the Court noted that "full and *ex nunc* evaluation is required where it is necessary to take into account information that has come to light after the final decision by the domestic authorities was taken."[34]

---

[29] F. G. (n 19) para. 117

[30] M. D. (n 20) para. 97.

[31] Ibid.

[32] Ibid., *Hirsi Jamaa and Others v. Italy* App no. 27765/09 (ECtHR, 23.03.2012), para. 118; F. G. (n 19) para. 117; *M.S.S. v. Belgium and Greece* App no. 30696/09 (ECtHR, 21.01.2011) Concurring Opinion of Judge Villiger.

[33] *Vilvarajah and Others v. the United Kingdom* App nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87 (ECtHR, 30.10.1991) para. 108.

[34] F. G. (n 19) para. 108.

Furthermore, in the same judgment, the Court explicitly noted that if national authorities assess asylum seekers' applications based on personal circumstances without applying the *ex nunc* principle, it would violate Articles 2 and 3 of the ECHR.[35]

The burden of proof also needs to be explained. The Court indicated in its earlier judgments that "in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that […] he would be exposed to a real risk of being subjected to treatment contrary to Article 3. Where such evidence is adduced, it is for the Government to dispel any doubts about it."[36] However, in the *M. D. and Others v. Russia* judgment, the Court noted that "considering the absolute nature of the rights guaranteed under Articles 2 and 3 of the Convention states are required to assess their own motion.[37] Furthermore, in the *Salah Sheekh v. the Netherlands* judgment, the Court added that "the applicant cannot be required to establish the existence of further special distinguishing features concerning him personally in order to show that he was, and continues to be, personally at risk."[38] Therefore, state parties hold a high portion of the burden of proof in cases concerning the deportation.

c. Examination of substantial grounds for believing that applicants may face a real risk of ill-treatment before the Court.

In the *Hirsi Jamaa and Others v. Italy* judgment, the Court listed factors to examine applicants' claims that they may face a real risk of ill-treatment; these factors can be listed as follows: assessment of the issue in the light of all material before it, the general situation of the particular country, the personal circumstances of individuals, the risk may be emanated by non-state actors and the *ex nunc* principle.

In the case of *Hirsi Jamaa and Others v. Italy*, the Court assessed the situation in the light of the material delivered by the parties, and in case of necessity, the material collected *proprio motu.*[39] Moreover, the Court noted that "[t]he information provided by the parties concerned

[35] Ibid., para. 158.

[36] Sufi and Elmi (n 11) para. 214; *Saadi v. Italy* App no. 37201/06 (ECtHR, 28.02.2008) para. 129.

[37] M. D. (n 20) para. 97.

[38] *Salah Sheekh v. the Netherlands* App no. 1948/04 (ECtHR, 11.01.2007) para. 148.

[39] The case was on the expulsion of a group of asylum seekers from Libya to Italy, and the applicants claimed that in case of their expulsion to Libya, they would be at real risk of being subjected to inhuman or degrading treatment in Libya. *Hirsi Jamaa* (n 32) para. 116.

was vague and insufficient,"[40] and the Court obtained some materials *proprio motu*. This means that the Court may conduct its own research, regardless of the information provided by the parties. Besides, the Court noted that "the examination of the existence of a real risk of ill-treatment must necessarily be a rigorous one."[41] As observed in the *Hirsi Jamaa and Others v. Italy* judgment, the Court may consider reports from NGOs and international organizations to examine a particular country's situation during the assessment. As noted above, although in principle, the applicants have the burden of proof, due to the absolute nature of Articles 2 and 3 of the ECHR and the possible vulnerabilities of asylum seekers, the contracting States need to carry out the assessment on their own motion.

In consideration of the personal circumstances of the individuals, States should also consider individuals' circumstances separately from the general situation of the particular country. Although a state may be secure in general for its own citizens, ethnic or religious minorities may still be in danger. In the case of applicants claiming they are members of a group systematically exposed to ill-treatment, States must consider the possibility of violating Article 3 of the ECHR. In the *Hirsi Jamaa and Others v. Italy* judgment, the Court took into account the reports of the third-party interveners that say the applicants in the case were particularly vulnerable in Libya due to their status as asylum seekers and their background as Somalis and Eritreans; this vulnerability was exacerbated by the conditions in Libya, where migrants and asylum seekers are often subject to xenophobic and racist actions.[42]

Besides being subject to ill-treatment, other situations may cause a violation of Article 3 of the ECHR. In the case of individuals with serious health problems, in the very exceptional cases, the Court accepted individuals' claims that the receiving State might not provide appropriate treatment, which may violate Article 3 of the ECHR.[43] Another issue is in the case of individuals who live in extreme poverty conditions because of expulsion, which may cause a violation of Article 3 of the ECHR. In the *M.S.S. v. Belgium and Greece* judgment, the Court concluded that forcibly returning asylum seekers and other vulnerable individuals to countries

[40] Ibid., para. 110.

[41] Ibid., paras. 116-7.

[42] Ibid., paras. 125-128.

[43] *Paposhvili v. Belgium* App no. 41738/10 (ECtHR, 13.12.2016) para. 193. For further reading, Meltem İneli Ciğer, 'Protecting Aliens with Article 3 of the ECHR' in David Moya and Georgios Milios (eds), *Aliens before the European Court of Human Rights* (Brill | Nijhoff 2021).

where they will face extreme poverty and very poor living conditions can be considered a violation of Article 3 of the ECHR.[44]

In the assessment of the general situation of a particular country by the contracting States, the Court sets the threshold to assess the existence of a real risk of ill-treatment, which must be assessed based on facts *known or should have known*.[45] In the case of *Hirsi Jamaa and Others v. Italy,* even though the Italian Government claimed that the applicants did not request political asylum or any other form of IP during their transfer to Libya,[46] the Court noted that the situation in Libya was well-known and could be verified easily by various sources; therefore, the government "*knew or should have known that, as irregular migrants, they would be exposed in Libya to treatment in breach of the Convention and that they would not be given any kind of protection in that country*."[47]

Lastly, states also need to consider the risks that emanate from non-state actors. Of course, it must be shown that the risk is real, and the receiving State cannot protect applicants.[48] In the *M. D. and Others v. Russia* judgment, some applicants claimed that ISIS would target them due to their religion and ethnicity; therefore, the Court also considered the possibility of risk emanating from ISIS and other non-state paramilitary actors.[49] This factor needs special attention in the last chapter due to the existence of many non-state actors in Syria in the frame of current developments in the region.

To sum up, all factors to assess situations of countries and indicators of the facing a real risk of ill-treatment can be found in the *J.K. and Others v. Sweden* Grand Chamber judgment; the Chamber indicated ten general principles to apply to cases related to the *non-refoulement* and Articles 2 and 3 of the ECHR before the Court. The Grand Chamber counted out these principles as follows: (1) the general nature of obligations under Article 3, (2) the principle of *non-refoulement*, (3) general principles concerning the application of Article 3 in expulsion cases, (4) risk of ill-treatment by private groups, (5) principle of *ex nunc* evaluation of the circumstances, (6) principle of subsidiarity, (7) assessment of the existence of a real risk, (8)

---

[44] M.S.S. (n 32) para. 263.

[45] Ibid., para. 131. *See, Mamatkulov and Askarov v. Turkey* Apps nos. 46827/99 and 46951/99 (ECtHR, 04.02.2005) para. 69; F. G. (n 19) para. 115.

[46] Hirsi Jamaa (n 32) para. 96.

[47] Ibid., para. 131.

[48] Ibid., para. 119.

[49] M. D. (n 20) paras. 71-72, 105-106.

distribution of the burden of proof, (9) past ill-treatment as an indication of risk, (10) membership of a targeted group.[50]

Before concluding this chapter, in many judgments, the applicants also claimed that Article 13 of the ECHR, the right to an effective remedy, was violated during their expulsion processes. Therefore, noting the Court's understanding of what effective remedy is essential. In the *Salah Sheekh v. the Netherlands* judgment, the Court indicated that "*Article 13 requires that the remedy may prevent the execution of measures contrary to the Convention and whose effects are potentially irreversible.*"[51] This point will be revisited in the third section.

2. Syrians in Türkiye and The Narratives of Repatriation

After thoroughly examining the ECtHR jurisprudence on the *non-refoulement* principle, this section presents the recent claims regarding the current situation in Syria to allow authors to discuss the applicable conditions of SuTP repatriation by Turkish authorities. By doing so, this section forms two groups of claims. The first one is negative conditions in Syria that will prohibit the refoulement of SuTPs, whereas the second group consists of the information that may allow asserting the implementation of repatriation without breaching the *non-refoulement* principle under the ECtHR jurisprudence. Besides the refugee status defined with the geographical limitation of the 1951 Convention, conditional refugee status is given to individuals who fit in the scope of the refugee definition but flee from the events that occurred in non-European territories and to whom they seek refuge in third countries.

The other provision of the Temporary Protection Regime (TPR) covers mass migratory flows instead of individual-based evaluation. In addition to the Law on Foreigners and International Protection (LFIP), also the Temporary Protection Regulation codifies temporary protection in Turkish domestic law.[52] The LFIP Article 91 defines temporary protection as follows, "Temporary protection may be provided for foreigners who have been forced to leave their country, cannot return to the country that they have left, and have arrived at or crossed the borders of Türkiye in a mass influx situation seeking immediate and temporary protection."[53]

---

[50] J. K. (n 17) paras. 77-105.

[51] Salah Sheekh (n 38) para. 153.

[52] Temporary Protection Regulation (No: 6203, Accepted on 13.10.2014).

[53] Law on Foreigners and International Protection (No: 6458, Accepted on 04.04.2013), art 91(1). *See* Unofficial translation of the law is available via https://en.goc.gov.tr/kurumlar/en.goc/Ingilizce-kanun/Law-on-Foreigners-and-International-Protection.pdf.

Hence, temporary protection is provided by the decision of Turkish authorities, which is the President in the current legislation according to LFIP, to address such groups of mass migration who are in need of *urgent* and *temporary* international protection. In line with this system, Syrians who fled from the civil war that has been ongoing since 2011 are provided with the status of temporary protection. Therefore, according to domestic and international legislation, Syrians in Türkiye are not legally considered refugees. However, to comply with the international refugee regime, beyond their legal status, international bodies such as UNHCR,[54] the majority of research refer to them as refugees.[55]

2.1. Contradictory Narratives of Syria's Safety and Current Situation

Within the last decade, SuTPs in Türkiye have become one of the focal points of political debates within the society due to the current macroeconomic status, such as climbing inflation, unemployment levels, and currency exchange rates. Moreover, these debates widely refer to the current situation in Syria, which is claimed to be less dangerous day by day. In this sense, SuTPs' repatriation narratives have been legitimized by the excessive numbers of forced migrants in the country, claims of an unfair burden-sharing system, which implies the burden-shifting of EU countries, especially in the case of Syrians in Türkiye, within the international community and the claims of the establishment of safe zones by Turkish Government.[56] From the Syrian side, such developments are strengthening the repatriation narratives of Türkiye. Additionally, a survey report of The Day After, a Syrian NGO, shows the desire to return to Syria among SuTPs.[57]

Although the narratives are widespread among the social and political spheres of Türkiye, a scholarly legal debate has been limited to repatriation. To initiate the repatriation and align with international legislation and human rights, the most challenging issue concerns the credibility of the information on the current situation in the country of origin to determine whether it is safe to repatriate refugees. Especially in the case of Syria, it is difficult to gather

---

[55] See, the UNHCR's Situation Syria Regional Refugee Response portal that indicates SuTP numbers in Türkiye as Registered Syrian Refugees on https://data.unhcr.org/en/situations/syria/location/113 (last visit 20.03.2024).

[56] Birce Altıok & Salih Tosun, 'Understanding foreign policy strategies during migration movements: a comparative study of Iraqi and Syrian mass refugee inflows to Turkey' (2020) 21(5) Turkish Studies 684, 685.

[57] The Day After, Syrian Refugees in Turkey: Perceptions on Return to Syria (Survey Report), April 2020, 19.

updated and reliable information on the ground. Hence, the contradictory narratives on conditions in Syria are grouped into two in the remainder of this section.

The first group of claims on the conditions of Syria arise from the narratives concerning safety and security for Syrians who will return to their country of origin. The popular wisdom regarding this case prompts that a safe and secure return is not yet possible for Syrians.[58] Most of these viewpoints arise from the devastating physical and socioeconomic impacts of the last decade's civil war that demolished Syria's infrastructure, institutions, and economic activity.[59] Furthermore, the claims made by the Assad regime that there are 'definitely' terrorists among the refugees[60] are also concerning for the international community by means of political security. In addition, from the point of view of returnees, they also express their socioeconomic, political, and security concerns, which are vital for repatriation.[61]

According to the Dutch MFA's report, the civilians were subjected to arbitrary arrest and detention and forced disappearances throughout the Syrian territory, including government and opposition groups-controlled areas.[62] Also, the report of the Independent International Commission of Inquiry on the Syrian Arab Republic notes that Syria is not a safe place to return.[63] Furthermore, the Dutch MFA's report notes that in the area under the control of Syrian Democratic Forces, *"[c]hildren are also recruited for the protection units YPG and YPJ*."[64] In addition, EUAA's report notes that even though the officials of the Syrian Army are not allowed to recruit children but having some minors in the forces based on voluntary recruitment; moreover, non-state groups recruit children in their armies by force or threats,[65] which occurs as a war crime under the Geneva Conventions and the Rome Statute of the International

[58] Zeynep Şahin Mencütek, 'Governing Practices and Strategic Narratives for Syrian Refugee Returns' (2021) 34 Journal of Refugee Studies 2804, 2805.

[59] Ahmet Içduygu and Maissam Nimer, 'The Politics of Return: Exploring the Future of Syrian Refugees in Jordan, Lebanon and Turkey' (2020) 41 Third World Quarterly 415, 423.

[60] ibid.

[61] Gerasimos Tsourapas & Zeynep Şahin Mencütek 'When Do States Repatriate Refugees? Evidence from the Middle East' (2022) 8(1) Journal of Global Security Studies 1.

[62] The Ministry of Foreign Affairs of the Kingdom of the Netherlands, Country of Origin Information Report Syria (May 2022) 16-28.

[63] Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/51/45, 17.08.2022.

[64] Ibid., 33.

[65] European Union Agency for Asylum (former EOSA), Country Guidance: Syria (February 2023) 84-86, 115.

Criminal Court.[66] These also need to be read along with the *Sufi and Elmi v. the United Kingdom* judgment; the Court noted that 'in the most extreme cases' on being subjected to arbitrary violence, repatriation may cause a violation of Article 3.[67] Therefore, while making the assessment for SuTPs, Syria's situation needs to be considered in this frame.

One of the main concerns of SuTPs in Türkiye on returning to Syria is being forced to join the Syrian Army. Article 46 of the Syrian Constitution states that "[c]ompulsory military service shall be a sacred duty and is regulated by a law" for all men over the age of 18 years,"[68] up until the age of 42.[69] Military service lasts 18 to 21 months, depending on the individual's education level.[70] According to the Military Service Law of Syria, reasons for deferrals and exemptions from military service can be listed as follows: (1) being the only male child of the family, (2) suffering from serious illnesses or having disabilities, (3) people who born and/or live abroad can pay an exemption payment, and (4) being a university student up to the age of 25 is a reason for deferral.[71] As mentioned above, although the Government of Syria (GoS) issued amnesties not to prosecute people who are draft evaders and military deserters, according to the report of the European Union Agency for Asylum (EUAA, former European Asylum Support Office - EASO), these amnesties did not result in their return to Syria because they still need to complete military service as a civic responsibility.[72] The principal hesitation for not serving in the military is the fear of being deployed to the frontlines of the civil war through discriminatory practices. However, varied sources indicate that deployment to the frontlines is based on whether individuals have active fighting experience.[73] In addition, according to a report from the Danish Ministry of Immigration and Integration, the likelihood of being sent to

---

66 Respectively, Article 77(2) of the Additional Protocol I to the Geneva Conventions and Article 8(2)(b)(xxvi) of the Rome Statute.

67 Sufi and Elmi v. UK (n 11) paras. 217-218.

68 UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/34/64 (02.02.2017) para. 51.

69 European Asylum Support Office, Syria: Military Service (Country of Origin Information Report) (April 2021) 13.

70 Ibid. 12.

71 Ibid. 28-32; The Danish Ministry of Immigration and Integration, Syria - Military Service (Report based on a fact-finding mission to Istanbul and Beirut (17-25 February 2020)) (May 2022) 22-28; Immigration and Refugee Board of Canada, Syria: Compulsory military service, including age of recruitment, length of service; occasions where proof of military service status is required; whether the government can recall individuals who have already completed their compulsory military service; penalties for evasion (2008-July 2014) (13.08.2014) SYR104921.E <https://irb-cisr.gc.ca/en/country-information/rir/Pages/index.aspx?doc=455461&pls=1> (last visit 18.04.2023).

72 EUAA, Military Service (n 69) 38-40.

73 Ibid. 23; Danish Ministry of Immigration and Integration (n 71) 15.

the frontlines is not affected by a person's qualifications, religion, place of origin, or place of residence.[74] On the contrary, some sources note that people who were recruited from former opposition-held areas were deployed to the frontlines without sufficient training or no training at all.[75] Secondly, against the unproven claims on Syria's unstable features regarding politics, economy, and security, the Dutch Ministry of Foreign Affairs report on Syria indicates that Syria's affairs with regional States have started to normalize in recent years, and several States have opened their borders with Syria.[76]

Indeed, there are other security concerns in Syria, and one of them is food security. According to the World Food Programme Syria's brief in August 2021, almost 12.4 million out of approximately 20 million population are in need of humanitarian needs because of the ongoing civil war over a decade.[77] Basic needs are also hardly met in government-controlled areas due to prolonged drought and the destruction of the civil war, including access to clean water and health care.[78] At this point, the *M.S.S v. Belgium and Greece* must be mentioned. The Court noted that the case of asylum-seekers would be living in extreme poverty conditions because of expulsion, which may cause a violation of Article 3 of the ECHR. Based on the Court's conclusion in the *M.S.S. v. Belgium and Greece* judgment, forcibly returning asylum seekers and other vulnerable individuals to countries where they would face extreme poverty and very poor living conditions can be considered a violation of Article 3 of the ECHR.[79] As pointed out by Meltem İneli Ciğer, in case of finding a violation of Article 3 of the ECHR by the Court, two elements should be met: (1) to consider living conditions to be so poor that they constitute a violation of Article 3 of the ECHR when the most extreme poverty characterizes them; this means that individuals are unable to meet their most basic needs, such as access to food, proper hygiene, and a place to live, and (2) individuals must be vulnerable.[80] Therefore, the Court noted that each applicant's circumstances must be assessed individually.[81]

---

74 Ibid. Danish, 13.

75 Syria Direct, 'As losses mount in Idlib, Damascus sends conscripts from "reconciled" areas to the front' 04.03.2020. <https://syriadirect.org/as-losses-mount-in-idlib-damascus-sends-conscripts-from-reconciled-areas-to-the-front/> (last visit 13.03.2024).

76 MFA Netherlands (n 62) 10.

77 WFP Syria, Country brief, August 2021.

78 MFA Netherlands (n 62) 11-13.

79 M.S.S. (n 32) para. 263.

80 İneli Ciğer (n 3) 69.

81 Hirsi Jamaa (n 32) para. 110.

Although the earlier returnees' experiences are based on individuals' experiences, the PMM should define factors in the conditions the earlier returnees faced while conducting interviews in order to anticipate the possible obstacles that Syrian individuals may face after their return. Given the individual voluntary returns from the European Union and hosting neighboring States, Syrian individuals must apply for a security clearance in the Syrian diplomatic premises, or their relatives may apply inside Syria on their behalf.[82] After the clearance, they must fill out return or reconciliation forms, which contain questions on personal details and their political activities to determine whether they support opposition groups against the GoS. The EUAA's report on the earlier returnees states three key obstacles. The first obstacle is that the returnees have had limitations in accessing their area of origin due to the discriminatory motives of pro-government groups, such as ethnicity, religion, or politics.[83] The second obstacle is the lack of access to government services due to the lack of civil documentation and the loss of nationality. Article 21 of the Nationality Law of Syria codifies the situations in which citizens may lose their citizenship. Two paragraphs of this article need to be considered: (1) Article 21(E) states that "the person concerned has illicitly left Syria for another country, which is in a state of war with Syria," and (2) Article 21(G) states that "If the person has left the country indefinitely for settling in a non-Arab country and has been away for more than three years …"[84] As pointed out by experts, even though Türkiye is not at war with Syria, the GoS may consider and apply Article 21(E) because of the Turkish-backed opposition groups in the civil war.[85] Moreover, the GoS may also apply Article 21(G) to SuTPs in Türkiye. The last obstacle is the GoS' violations of housing, land, and property rights; the GoS issued laws and decisions to legitimize the expropriation of properties.[86]

The second group of claims to the current situation and safety of Syria for returnees indicated by various scholars that the Syrian repatriation has already started. The trending example of Syrians' voluntary and personal decision to return is their short-term visits to Syria during the religious holidays. As the Turkish Government mainly adopts the strategy of either

[82] EUAA, Syria: Situation of returnees from abroad (June 2021) 21.

[83] Ibid. 24.

[84] Syrian Arab Republic, Syrian Nationality Law, 1969, Legislative Decree 276, 24 November 1969. <https://www.refworld.org/pdfid/4d81e7b12.pdf> (last visit 15.03.2024).

[85] EUAA, Returnees (n 82) 25

[86] Ibid. 25-26.

integration or voluntary return,[87] numerous incidents have been observed in SuTPs visiting their origin countries for religious days and celebrations and their re-entrance to Türkiye.[88] The visit permits utilized by the Turkish Government were applied for the mitigation role upon Syrians' concerns for voluntary repatriation. The aim of this policy has been to allow them to observe the current situation in their countries of origin and support them in making permanent returns. Yet, the result was not what the Turkish government expected. For instance, in 2018, 194,000 SuTPs out of 254,000 who crossed the border from Türkiye to Syria for visits re-entered Türkiye.[89] Moreover, around 40,000 Syrians have returned to Syria from Türkiye after the recent earthquakes hit the country.[90] The ability of individuals under temporary protection to visit their home countries and re-enter the host country after a short period hints at the current situation in particular areas in the origin country. From this perspective, the return and *non-refoulement* principle should be re-captured.

The Dutch MFA's report indicates that, although civilians in Syria, including government and other groups-led areas, are not fully safe, they are not directly targeted by military forces, neither governmental nor opposition groups.[91] For instance, in October 2021, a bomb attack occurred in Damascus, which resulted in the deaths of 14 soldiers; this was the first lethal attack directed at military personnel to take place in the capital in approximately four years. The number of verified civilian casualties in 2021 is the lowest since the start of the civil war, with figures ranging between 1,271 and 1,309 based on various sources.[92] Moreover, the report notes that the government-controlled area was not subject to widespread civil war-related violence.[93]

The current situation in Syria regarding voluntary repatriation safely and securely is still a dilemma. The presence of ISIS, threats of the Assad regime, which is still in power, against the opposition groups, and the ongoing tensions and clashes between the regime and local or

---

87 M. Valenta et al., "Syrian Refugee Migration, Transitions in Migrant Statuses and Future Scenarios of Syrian Mobility", Refugee Survey Quarterly, 39(2), 2020, 153-176, 153.

88 Başak Yavçan, 'Turkish Experience with Refugees Returns to Syria' <https://gcris.etu.edu.tr/handle/20.500.11851/2965> (accessed 13.04.2023).

89 ibid.

90 Timour Azhari, 'Around 40,000 Syrians Return from Turkey after Quake' *Reuters* (28.02.2023) <https://www.reuters.com/world/middle-east/around-40000-syrians-return-turkey-after-quake-2023-02-28/> accessed 17 April 2023.

91 MFA Netherlands (n 62) 16-28.

92 Ibid. 14.

93 Ibid. 16.

foreign powers are the main reasons for the dilemma.[94] The Assad regime's power in the judicial wing and military[95] are still concerned for Syrians returning to their home countries.

2.2. Türkiye's Policies and Practices for Voluntary Repatriation

The repatriation or return has been a challenging topic for Turkish authorities and society. The neoliberal policies implemented in the aftermath of the Syrian civil war in 2011 as the open-door policy did not last more than several years.[96] The rising numbers of Syrians in Türkiye and the difficulty in providing sufficient, sustainable, and proper aid to them led the Turkish Government to tighten its open-door policy for further Syrian refugee flows. To reach this point, Türkiye has started to implement and follow a voluntary repatriation policy regarding Syrians, and that is how the narratives of return were initiated. Türkiye has been using strong narratives regarding Syrians' voluntary repatriation and military intervention to create a stable and safe zone to maintain the return phase of millions of Syrians in the country.[97] There have been several actors in creating refugee repatriation discussions, and pro-government NGOs and a few municipalities have utilized voluntary repatriation practices, yet they were small-scale.[98] The political and social tensions against Syrians in Türkiye, especially in neighborhoods, have been reported in several documents.[99] After 2016, the sparked debates about Syrian refugees in the social and political spheres of the country have led the Government to utter the return narrative.

Türkiye's prolonged refugee hosting in the case of SuTPs has been underlined in the existing literature. In line with this, the country has given priority to policies regarding the apprehension, detention, and return of undocumented immigrants under the security approach.[100] The growing number of SuTPs has triggered public and political attention on national security, which may lead to the securitization of immigrants via linking them to terrorism or illegal activities, resulting in arguments and narratives about return and

94 İçduygu and Nimer (n 59) 423.

95 Ihlamur-Öner (n 58) 300.

96 Başak Kale, 'The Limits of an International Burden-Sharing Approach: The Syrian Refugee Protection Crisis and Its Consequences on Turkey's Refugee Policy' (2017) 22 PERCEPTIONS: Journal of International Affairs 55.

97 Şahin Mencütek (n 58) 2805.

98 Ibid. 2812.

99 İçduygu and Nimer (n 59) 420.

100 Zeynep Şahin-Mencütek, 'The Institutionalization of "Voluntary" Returns in Turkey' (2022) 5 Migration and Society 43, 48.

repatriation.[101] Yet, there is no agreement between Türkiye and Syria regarding facilitating a repatriation policy or any unilateral international organization. Hence, mainly voluntary or individual-based decisions have led to the return migration from Türkiye to Syria, as in the case of SuTPs.[102]

In recent years, Turkish authorities have attempted to take concrete steps to initiate the repatriation of SuTPs. Authorities have implemented numerous policies and followed legal and bureaucratic policies to initiate and maintain the repatriation. These steps include bureaucratic and legal actions taken by the Presidency of Migration Management (PMM) as the main administrative body of Türkiye and over-border military operations by the Turkish Army in Syria to create safe zones for returnees.[103] As such concrete actions, the Turkish Army conducted Operation Euphrates Shield (2016–2017), Operation Olive Branch (2018), and Peace Spring Operation (2019) in recent years to claim the security and safety of Northern Syria for returnees and prevent any kind of Kurdish *de facto* state near the Turkish borders.[104]

Voluntary repatriation has become one key policy of the EU, UNHCR, and other intergovernmental actors, international organizations, or such governments as Türkiye.[105] On the one hand, the return of the refugees in a prolonged situation is the desire of host countries for several reasons, including political and social backlashes or adverse economic impacts. On the other hand, refugees' conditions should be considered before repatriation as they may still have security concerns in their home countries.[106] Such a recent case, heard by the ECtHR, *Akkad v. Turkey*,[107] reflects a serious example of understanding of the Court in

[101] See, Murat Erdoğan, '"Securitization from Society" and "Social Acceptance": Political Party-Based Approaches in Turkey to Syrian Refugees' (2020) 17 Uluslararası İlişkiler 68.

[102] Şahin-Mencütek and Tsourapas (n 61).

[103] Suna Gülfer Ihlamur-Öner, 'The Global Politics of Refugee Protection and Return: The Case of the Syrian Refugees' in Eva Kassoti and Narin Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (TMC Asser Press 2022) 291.

[104] Şahin-Mencütek and Tsourapas (n 61). See, The Turkish MFA, 'Article by H.E. Mr. Mevlüt Çavuşoğlu published in Foreign Policy titled "The Meaning of Operation Olive Branch" (Press Release) (5 April 2018) <https://www.mfa.gov.tr/article-by-h_e_-mr_-mevlut-cavusoglu_-the-minister-of-foreign-affairs-of-turkey-the-_meaning_-of-operation-olive-branch.en.mfa> (last visit 18.03.2024). See also, Fatima Mashi, Sofie Hamdi Icon and Mohammad Salman, ''Operation Olive Branch' in Syria's Afrin District: towards a new interpretation of the right of self-defence?' (2022) 9(2) Journal on the Use of Force and International Law 324.

[105] Ibid. 290; Şahin-Mencütek (n 107) 43.

[106] Esra Yılmaz Eren, 'Is Temporary Protection Eternal? The Future of Temporary Protection Status of Syrians in Turkey' (2019) 9 Border Crossing 125, 131.

[107] ECtHR, *Akkad v. Turkey*, Judgment, Second Section, Appl. No.1557/19, 21 Jun. 2022. P.s. The judgment is rendered in French; therefore, English version of the Press Release on the judgment and the Istanbul Bar Association's translation of the judgment were used.

deportation/repatriation cases; therefore, it concludes the false applications that may breach the *non-refoulement* principle. In this case, the Court concluded that Articles 3, 5, and 13 of the Convention were violated and found two violations under Article 3. Firstly, Akkad, who was deported from Turkey to Syria in 2018, faced a risk of torture or ill-treatment due to the absence of any authority in the conflict zone of Aleppo, where he was deported, and the fact that it was an active war zone at the time of deportation.[108] The Court also noted that Turkish authorities did not properly assess the dangers that Akkad may have faced in Syria.[109] Secondly, the Court considered Akkad was handcuffed during the approximately 20-hour bus journey from Edirne to Hatay, which was a violation of Article 3 because of degrading treatment.[110] Furthermore, the Court found the violation of Article 13 in conjunction with Article 3 due to the following reasons: the absence of a UNHCR or NGO representative when Akkad was asked to sign a voluntary return form, the lack of a translator during this process, the failure to provide Akkad with a copy of the form, the lack of explanation of the deportation procedure, and the failure to inform Akkad of his legal rights to challenge the decision.[111] Lastly, the Court found a violation of Article 5 because Akkad was told that he would be taken to a refugee camp in Gaziantep along with other individuals on the bus; however, the actual process was not explained to him.[112] Therefore, the Court found that Akkad's rights under Article 5 were violated due to the failure to formally record his deportation, failure to notify him of the process, failure to inform him of his legal right to challenge the decision, and the denial of his right to access legal remedies.

Could we claim that the aligning interests between European countries and Türkiye to Syrians' repatriation[113] have a point? The conditions for the repatriation of Syrians capture a similar frame, with diverging results in other countries, especially Europe. For instance, Germany has used arguments against Syrians who have refugee status in Germany and visit Syria, especially for holidays, to *deport* them. The German Interior Minister Horst Seehofer reported this to Bild: "Anyone who regularly goes to Syria for a holiday as a Syrian refugee cannot seriously complain about being persecuted there. We have to strip him of his refugee

[108] *Ibid*., para. 72.

[109] *Ibid*., para. 74.

[110] *Ibid*., paras. 110-115.

[111] *Ibid*., paras. 82-92.

[112] *Ibid*., paras. 104-105.

[113] Sinem Adar, 'Repatriation to Turkey's "Safe Zone" in Northeast Syria: Ankara's Goals and European Concerns' (Stiftung Wissenschaft und Politik (SWP), German Institute for International and Security Affairs 2020) SWP Comments 1/2020 <https://econpapers.repec.org/paper/zbwswpcom/12020.htm> (last visit13.04.2023).

status."[114] In another example, the Danish Immigration Service announced Damascus and Rif Damascus as safe areas for returns in 2019 and added Tartous and Latakia to the list in March 2023.[115] Therefore, Denmark has made it possible for Syrian refugees from those areas to lose their temporary protection status and be forced into repatriation.[116] In accordance with these arguments and applications by various governments, readers should think critically about the *non-refoulement* principle and its implications or implementation process. The *eternality* of temporary protection status and the irrefutable nature of *non-refoulement* creates a dilemma for hosting countries in terms of economic, social, and political manners. Türkiye, as the world's leading refugee hosting country for at least a decade, is now explicitly seeking a safe and secure solution for both SuTPs and the host society.

Ultimately, this section shows the Turkish government's intention regarding the repatriation of SuTPs. The narrative building policy, extraterritorial military operations to establish safe zones, and visit permits to promote voluntary return have been general applications by the Turkish authorities. This section has also underlined the practices implemented by Germany and Denmark for comparison. Overall, this section attempted to prompt the complex question: Is it possible to safely and securely return to Syria? While the vast majority of the existing literature suggests that there is no such proof for safety in Syria, the safe zone claims by various countries are also on the table. In this case, it is impossible to directly and easily reject the idea that particular areas in Syria are not yet safe for return for at least two reasons. Firstly, such military operations held by the Turkish Army have been used by Turkish authorities to establish safe and secure zones for voluntary repatriation. Secondly, the case of Syrians visiting their home countries and re-entering Türkiye after a short period might be asserted as evidence of the possibility of relative safety in Syria.

3. Discussion: The Breach of the *non-refoulement* or the Humanitarian Solution for All Parties?

[114] Sputnik International, 'German Interior Minister Threatens to Deport Refugees Who Spend Holidays in Embattled Homeland' (*Sputnik International*) <https://sputnikglobe.com/20190818/german-minister-deport-refugees-holidays-1076580080.html> (last visit 13.03.2024).

[115] Human Rights Watch, 'Syrian Refugees in Denmark at Risk of Forced Return' (13.03.2023) <https://www.hrw.org/news/2023/03/13/syrian-refugees-denmark-risk-forced-return> (last visit 13.03.2024).

[116] Ibid.

The International Protection Regime (IPR) and the subsidiary protection, which is a secondary form of protection, allow persons to flee their home countries under certain conditions that severely threaten their right to live in a free, liberated, safe, and secure environment. The universal human rights acceptance to flee from one's home country and seek asylum in another country for such threats is a guiding principle in international law. Yet, the provision of this principle indicates an urgent action in emergencies to provide shelter to those who are in need of protection. The first dilemma occurs here: When does the urgency to provide IP end? On the one hand, we have the human rights notion and the guiding principle of *non-refoulement*, whilst, on the other hand, we also aim for the sustainability of IP for hosting countries by means of economic, social, and political tensions.

The case of Türkiye poses a unique and rare actuality as multi-level narratives and definitions have been used to refer to Syrians in the country. As a neighboring country, Türkiye had opened its borders to Syrians, who fled from the civil war that started in 2011. At the beginning of the flow, Türkiye desired Syrians to reside temporarily and in the short term.[117] Hence, the social and political perceptions regarding Syrian migration flows were based on *temporary guest hosting.* However, then, the initial social narrative of *guests* regarding Syrians transformed into the political field via religious terms to justify the Government's responsibility to protect them for an extended period: *ensar* and *muhajir*.[118] In addition to these frameworks, the legal status of Syrians was determined as *SuTPs.*

Besides international documents, the LFIP also codifies the *non-refoulement* principle in Article 4, which denotes, "No one within the scope of this of this Law 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." The scope of the FLIP Article 4 is more comprehensive than Article 33 of the Convention. The exact scope is also shared by the TPR Article 4. Additionally, Article 55 of the LFIP lists exceptions for the removal of decisions, as follows: "when there are serious indications to believe that they shall be subjected to the death penalty, torture, inhuman or degrading treatment or punishment in the

[117] Osman Bahadır Dinçer, Vittoria Federici, Elizabeth Ferris, Sema Karaca, Kemal Kirişci, and Elif Özmenek Çarmıklı, 'Turkey and Syrian Refugees: The Limits of Hospitality' International Strategic Research Organiaztion (USAK) (2013) 32.

[118] Murat Erdoğan, *Syrian Barometer 2020: A Framework for Achieving Social Cohesion with Syrians in Turkey* (Eğiten Book Publishing 2022) 213. Ensar and Muhajir refer to the religious definition of immigrant and host community in Islamic culture. Precisely, Ensar means the host community whereas.

country to which they shall be returned to; who would face risk due to serious health condition, age or, pregnancy in case of travel; who would not be able to receive treatment in the country to which they shall be returned while undergoing treatment for a life-threatening health condition."

The legal framework and ECtHR jurisprudence regarding refugees' repatriation discussed above have led to the critical search for possible solutions for refugee repatriation without breaching the *jus cogens non-refoulement* principle. As mentioned earlier, the sustainability of the IPR is crucial for both those who need protection from the international community and the hosting countries. In this sense, it is also vital to maintain social cohesion and hospitality between two parties as refugees and host communities. Despite the uprising of far-right parties and their securitization approach toward SuTPs in Türkiye, Turkish society has also been living in the country's harshest economic and political conditions in recent years. Under these circumstances, the hosting countries' urge to initiate refugee returns should be addressed.

The ability of SuTPs to visit Syria and re-enter Türkiye after a brief period of stay in their home countries, the number of SuTPs returned to Syria after the February 2023 earthquakes, and the other countries' applications such as Germany and Denmark regarding returns have triggered Türkiye's debate about the safe and secure return of SuTPs to Syria. The Turkish Government's efforts to establish safe zones in Northern Syria through cross-border military operations and construction projects for a humane life of returnees in Syria should be evaluated from the lens of Türkiye's attempt to initiate repatriation. Hosting SuTPs for more than a decade, overall, is an understandable policy decision from economic, political, and social means to maintain the safe and secure return of SuTPs in Türkiye. The failed international burden-sharing approach in the international refugee regime and the uneven responsibility, especially on neighboring countries in such cases, have been consistently underlined in the relevant literature.[119] Given that, the twofold feature of refugee hosting must be analyzed: the responsibility to give shelter to those in need, the burden on host countries for extended hosting periods, and the coercive impacts of a large number of refugee stock.

Under this unjust process of refugee hosting that excessively creates a burden on neighboring countries, host countries and communities should also have their voices. Efforts to

[119] Eiko Thielemann, 'Why Refugee Burden-Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU' (2018) 56 JCMS: Journal of Common Market Studies 63; Frederik R Lybaek-Jensen, 'Burden-Sharing or Burden-Shifting: Analyzing International Cooperation on the EU-Turkey Statement and Its Implications for Refugee Protection' (Master's Thesis, Aalborg University 2019) <http://rgdoi.net/10.13140/RG.2.2.14965.32484> (last visit 17.03.2024; Kale (n 95).

maintain safe zones in the conflict areas, preparing the conditions for safe and secure return, and assisting the repatriation process are considered primary steps for refugee returns. To do so, neighboring countries should have a right to claim the safe return to the refugees' country of origin. Unless there is a consensus on this approach, countries will attempt to externalize migration management and prevention applications or be economically or socially destabilized due to the hospitality burden.

In the case of Türkiye, the Presidency of Migration Management (PMM) was established by enacting the LFIP in 2013 to obtain managerial responsibility for voluntary and involuntary migration-related issues. Therefore, in the case of a repatriation policy concerning SuTPs, the PMM would play a pivotal role. The organizational capacity of the PMM has increased over the years as it has spread all over the country with its institutional framework. In every city, there are Provincial PMM offices, and metropolitan areas have more offices. The quality and expertise of the PMM staff are also notable. Under the legal framework and duties, the PMM has sufficient resources, facilities, and specialized staff to interview foreigners. LFIP Article 75 notes that the PMM needs to conduct in-person interviews to assess international protection applications. Hence, the repatriation process of SuTPs could be enhanced under the PMM structure. To do so, the PMM needs to conduct interviews with each Syrian before making the decision for their return. In these interviews, the PMM needs to assess whether Syrians have legitimate fears of persecution based on their minority status or other factors, e.g., they can be religiously, politically, or ethnically minority in Syria. In case of necessity, the PMM needs to provide an officially registered translator. Furthermore, the PMM is an accredited institution that has the authority to cooperate with other international organizations, governments, NGOs, or INGOs, according to LFIP Article 92. An example of this might be the International Organization for Migration (IOM), the INGO, which has been organizing voluntary returns.[120] Additionally, the United Nations High Commissioner for Refugees (UNHCR) might be another durable option to initiate a well-organized and planned repatriation process.

During the interviews, the PMM must consider people with serious health problems. In the leading judgment of the ECtHR, *Paposhvili v. Belgium*, the applicant claimed that he would not be able to access adequate treatment for his last stage of leukemia in Georgia, which would cause the violation of Article 3 of the ECHR.[121] During its examination of the case, the Court

[120] Azadeh Dastyari and Asher Hirsch, 'The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy' (2019) 19 Human Rights Law Review 435, 437.

[121] Paposhvili (n 44) paras. 139-140.

noted that the returning State should consider the situation of the receiving State using general sources, such as the World Health Organization (WHO) or well-known NGOs; moreover, applicants' personal health conditions before removal and possible effects of the removal on their health conditions should be considered as well.[122] Furthermore, the returning State should also take into account that even though the receiving State may have sufficient means to provide treatment, applicants should actually have access to the health system and facilities; this consideration should cover the "cost of medication and treatment, the existence of a social and family network, and the distance to be traveled in order to have access to the required care."[123] The Court also noted that if there are serious doubts concerning the impact of the removal on the applicant, the returning State must obtain assurances from the receiving State.[124] Consequently, the PMM must consider those who claim to have serious health problems, and they may not be able to access treatment in Syria. While considering the Syrian health system's condition, the PMM can use reports from WHO, ICRC, and reputable NGOs. Besides, contrary to the ECtHR's threshold on the examination of the violation of the *non-refoulement* principle on the removal of people with illnesses, the PMM also needs to consider Syria's health system's condition post-civil war. After conducting a thorough examination, if the PMM considers that a person may not be able to access treatment in Syria, it should not render a decision to return to Syria, which would violate the *non-refoulement* principle. Lastly, people who remain in the country should be able to continue their treatment before consideration of their removal; in contrast, having no option to leave because of the lack of treatment would be a *de facto* enforced departure, which would violate the *non-refoulement* principle.[125]

There are also two main groups of people who cannot be deported or are vulnerable to these processes. The first one is elderly individuals and other vulnerable groups, such as persons with disabilities, single women, children, and LGBTQI+ individuals . As of April 6, 2023, the number of people above 70 exceeds forty thousand, according to the PMM's official statistics.[126] These individuals require special attention due to their fragility based on their age. Besides, the above considerations should be applied when they need treatment. The second group consists of people who cannot be extradited or deported, including those who hold

[122] Ibid. paras. 187-188.

[123] Ibid. para. 190.

[124] Ibid. para. 191.

[125] Dastyari and Hirsch (n 117) 459.

[126] The PMM, Distrubition by age and gender of registred Syrian refugees recorded by taking biometic data. <https://en.goc.gov.tr/temporary-protection27> (last visit 17.04.2023).

Turkish citizenship, and those who acquired it through the naturalization process. Article 23(5) of the Turkish Constitution clearly states that "Citizens shall not be deported or deprived of their right of entry into the homeland." As per Article 23(5) of the Turkish Constitution, citizens are assured that they cannot be deported or extradited and have the right to enter Turkish territory. However, in case of cancellation of citizenship status by a court decision following a fair trial process, their repatriations can be considered. Apart from these groups, Article 55 of the FLIP lists other groups that cannot be issued removal decisions.[127]

Although an effective remedy may not need to be a judicial authority,[128] SuTPs will have the right to appeal the PMM's decision on removal before administrative courts. They can appeal the decision in seven days before the administrative courts. The administrative courts must decide in 15 days and have the power to suspend removal decisions of the PMM. Besides, Article 53(c) of the LFIP ensures that Syrian individuals have the right to stay in Türkiye until the appeal proceedings are completed. The administrative courts' decisions are final. However, Syrian individuals have a right to bring those judgments before the Turkish Constitutional Court (TCC) as an individual complaint to claim that their rights are violated, which is derived from the Turkish Constitution and the ECHR.[129] Although an individual complaint may not cause an automatic suspensive effect on the removal decision, the TCC may decide to suspend it upon the individual's request or *ex officio.*[130] Moreover, as the TCC noted in the Y.T. application, individuals can request legal aid when they are not able "to afford the litigation process without suffering a significant financial burden."[131] Lastly, considering the importance and complexity of the matter, the TCC may render a pilot judgment to set the principles to guide the PMM and administrative courts according to Article 75 of the Internal Regulations of the Court. Besides, considering Article 13 with Articles 2 and 3 of the Convention, the Court noted that an effective remedy requires a close, independent, and rigorous scrutinization of any allegation of existing

[127] See, 5-6.

[128] Hirsi Jamaa (n 32) paras. 197-200.

[129] Article 45(1) of the Law on Constitutional Court says that "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."

[130] Meltem İneli Ciğer, 'Protecting Syrians in Turkey: A legal analysis' (2017) 29(4) International Journal of Refugee Law 555, 573.

[131] Y.T. Application App No: 2016/22418 (Turkish Constitutional Court, 01.11.2016) para. 37.

a real risk of ill-treatment in return.[132] Further, it requires that the concerned person should have access to a remedy that would have an automatic suspensive effect on removal decisions.[133]

In summary, the repatriation process is vastly complex and involves many obstacles that must be considered for safe completion. The PMM would play a central role during the process, including conducting interviews with every SuTP to clarify their individual conditions, including their health conditions, or belonging to a minority group that may be subjected to discriminatory treatments. During the interviews, the PMM should provide legal assistance and translation for those who need it. As noted in the Akkad judgment, the means of repatriation also might cause a violation of the Convention; therefore, the repatriation means and process should not be degrading or inhumane. In addition, interviews should be conducted effectively to provide the necessary information to SuTPs. Moreover, the PMM should cooperate with IOs, NGOs, and INGOs to achieve fair burden-sharing and provide transparent processes. Further, the Turkish government and international community should establish a means of communication with the GoS to ensure the safe repatriation of SuTPs and monitor their conditions after the process.[134]

CONCLUSION

This research explores whether it is possible to maintain a safe and secure return of SuTPs to Syria without breaching international law, particularly the *jus cogens* norm of the *non-refoulement* principle. To achieve this end, the paper has investigated the ECtHR jurisprudence and applications to the *non-refoulement* principle, respectively. After a comprehensive understanding of the *non-refoulement* principle and its nexus with ECtHR jurisprudence, the possible scenarios for SuTPs' repatriation from Türkiye and the limits of the *non-refoulement* principle have been discussed. Various parties' claims regarding Syria's safety for returns and other countries' applications have been scrutinized. Ultimately, we enhance the perspective that

[132] M.S.S. (n 32) para. 293.

[133] Ibid.

[134] As noted in the EUAA's report, the GoS organized an international conference to discuss Syrians' return to Syria in November 2020 in Damascus. The GoS invited the EU, several States, and international organizations, including UNHCR. The EU, several States, and UNHCR boycotted the event and did not participate in it. Although the EU and some States' non-participation decision to the event could be accepted as a political decision, as a non-political international organization, UNHCR should have participated in this event; it needs to play an active role in future as a leading organization. See, EUAA, Returnees (n 82) 11.

the repatriation of persons under IP is strictly regulated and monitored by international law, and any violation of that legal framework could put their lives in danger.

The situation in Türkiye is unique for international migration and refugee law research. Indeed, the international legal framework is expected to be well-designed, but there are still gaps in applying international refugee law and regulations. The World's leading refugee-hosting country has, obviously, faced problems and obstacles during the last decade, including an uneven burden-sharing approach and the complexity of the legal status of Syrians in Türkiye. The proximity between Türkiye and Syria has made Türkiye the first and most effective option to flee. Piling numbers of Syrians in Türkiye has, on the one hand, triggered social and political tensions in the country over the years. Especially the deepening economic and political crises have led to societal backlashes against the Syrian community in Türkiye. On the other hand, the cross-border military operations held by the Turkish Army and Syrians' visits to their home country during holidays have made the situation in Syria debatable for public opinion in Türkiye. Despite these claims, at least partial safety in Syria is not sufficient for initiating the repatriation process of persons under IPR without breaching the *non-refoulement* principle.

Safety is a multi-dimensional concept that covers food security, health services, economic security, environmental security, political security, legal security, and civil security. Unless one reaches complete safety regarding these components, legally, it is impossible to claim a region or country as a safe zone, which will provide the base for legal repatriation before international law. Hence, we cannot debate legal repatriation or return by ignoring international cooperation, which will convince the international community. The failed international regime of burden-sharing regarding refugee hosting has obviously hit Türkiye by means of economy and politics. Under these circumstances, although it is understandable to implement or initiate policies for repatriation, compliance with international law is not a *should* but a *must*.

In this line, what should be done for refugees and host countries needs to be argued. The results of this research show that a repatriation policy would depend on international cooperation. Hence, repatriation is not perceived as a process but as a well-designed policy. The policy should focus on international cooperation for several reasons. Firstly, international cooperation is the key factor for convincing the audience as the international community of a safe and secure return. Unfortunately, policies only implemented by host countries lack credibility with other countries. Secondly, the failed burden-sharing implementation can only be resolved by international cooperation. Thirdly, it is essential to observe and monitor the returnees' situations in the country of origin after repatriation, not only to maintain a safe and

secure return. There should be an international independent body to monitor the possible human rights violations of returnees after their arrival to their country of origin. All these steps, as mentioned above, require international cooperation. However, there are two more points for the legal and well-designed repatriation policy: cooperation with the country of origin's legal Government and hearing the voice of regional actors such as neighboring host countries. In the case of SuTPs in Türkiye and their legal repatriation to Syria without crossing the limits of the *non-refoulement* principle, Türkiye should take the following steps: i) rather than single-party military operations, Türkiye should initiate and lead joint military operations in Syria to achieve greater safe zones for SuTPs safety, ii) the legal government of Syria, which is Bashar Al-Assad in this case, should be taken into consideration for official negotiations to compromise for a safe and secure return of SuTPs, iii) an international body should be established in Syria to observe and monitor the status of returnees, iv) regional actors' voices should be carefully taken into consideration for further implementations, and lastly, all of these steps should be taken in an international environment to acknowledge and convince international community for the purest strategy of repatriation. Furthermore, as a necessity of international peace, humanitarian aid should be provided to Syrians who returned to their home country, sanctions should be lifted, and international affairs should be normalized. Only after these steps are taken will it be possible to legally initiate a repatriation policy by Türkiye without forcing the limits of the application of the *non-refoulement* principle.

Ultimately, this paper has applied ECtHR jurisprudence over the application of the *non-refoulement* principle in the case of SuTPs in Türkiye and their repatriation. We, therefore, have revealed the necessary steps for the legal repatriation or return of Syrians. Future research may focus on other perspectives and jurisprudence of other bodies in the case of SuTP repatriation. Besides, we believe the host countries should be able to call on the international community for durable solutions to extended periods of refugee hosting, especially under the failed burden-sharing system.

BIBLIOGRAPHY

Primary Sources

Akkad v. Turkey, App no: 1557/19 (ECtHR, 21.06.2022)

F. G. v. Sweden App no. 43611/11 (ECtHR, 23.03.2016)

Hirsi Jamaa and Others v. Italy App no. 27765/09 (ECtHR, 23.03.2012)

J. K. and Others v. Sweden App no. 59166/12 (ECtHR, 23.08.2016)

Khlaifia and Others v. Italy App no. 16483/ 12 (ECtHR, 15.12.2016)

Law on Foreigners and International Protection (No: 6458, Accepted on 04.04.2013),

M. D. and Others v. Russia App nos. 71321/17 and 9 others (ECtHR,14.09.2021)

M. S. S. v. Belgium and Greece App no. 30696/09 (ECtHR, 21.01.2011)

Mamatkulov and Askarov v. Turkey Apps nos. 46827/99 and 46951/99 (ECtHR, 04.02.2005)

Paposhvili v. Belgium App no. 41738/10 (ECtHR, 13.12.2016)

Saadi v. Italy App no. 37201/06 (ECtHR, 28.02.2008)

Salah Sheekh v. the Netherlands App no. 1948/04 (ECtHR, 11.01.2007)

Sufi and Elmi v. the United Kingdom Apps nos. 8319/07 and 11449/07 (ECtHR, 28.06.2011)

Temporary Protection Regulation (No: 6203, Accepted on 13.10.2014).

Vilvarajah and Others v. the United Kingdom App nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87 (ECtHR, 30.10.1991)

Y.T. Application App No: 2016/22418 (Turkish Constitutional Court, 01.11.2016)

Syrian Nationality Law (Syrian Arab Republic), Legislative Decree 276, 24 November 1969.

Secondary Sources

'UN Praises 'Potential' of Syria Prisoner Amnesty' Voice of America, 22.05.2022, https://www.voanews.com/a/un-praises-potential-of-syria-prisoner-amnesty/6584336.html (last visit 15.03.2024).

Adar S, 'Repatriation to Turkey's "Safe Zone" in Northeast Syria: Ankara's Goals and European Concerns' (Stiftung Wissenschaft und Politik (SWP), German Institute for International and Security Affairs 2020) SWP Comments 1/2020 <https://econpapers.repec.org/paper/zbwswpcom/12020.htm>.

Allain J, 'The jus cogens nature of non-refoulement' (2001) 13(4) International Journal of Refugee Law 533.

Altıok B and Tosun S, 'Understanding foreign policy strategies during migration movements: a comparative study of Iraqi and Syrian mass refugee inflows to Turkey' (2020) 21(5) Turkish Studies, 684.

Azhari T, 'Around 40,000 Syrians Return from Turkey after Quake' Reuters (28.02.2023) <https://www.reuters.com/world/middle-east/around-40000-syrians-return-turkey-after-quake-2023-02-28/>.

Dastyari A and Hirsch A, 'The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy' (2019) 19(3) Human Rights Law Review 435.

Dinçer OB, Vittoria Federici, Elizabeth Ferris, Sema Karaca, Kemal Kirişci, and Elif Özmenek Çarmıklı, 'Turkey and Syrian Refugees: The Limits of Hospitality' International Strategic Research Organization (USAK) 2013.

Erdoğan M, '"Securitization from Society" and "Social Acceptance": Political Party-Based Approaches in Turkey to Syrian Refugees' (2020) 17 Uluslararası İlişkiler 68.

Erdoğan M, Syrian Barometer 2020: A Framework for Achieving Social Cohesion with Syrians in Turkey (Eğiten Book Publishing 2022).

EUAA, Syria: Situation of returnees from abroad, June 2021.

European Asylum Support Office, Syria: Military Service (Country of Origin Information Report) April 2021.

European Union Agency for Asylum (former EOSA), Country Guidance: Syria, February 2023.

Gil-Bazo MT, 'Refugee protection under international human rights law: From non-refoulement to residence and citizenship' (2015) 34(1) Refugee Survey Quarterly 11.

Greenman K, 'A Castle Built on Sand? Article 3 ECHR and the Source of Risk in Non-Refoulement Obligations in International Law' (2015) 27(2) International Journal of Refugee Law 264.

Hathaway JC, 'The Meaning of Repatriation' (1997) 9(4) International Journal of Refugee Law 551.

Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/51/45, 17.08.2022.

Human Rights Watch, 'Syrian Refugees in Denmark at Risk of Forced Return' <https://www.hrw.org/news/2023/03/13/syrian-refugees-denmark-risk-forced-return> accessed 13 April 2023.

Hyde L, 'The principle of non-refoulement in international law' (2016) 1 Rescriptum 29.

İçduygu A and Nimer M, 'The Politics of Return: Exploring the Future of Syrian Refugees in Jordan, Lebanon and Turkey' (2020) 41(3) Third World Quarterly 415.

Ihlamur-Öner SG, 'The Global Politics of Refugee Protection and Return: The Case of the Syrian Refugees' in Eva Kassoti & Narin Idriz (eds) *The Informalization of the EU's External Action in the Field of Migration and Asylum*. (1st edn, T.M.C. Asser Press 2022) 291-315.

Immigration and Refugee Board of Canada, Syria: Compulsory military service, including age of recruitment, length of service; occasions where proof of military service status is required; whether the government can recall individuals who have already completed their compulsory military service; penalties for evasion (2008-July 2014), 13.08.2014, SYR104921.E.

İneli Ciğer M, 'Protecting Syrians in Turkey: A legal analysis' (2017) 29(4) International Journal of Refugee Law 555.

İneli-Ciğer M, *Temporary Protection in Law and Practice* (1st edn, Brill- Nijhoff 2017).

Kale B, 'The Limits of an International Burden-Sharing Approach: The Syrian Refugee Protection Crisis and Its Consequences on Turkey's Refugee Policy' (2017) 22(4) PERCEPTIONS: Journal of International Affairs 55.

Kırdım ŞE and Demirkol A, 'Uluslararası İnsan Hakları Hukukunun Bir Kaynağı Olarak Uluslararası Örf ve Âdet Hukuku' (2021) 25 Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi 379.

Mashi F, Hamdi Icon S and Salman M, ''Operation Olive Branch' in Syria's Afrin District: towards a new interpretation of the right of self-defence?' (2022) 9(2) Journal on the Use of Force and International Law 324.

Molnár T, 'The principle of non-refoulement under international law: Its inception and evolution in a nutshell' (2016) 1(1) Corvinus Journal of International Affairs 51.

Moran CF, 'Strengthening the principle of non-refoulement' (2021) 25(6) The International Journal of Human Rights 1032.

Özdan S, Human Rights Recognised as Jus Cogens (1st edn, Palgrave MacMillan 2022) 47.

Riyanto S, 'The Refoulement Principle and Its Relevence in the International Law System.' (2009) 7 Indonesian Journal of International Law 695.

Şahin Mencütek Z, 'Governing Practices and Strategic Narratives for Syrian Refugee Returns' (2021) 34(3) Journal of Refugee Studies 2804.

Şahin Mencütek Z, 'The Geopolitics of Returns: Geopolitical Reasoning and Space-Making in Turkey's Repatriation Regime' (2023) 28(3) Geopolitics 1079.

Şahin Mencütek Z, 'The Institutionalization of "Voluntary" Returns in Turkey' (2022) 5(1) Migration and Society 43.

Sputnik International, 'German Interior Minister Threatens to Deport Refugees Who Spend Holidays in Embattled Homeland' (Sputnik International) <https://sputnikglobe.com/20190818/german-minister-deport-refugees-holidays-1076580080.html>.

Stein BN, 'Refugee Repatriation, Return, and Refoulement During Conflict' (USAID Conference Promoting Democracy, Human Rights, and Reintegration in Post-conflict Societies, 1997) <https://pdf.usaid.gov/pdf_docs/pnacd092.pdf> 29 April 2024.

Syria Direct, 'As losses mount in Idlib, Damascus sends conscripts from "reconciled" areas to the front' 04.03.2020.

The Danish Ministry of Immigration and Integration, Syria - Military Service (Report based on a fact-finding mission to Istanbul and Beirut (17-25 February 2020)), May 2022.

The Day After, Syrian Refugees in Turkey: Perceptions on Return to Syria (Survey Report), April 2020.

The Ministry of Foreign Affairs of the Kingdom of the Netherlands, Country of Origin Information Report Syria, May 2022.

The Turkish MFA, 'Article by H.E. Mr. Mevlüt Çavuşoğlu published in Foreign Policy titled "The Meaning of Operation Olive Branch" (Press Release) (5 April 2018) <https://www.mfa.gov.tr/article-by-h_e_-mr_-mevlut-cavusoglu_-the-minister-of-foreign-affairs-of-turkey-the-_meaning_-of-operation-olive-branch.en.mfa> (last visited 18.03.2024)

Thielemann E, 'Why Refugee Burden-Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU' (2017) 56(1) Journal of Common Market Studies 63.

Tsourapas G and Şahin Mencütek Z, 'When Do States Repatriate Refugees? Evidence from the Middle East' (2022) 8(1) Journal of Global Security Studies 1.

UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/34/64, 02.02.2017.

Valenta M, Jakobsen J, Župarić-Iljić D, Halilovich H, 'Syrian Refugee Migration, Transitions in Migrant Statuses and Future Scenarios of Syrian Mobility' (2020) 39(2) Refugee Survey Quarterly 153.

Vogelaar F, 'Principles Corroborated by Practice? The Use of Country of Origin Information by the European Court of Human Rights in the Assessment of a Real Risk of a Violation of the Prohibition of Torture, Inhuman and Degrading Treatment' (2016) 18(3) European Journal of Migration and Law 302.

World Food Programme Syria, Country brief, August 2021.

Yavçan B, 'Turkish Experience with Refugees Returns to Syria' Discussion Paper (2019) <https://gcris.etu.edu.tr/handle/20.500.11851/2965> 13 April 2023.

Yılmaz Eren E, 'Is Temporary Protection Eternal? The Future of Temporary Protection Status of Syrians in Turkey' (2019) 9(2) Border Crossing 125.