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Of  
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*To my sister,*

*Ablam'a*



# Human Rights Protection Of The Forcibly Displaced: THE STORY OF ANABASIS

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## Abbreviations

AFAD	Turkish Disaster and Emergency Management Presidency
ECRE	European Council of Refugees and Exiles
ECHR	The Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	The European Court of Human Rights
EU	European Union
EXCOM	Expert Committee of the United Nations of High Commissioner for Refugees
IDP	Internally Displaced Persons
IGO	International Governmental Organizations
ILO	International Labour Organization
IMO	International Organization for Migration
LFIP	Law of Foreigners and International Protection, no. 6458
Mazlum-Der	İnsan Hakları ve Mazlumlar İçin Dayanışma Derneği
NGO	Non-Governmental Organization
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
SARC	SYRIAN Arab Red Crescent
SHARP	Syrian Arab Republic Humanitarian Assistance Response Plan 2014
UK	United Kingdom
UN	United Nations
US	United States of America
UNHCR	United Nations High Commissioner for Refugees
UNICEF	UN International Children's Emergency Fund

UNOHCR	United Nations Office of the High Commissioner of Human Rights
UNRWA	The United Nations Relief and Works Agency for Palestine Refugees in the Near East
UNSMIS	United Nations Supervision Mission in Syria
WFP	UN World Food Program
WHO	UN World Health Organization

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## **i. STRUCTURE**

The paper begins with a brief history concerning international governance of forced migration, aiming at demonstrating how the evolution of this regime shifted from the normative legal framework of refugee law to utilization of soft law instruments, temporary arrangements and general framework of human rights law. I then take up each measure and test the effectiveness of the protection that those instruments bring about, with the objective of a general overview of the system and also to address the commonalities regarding the functions of those instruments.

In order to conduct such a complicated test, I follow the dangerous journey of a Syrian refugee, a collective semi-fictional character who is called Anabasis. She will first be displaced within Syria, and hence be an internally displaced person; in Istanbul she will be subject to the temporary arrangements rooted in Turkish domestic law, and finally she will resort to human rights law by claiming her sacred rights before the European Court of Human Rights against Greece.

In each section, I establish the relevance of each instrument and provide a brief conceptual background. Note that I focus on the soft(er) quality of the Guiding Principles in the first section, whereas in the Turkish sections I elaborate more on the Turkish domestic law as a result of the natural complexity of the domestic that vaporizes the most lawful claims within the conflicting interests of parties. I am also willing to translate Turkish materials to make them available to students who might need them. In the following section, I chiefly explain the relevance of human rights law and ECHR. However, the limits of this study required a superficial analysis of each tool.

Each test is closed by formulating specific outcomes and generalizing the specific input that the test of Anabasis provides. Finally, I conclude that international law for the protection of the forcibly displaced is not evolving towards the effective protection of the forcibly displaced and that this fact could pose a threat for the legitimacy of human rights law in general.

## **ii. DELIMITATIONS**

As a result of the deliberate choice of the geographical framework, I exclude European Union Law. Consequently, although an important part of the contemporary regime of international protection, subsidiary protection is not tested in this paper. I decided instead to focus on Guidelines on Internal Displacement, Temporary Protection and Human Rights Law for the sake of the limits of this study.

As for the protection that could be provided by international humanitarian law and international criminal law, I chose not to specifically scrutinize these legal sources. First of all, neither of them are refugee-specific legal instruments. Secondly, international criminal law does not deliver human rights but focuses in restitution of justice. Guiding Principles on



Internal Displacement not only embodies relevant principles of international humanitarian law but also contextualizes them. Therefore, although I do not refer to Geneva Conventions, I resort to the norms of international humanitarian law by using the Guiding Principles on Internal Displacement.

### **iii. METHODS AND THEORIES**

I combine traditional legal methods with the method of narration. Although I have not deliberately employed legal realism as the theoretical background, the paper follows this legal doctrine closely.

It should be noted that the characteristics of each instrument that I test also determined how the tests were conducted. Guiding Principles on Internal Displacement is a soft law instrument that aims at leading the protection efforts at the very moment of displacement. Therefore, I took the Guiding Principles as a template and assessed the adequacy of the protection that Anabasis received, in comparison to the provided standards. However, in the following parts, using domestic Turkish Law and International Human Rights Law as a template would not help me to draw conclusions. If I were to do so, I would not only exclude the “access to justice” element of a legal system that is an essential part of the functioning of law, but also the factual test would be testing the conduct of relevant actors, not the law itself. Therefore, I combine both the substantial and procedural aspects of these legal systems and also include the competing legal norms, and I virtually process the story of Anabasis in the Turkish Courts and ECtHR. Consequently, in Atmeh the test is factual, whereas the test in Istanbul and Greece is a post facto assessment of the protection.

# I. Introduction

Refugee Law sits in the center of the legal and theoretical framework governing the international protection of the forcibly displaced. The evolution of the international protection, however, heads towards altering the rule of refugee law to the detriment of effective protection of persons who are deprived of a state's protection.

Initially, refugee law is delivered by the institutionalization of the nation state. Prior to this transformation of political structures, ad hoc domestic and bilateral arrangements, complemented by liberal admittance policies had been the manner that the forced displacement was governed. However, from then onwards, this fashion became more formal and took the form of international arrangements.<sup>1</sup> Initially, The League of Nations, in response to the influx of Armenian and Russian refugees, sheltered the efforts of Fridtjof Nansen to eliminate difficulties deriving from the strict reciprocity dominant during that period for those who were "unprotected aliens".<sup>2</sup> Regardless of the amendments that had been made to enlarge its coverage, Nansen Passports proved to be insufficient within time. As a result, an international binding treaty was been ratified by 1933. The 1933 Convention is a step forward for the international protection of refugees, as it is the first binding instrument that articulates the principle of non-refoulement, while establishing basic civil, labor and social rights of the refugees.<sup>3</sup> However, the 1933 Convention did not establish a general refugee definition but was concerned with a particular category: the refugees of World War I.<sup>4</sup>

As a result of the large number of Jewish refugees fleeing the Nazi regime and the reluctance of utilizing the existing systems, by 1938 a treaty tailored for refugees from Germany had been drafted.<sup>5</sup> In spite of displaying a similar structure with the 1933 Convention, albeit humble in labour rights, the 1938 Treaty received only a few ratifications.<sup>6</sup> Following the failure of the 1938 Treaty and the suffering of Austrian Jews, the US held an independent Conference that established a wider definition of refugees.<sup>7</sup> This definition signals the caustic approach employed in the Refugee Convention as it addressed political opinions, racial origins, and religious beliefs as the normative grounds for refugee status.<sup>8</sup>

Following the major displacement in the wake of World War II, these arrangements were replaced by the UN, and the International Refugee Organization was officially

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1 James Hathaway, *The Rights of Refugees under International Refugee Law*, Cambridge University Press, New York, 2005, pp. 83- 84. See also; Laura Barnett, "Global Governance and the Evolution of the International Refugee Regime", *International Journal of Refugee Law*, Vol. 14, No. 2/3, 2002, pp. 239-241.

2 Hathaway, p. 85.

3 Andreas Zimmerman (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, Oxford, 2011, pp.11 -14.

4 *Ibid*, pp. 14-21.

5 *Ibid*.

6 The fear among States regarding Adolf Hitler's aggression hindered the ratification of the 1938 Convention. See, *Ibid*, p. 34.

7 *Ibid*, p. 34.

8 *Ibid*.

established by 1948.<sup>9</sup> However, the Cold War colored the popularity of this system, as the Soviet Union and other Eastern European States were reluctant to join the organization.<sup>10</sup> In 1948, Declaration of Universal Human Rights was also adopted and stipulated the right to seek and enjoy asylum.<sup>11</sup> In addition to the foundation of the legal and institutional framework, recognition of the persistence of the displaced population after World War II has led to the adoption of The Convention and Protocol Relating to the Status of Refugees (Refugee Convention and The Protocol).<sup>12</sup>

This Refugee Convention introduced a normative ground to become a refugee with its Art.1A and left the long tradition of addressing certain displaced categories with ad hoc arrangements.<sup>13</sup> Instead, persons who were outside of their country or habitual residence, with a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, qualified as refugees. However, the events that resulted in this fear should have been occurred before January 1951 and only within Europe.<sup>14</sup>

The value of the Refugee Convention remains in terms of its comprehensiveness in relation to the rights of refugees. The right to remain and right to return, the principle of non-refoulement, and the right of first asylum are fundamental norms stipulated in the Convention.<sup>15</sup> However, what is more remarkable is that The Refugee Convention aims at compensating the absence of state protection by creating an international legal status, albeit inferior, that provides the refugee with certain legal rights and freedoms.<sup>16</sup>

Still, the geographical and temporal limitations, exclusion clauses, as well as a weak supervisory mechanism resulted in the insufficiency of the system while the issue of forced migration gained a global character.<sup>17</sup> Protection gaps resulted from the letter of the Refugee Convention; for example, “undeserving” persons were left out by the exclusion clause of Article 1.F of the Convention, while exceptions of public order and the adherence to the principle of non-refoulement resulted in a vacuum within the regime.<sup>18</sup> Moreover, the individual quality of the well-founded fear of persecution fails to take into account the

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9 Barnett, p. 244.

10 Ibid, p. 245.

11 Zimmerman, pp. 47-48.

12 Convention Relating to the Status of Refugees, *adopted* July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention], Protocol Relating to the Status of Refugees, *adopted* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

13 Barnett, p. 245.

14 Art. 1(a) of the Refugee Convention,

“..For the purposes of the present Convention, the term ‘refugee’ shall apply to any person who . . . as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”

15 Barnett, p.244.

16 Jane McAdam, “The Refugee Convention Rights As a Rights Blueprint for Persons in need of International Protection”, in *Forced Migration, Human Rights and Security*, Hart Publishing Limited, Oxford, 2008, p. 247.

17 Ibid, p. 248.

18 See Art. 32/1 and Art. 33/2 of the Refugee Convention.

phenomenon of generalized violence, which is widespread in Africa and the Americas.<sup>19</sup> Finally, although the supervisory role had been delegated to the United Nations High Commissioner for Refugees and its Expert Committee (hereinafter EXCOM) for international standard setting, the mandate of UNHCR had been challenged by the dynamic nature of displacement.<sup>20</sup>

The initial response to those deficiencies was the adoption of The New York Protocol of 1967, which eliminated temporal and geographical limitations of the Refugee Convention.<sup>21</sup> Also, some of these protection gaps have been tackled by regional arrangements that complemented the rule of refugee law around the globe. The Convention governing the Specific Aspects of Refugee Problems in Africa and Cartagena Declaration in America expanded the individual and exhaustively caustic approach of the Refugee Convention.<sup>22</sup>

After the 1980s, however, the evolution of the international protection regime that had been heading towards strengthening the rule of refugee law started to ebb. Goodwin-Gill points out that after the 1980s the progress of refugee protection fell into decline to such a degree that should one ask “Does the system work?” the author would respond with capital letters: “NO!”<sup>23</sup>

Against this background, human rights law and its machinery have progressively evolved and managed to compensate for some of the protection gaps and systemic deficiencies noted above.<sup>24</sup> Additionally, the changing nature of armed conflicts resulted in large number of persons being displaced within their own country or place of habitual residence, deprived of their State's protection.<sup>25</sup> Finally, with the introduction of “international management of migration,” migration has been formulated as a single phenomenon, leaving refugee law to become one of the items concerning the global governance objective, suffering from firmer non-entree politics within the mixed flow of persons.<sup>26</sup>

Consequently, the evolution of the protection of the forcibly displaced shook the dominance of the normative legal regime of refugee law and introduced competing

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19 McAdam, p. 265.

20 Barnett, p.247.

21 Art. I of the New York Protocol adopted by UN General Assembly, at 31 January 1967,

“For the purpose of the present Protocol, the term “refugee” shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words “As a result of events occurring before 1 January 1951 and ...” “and the words”... “a result of such events”, in article 1 A (2) were omitted.” Note that however, adopting the Protocol with geographical reservations has not been deemed as contradicting with the object and the purpose of this instrument.

22 Hathaway, pp. 118 -119.

23 Guy S. Goodwin-Gill, “The International Protection Of Refugees: What Future?”, *International Journal of Refugee Law*, Vol. 12, Editorial, p. 3.

24 McAdams, p. 273.

25 Barnett, p. 250.

26 International Management Of Migration was first introduced by Bimal Ghosh, In 1993. See, M. Geiger; A. Pécoud, “The Politics Of International Migration Management” in , *The Politics Of International Migration Management*, ed. M. Geiger; A. Pécoud, Palgrave Macmillan, Palgrave Macmillan, UK, 2010, p. 3.

instruments such as general human rights law treaties, soft law instruments developed to protect internally displaced persons, and regional and domestic arrangements such as subsidiary or temporary protection.<sup>27</sup>

The hypothesis that I study in this paper is that the instruments most frequently utilized for the purpose of protecting the forcibly displaced — Guiding Principles on Internal Displacement, temporary protection, and human rights law — are all destined to fail to effectively protect human rights of the forcibly displaced.<sup>28</sup>

Relying on the outcome of this test, I further argue that the evolution of the international protection of the forcibly displaced will further the frequency and the severity of human rights violations and, subsequently, pose a threat to the rule of human rights law.

## 1. The Story of Anabasis

Anabasis is a fictional character fleeing Syria. Her story will constitute an example displaying the aforementioned incompatibility of the fragmented protection schemes to provide international protection for displaced persons.

Incidents that Anabasis goes through during her dangerous journey have allegedly happened to people who fled from Syria in search of international protection.<sup>29</sup> I collected the factual elements of the story of Anabasis from newspapers, as well as IGO and NGO reports. By doing so, I also invite the reader to consult the reports and the newspaper articles that are cited in this study. This promotion serves one of the primary purposes of this method: publicizing information regarding the Syrian humanitarian crisis.<sup>30</sup>

While putting the facts into words, I inevitably employ literary writing that is distinguished by the *italic* form of text. However, I would like to state that I do not intend to aestheticize the suffering that Syrian refugees have been through. Rather, I aim to publicize their stories, as well as reveal that this suffering is a direct result of the current international protection regime.

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27 Alexander Betts, Institutional Proliferation and the Global Refugee Regime, *Perspectives on Politics*, Vol. 7, No. 1, 2009 pp. 53-58, available at, <http://www.jstor.org/stable/40407214> [Accessed 04 February 2014]

28 As a result of the limited time and space that I have here I do not tackle the subsidiary protection. However please see, Jane McAdam, *The Refugee Convention as a Rights Blueprint for persons in Need of International Protection*, in *Forced Migration, Human Rights And Security*, Oxford, Hart Publishing Limited, 2008.

29 See Generally, Pro Asyl, *Pushed Back: Systematic Human Rights Violations Against Refugees in the Aegean Sea and at the Greek-Turkish Land Border*, available at, [http://www.proasyl.de/fileadmin/fm-dam/1\\_EU\\_Fluechtlingspolitik/proasyl\\_pushed\\_back\\_24.01.14\\_a4.pdf](http://www.proasyl.de/fileadmin/fm-dam/1_EU_Fluechtlingspolitik/proasyl_pushed_back_24.01.14_a4.pdf), [accessed 14 January 2014]

30 After I started my research, the British newspaper *The Guardian* launched an interactive stimulation with the headline of “[The refugee challenge: can you break into Fortress Europe? - interactive](#)”. Following the same vein with this paper, this challenge allows us reaching actual stories while displaying how hard it is to find a safe haven for refugees. Both systematic abuses occurring in Greek border and the insufficient protection in Turkey plays its part in the *Guardian's* bitterly entertaining online game. Grant H., Domokos J, “[The refugee challenge: can you break into Fortress Europe? - interactive](#)”, *The Guardian*, 14/01/2014, [accessed 14 January 2014]

The geography that the route of Anabasis covers is also significant for two reasons. The primary reason is of vital importance for the sake of this research and is resultant from the fact that although the principle of non-refoulement<sup>31</sup> might serve the interests of asylum seekers once they arrive at a safe haven, people in flight suffer from the most severe violations of human rights on the way to said safe haven. Second, Greek borders, the last component of the route of Anabasis, will witness versions of this story more frequently than before as a result of the recent readmission agreements ratified between European Union and Turkey. Therefore, the governance of the Greek-Turkish border needs to be under closer scrutiny.

## 2. The Character

*Anabasis is a woman from Aleppo, Syria. She is 18 years old and belongs to the Alewite sect. Her father and mother are killed as a result of an attack of their neighborhood, leaving her home damaged. As a result of losing her immediate family and her concerns regarding her own security, she decides to leave Aleppo, striving to seek international protection by reaching Sweden, where her remaining family members live. She is named after The Anabasis of Xenophon. Eric Baudelaire's work, where I came across this term, has a theme of returning home,<sup>32</sup> yet the original work of Xenophon is the story of Greek mercenaries hired by Cyrus the Younger and taken to Persia to fight for his war. Upon the killing of Cyrus the Younger by the king of Persia (Artaxerxes), Greek soldiers decided to go back home. However, their leaders were seized by the king and they were unsure of which route to follow to find their homeland.<sup>33</sup> While Merriam Webster emphasizes the literal meaning as “a going or marching up; advance; especially: a military advance,”<sup>34</sup> I am convinced that the story itself, with its themes of homeland and returning, provides sufficient ground for me to create an analogy with the journey of a person in need of international protection. Hence, while Anabasis seeks a safe home for herself, I will be seeking shelter for “human dignity” within the contemporary framework that governs forced migration.*

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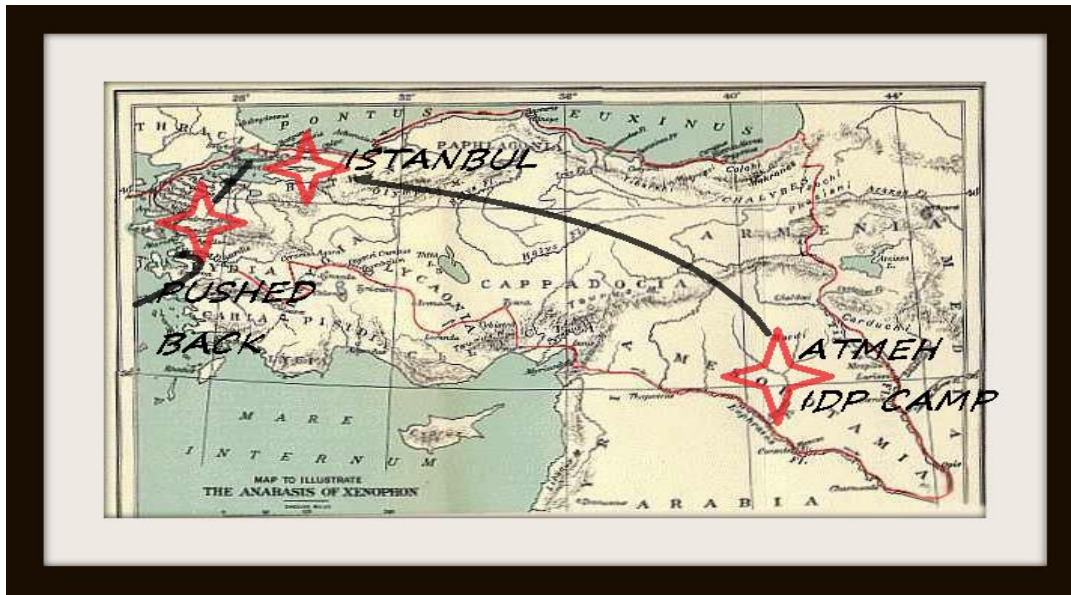
31 The prohibition of returning an individual when she would face a real risk of being subjected to inhuman, degrading treatment upon her return.

32 Eric Baudelaire's work may be reached at this link: <http://baudelaire.net/anabases3/the-anabasis--film/>

33 Xenophon, the Anabasis, Book III ff., <http://www.gutenberg.org/files/1170/1170-h.htm>, [accessed 23 December 2013]

34 <http://www.merriam-webster.com/dictionary/anabasis>, [accessed 23 December 2013]

### 3. The Route



Anabasis leaves Aleppo and travels to the village of Atmeh, bordering Turkey. She joins thousands of refugees accumulated along the border in the Atmeh Refugee Camp. Her journey takes her to Istanbul, where she will be an urban refugee in Turkey. After Istanbul, she heads to northwest Turkey, to Edirne, aiming at reaching Greece by crossing the land border along the Evros River. After the failure of her first attempt first push back, she must try the Aegean route, yet she will be returned back to Turkey as a result of a summary return by Greek officers. We will follow her story, analyzing her physical and legal situations, in the following sections.

## II. Syrian IDPs and Humanitarianism

### 1. Introduction

Having started in March 2011, the unrest in Syria quickly evolved to a non-international armed conflict<sup>35</sup>, and resulted in more than 100.000 casualties as the death toll continues. Apart from the deceased, this protracted conflict also led a majority of the population to be displaced.<sup>36</sup> The Office of The High Commissioner for Human Rights

35 International Committee of the Red Cross, Operational Update: “Syria: ICRC and Syrian Arab Red Crescent maintain aid effort amid increased fighting”, 17 July 2012, available at <https://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm> [ accessed 17 February 2014]

36 UN News Center, “Syrians internally displaced by war expected to nearly double to 6.5 million by year’s end –UN”, 05 February 2014, available at, <http://www.un.org/apps/news/story.asp?NewsID=47084&Cr=syria&Cr1=#.UwKLOPI5OSo> [ accessed 17 February 2014]

acknowledges that the displacement in Syria is “large scale and fluid.” According to his report, primary reasons of displacement are “violations of international human rights and humanitarian law and the lack of security.” In addition to these primary reasons, loss of the ability to meet basic needs such as food, shelter, healthcare and sanitation play an important role in the displacement of millions of Syrians.<sup>37</sup> The report also provides information about settlements like Atmeh, noting that this concentration is a result of the closed-border policy of neighboring states.<sup>38</sup>

The people of Atmeh Camp are forced to flee their homes to avoid the effect of the armed conflict, yet they have not crossed an internationally recognized State border.<sup>39</sup> Therefore, they are internally displaced persons (hereinafter IDP). Erin notes that internal displacement is not a legal status; it is a factual situation that people who are forced to leave their homes find themselves in.<sup>40</sup> Consequently, the legal framework regulating protection of IDPs “consists of a highly complex web of norms.”<sup>41</sup> This complexity, which aggravates the problem of internal displacement, had been tackled by the first UN representative on IDPs, namely Francis Deng and his supporting legal team, leading to introducing the Guiding Principles on Internal Displacement.

## 2. Soft Law for a Tough Problem: Guiding Principles on Internal Displacement

After the dramatic increase in the numbers of IDPs, the international community was forced to address this issue by the early 1990s. Francis M. Deng, as the UN representative on internal displacement, had led a group consisting of experts from academic and legal institutions that carried out comprehensive research on the international legal norms applicable in the case of internal displacement. The outcome of their work, “Compilation and analysis of legal norms,” identified IDPs as a category of people who needed particular attention and favored a “needs based approach” in contrast to the rights based approach.<sup>42</sup> This study has led to the production of the Guiding Principles since it acknowledged that although human rights law, humanitarian law, and refugee law contain norms protecting IDPs, they were either too general to fit the context of internal displacement or contained legal gaps to address specific issues. As a result, by 1998 non-binding legal standards were produced by

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37 UN General Assembly, *Protection of and assistance to internally displaced persons: situation of internally displaced persons in the Syrian Arab Republic*, 15 July 2013, A/67/931, available at: <http://www.refworld.org/docid/522f06964.html> [accessed 19 February 2014], p. 8.

38 Ibid, p.10, para 26.

39 G.A. Res. 60/L.1, 132, U.N. Doc. A/60/L.1; Guiding Principles on Internal Displacement, Introduction, Para 2.

40 Mooney Erin, “*The concept of internal displacement And the case for internally displaced persons as a category of concern*”, *Refugee Survey Quarterly*, Vol. 24, Issue 3, p. 14.

41 Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1995/57 *Compilation and analysis of legal norms*, E/CN.4/1996/52/Add.2 5 December 1995, para 4, available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/75550ee91a4fb1ff802566cc005c2c63?Opendocument>. [accessed 10 March 2014]

42 Roberta Cohen, “The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting”, *Global Governance*, Vol. 10, 2004, p. 5.



contextualizing existing international legal norms to meet the specific needs of internally displaced people by providing guidance for governments, NGOs and IGOs during their work with IDPs.<sup>43</sup>

Cohen addresses the unique process that delivered the Guiding Principles. She points out the fact that it was experts who produced the standards, while very little consultation with States had taken place.<sup>44</sup> Besides, the UN never adopted the Guiding Principles despite the fact that various bodies frequently cite this document. Thus, Guiding Principles on Internal Displacement is not even a declaration, falling outside of the traditional form of soft law. This formal characteristic has been used by some states to undermine the enforceability of the standards embodied in this instrument.<sup>45</sup> Nevertheless, Kälin argues that this unique process followed by F. Deng and his team might work in favor of international law. According to him, the hardship of drafting a treaty had been overcome by opting for standard setting. This prevented loss of time that would deprive IDPs from an articulate framework that they could turn to.<sup>46</sup> Furthermore, the fact that Guiding Principles are derived from already existing norms makes it difficult for States unwilling to follow these standards. Although their responsibility may not be triggered by relying on the Guiding Principles, violation of these rules might bring forward responsibility of States already bound by human rights law and humanitarian law. Kälin concludes that this even “softer law” might be “harder” in practice.<sup>47</sup>

Indeed, the Guiding Principles are 30 principles, and most of those norms already existed in international law. The first four principles are general standards, while principles 5-9 aim to prevent displacement, human rights of the displaced are articulated under the principles 10-23. The final provisions address the right of humanitarian assistance and focus on the post-displacement period.<sup>48</sup>

The following section will consist of the story and the test of Anabasis in relation to these guiding principles. In order to assess the effectiveness of protection and assistance, I use the Legal and Political Manual produced by Brookings Bern Project on Internal Displacement to further explain the principles by providing specific examples.<sup>49</sup> Additionally, since the guiding principles is to a very large extent a re-contextualization of existing legal norms, I will resort to relevant human rights or humanitarian law principles and mechanisms in order to further understand the content of the Principles. Finally, I will use certain standards such as “SPHERE Handbook: Humanitarian Charter and Minimum Standards in Humanitarian

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43 Mooney Erin, “The concept of internal displacement And the case for internally displaced persons as a category of concern”, *Refugee Survey Quarterly*, Vol. 24, Issue 3, p. 14.

44 Cohen, pp. 14-18.

45 Ibid.

46 Walter Kälin, “How Hard Is Soft Law?” in Recent Commentaries about the Nature and Application of the Guiding Principles on Internal Displacement, Brookings-Cuny Project on Internal Displacement, April 2002, pp. 7-10.

47 Ibid.

48 A general outlook of the Guiding Principles on Internal Displacement, Please see homepage of the Global Database on Guidance on Internal Displacement, at <http://www.idpguidingprinciples.org/> [accessed 10 March 2014].

49 Brookings-Bern Project on Internal Displacement, *Protecting Internally Displaced Persons: A Manual for Law and Policymakers*, October 2008, available at: <http://www.refworld.org/docid/4900944a2.html> [accessed 26 March 2014], hereinafter “The Manual”.

Response<sup>50</sup> or standard guidelines for humanitarian aid in order to assess the assistance that Anabasis benefits from.

### 3. Atma (Olive Tree Camp)

*Anabasis arrived at this camp established by charities in response to the needs of Syrian people fleeing the conflict and accumulating along the Turkish border.<sup>51</sup> This camp is near the Atmeh village in Syria and is protected by the Free Syrian Army.<sup>52</sup>*

*The driver who took Anabasis from Aleppo stopped the car when they arrived at a hill looking up to a valley of olive trees, with white tents confined by a tall wall. He pointed to the area around the olive trees, explaining that it is the Atmeh Camp, raising his arm only slightly, wagging his finger at the land behind the wall; he said, "There she is, Turkey." Moving his arm along the wall, which was decorated with barbed wire shining under the sun that came out after a rainy day, he said: "This is the border; it is closed."*

*She covered her head and started walking towards the camp. Soon after, a group of children, playing in the mud, noticed the new arrival and offered to lead her to the man in charge. After a rainy day, the people of Atmeh Camp were occupied by shoveling red muddy water out of their tents and fixing the tents ruined by the rain.<sup>53</sup> Floundering through the white corridors of tents, the man took Anabasis to a plastic one already occupied by 10 people, all women and children. The children told her that it was time for lunch and advised her to enjoy it since there was no dinner. She followed her inmates to the long queue that rewarded her with a piece of bread and a cup of lentil soup.<sup>54</sup>*

*When she asked where to relieve herself, the children pointed at crude cabins, to which she had no difficulty making her way, needing only to follow the sickening smell.<sup>55</sup> Only after an hour or so, a sudden pain in her stomach struck her, and she started trembling. Her roommates, however, looked indifferent and explained that it is because of the water they use. They advised her to try to sleep: there is no medical facility<sup>56</sup> in the camp; hence, there is nothing to do but rest.*

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50 The Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response, available at: <http://www.spherehandbook.org/en/water-supply-standard-2-water-quality/>, Hereinafter "Sphere Handbook"

51 Amnesty International, *Syria's internally displaced – 'The world has forgotten us'*, 20 June 2013, MDE 24/032/2013, available at: <http://www.refworld.org/docid/51c811af4.html> [accessed 8 February 2014]

52 Sarab Al-Jijakli, Latitude News, "What 2013 Looks like from ma Syrain Refugee Camp?", <Http://Www.Latitudenews.Com/Story/What-2013-Looks-Like-From-A-Syrian-Refugee-Camp/> [accessed 8 February 2014]. Although the web page does not provide information about the date that it was published, it is understood that it dates back to early 2013. Thus the number of people living in the camp is lower than it has been recently reported.

53 Paul Wood, BBC, "Syria crisis: Despair of refugees in Atma camp", 26 November 2012. <http://www.bbc.co.uk/news/world-middle-east-20493528> [accessed 07 February 2014]

54 Robin Yassin Kassap, Qunfuz, "In Atmeh Camp", September 2013, <http://qunfuz.com/2013/09/05/in-the-camps/#more-2173> [Accessed 8 February 2014]

55 Ibid.

56 Ibid.

*Anabasis emerged from her sleep by a boom followed by a short quake.<sup>57</sup> She rushed outside the tent, and noticed the smoke coming from the village. Outcries, curses and prayers filled the camp after a moment's silence. The noisy clamor was in harmony with the chaos in the camp, yet she stood there until one of her roommates shook her, telling her to pack up and follow them: "The border is open; we are crossing to Turkey!"*

#### **4. A hard case for soft law: The Test of Anabasis**

Anabasis, like the rest of the people of Atmeh, is forced to flee her home to avoid the effects of the armed conflict, though she hasn't crossed an internationally recognized State border.<sup>58</sup> Although she is forcibly displaced and deprived from her State's protection, her situation does not meet the criterion of being outside of one's country to become a refugee. However, the involuntary displacement and in-country movement satisfy the conditions of being an IDP; hence, while in Atmeh, Anabasis is an internally displaced person.<sup>59</sup>

##### **4.1. General Principles**

General principles are the first four standards laid down by the Guiding Principles, and they should be taken into consideration when reading the entire text. Principle 2 establishes that the standards should be followed by "all authorities, groups and persons irrespective of their legal status."<sup>60</sup> Thusly, the rights of Anabasis as an IDP should be guaranteed by every actor who is engaged with IDPs.

In her case of "regime-induced displacement"<sup>61</sup> there are three significant actors that are to follow the standards provided by the Guiding Principles: the state of jurisdiction, non-state actors of the conflict, and humanitarian organizations. The Syrian Arab Republic is the main authority responsible for protecting Anabasis, since she remains under the jurisdiction of the Arab Republic of Syria while she is in Atmeh. However, as the non-state actor in the Syrian civil war, the Free Syrian Army is also responsible, as they possess the right to protect her on behalf of the international community.

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57 Loveday Morris, Washington Post, "Syrian Jets Bomb Border Area That is Home to Refugees", 26/11/2012. [http://www.washingtonpost.com/world/middle\\_east/syrian-jets-bomb-border-area-that-is-home-to-refugees-rebel-fighters/2012/11/26/cacabf8a-37d7-11e2-a263-f0ebffed2f15\\_story.html](http://www.washingtonpost.com/world/middle_east/syrian-jets-bomb-border-area-that-is-home-to-refugees-rebel-fighters/2012/11/26/cacabf8a-37d7-11e2-a263-f0ebffed2f15_story.html) [accessed 07 February 2014]

58 G.A. Res. 60/L.1, ¶132, U.N. Doc. A/60/L.1; Guiding Principles on Internal Displacement, Introduction, Para 2. Hereinafter, Guiding Principles.

59 See Guiding Principles, Introduction, Para 2. These characteristics are reaffirmed in, Brookings-Bern Project on Internal Displacement, *Protecting Internally Displaced Persons: A Manual for Law and Policymakers*, October 2008, available at: <http://www.refworld.org/docid/4900944a2.html>, p. 12 [accessed 18 March 2014]

60 Guiding Principles, Principle 2.

61 Orchard uses this term to describe internal displacement as a result of an armed conflict. In particular this conception fits Syrian civil war's displacement policy as a tactic of war. Please see, Phil Orchard, "The Perils Of Humanitarianism: Refugee And IDP Protection In Situations Of Regime-Induced Displacement", *Refugee Survey Quarterly*, Vol. 29, No. 1.

According to Principle 3, the Syrian Government is the main actor to protect Anabasis. This principle reads, “National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.”<sup>62</sup> Corresponding with this obligation, IDPs possess the right to seek assistance from their own government.<sup>63</sup> Although the obligations of the government and the rights of Anabasis stemming from international law correspond to each other, the Syrian Government is neither willing nor able to provide assistance to her own citizens. First, similar to many instances of internal displacement, “gross violations of international human rights and international humanitarian law”<sup>64</sup> by the Syrian Government herself is the primary reason of displacement. Moreover, it is reported that forcible displacement has become a tactic of war, and the Syrian government pursues this goal by following a “strategy of denying food and medical supplies” to control areas that support armed groups.<sup>65</sup>

Furthermore, “the rule of law and the political authority has been eroded in Syria,” which in turn means that the Syrian Government lost its “capacity to provide basic services and ensure security under its effective control,”<sup>66</sup> As a result, other groups filled this authority gap by claiming their own rule in certain parts of Syria.<sup>67</sup> The northern region of Syria, where Atmeh is located, is one of those regions controlled by other groups; for example, the security of Atmeh camp is provided by the Free Syrian Army. Consequently, as we do not expect the aggressor to aid the wounded, there is a logical fallacy in Anabasis’ need for protection and assistance to be met by the Syrian Government.

Guiding Principles also aim to protect the displaced from discrimination both in comparison to the non-displaced population and within the IDP group. Principle 1 and 4 contextualize this “jus cogens” norm of international law, as Principle 1 articulates that IDPs “shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced,”<sup>68</sup> According to the Guiding Principles, Anabasis possesses the right of equal treatment both taken alone and also in conjunction with the other rights enshrined in the Guidelines.

According to the manual, IDPs are discriminated against when the State in question does not meet her positive obligations to eliminate the vulnerability of this group through legislation that singles out IDPs, disregards their particular vulnerabilities and/or charges

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62 Guiding Principles, Principle 3/1

63 Guiding Principles, Principle 3/2

64 UN General Assembly, *Protection of and assistance to internally displaced persons: situation of internally displaced persons in the Syrian Arab Republic*, 15 July 2013, A/67/931, available at: <http://www.refworld.org/docid/522f06964.html> [accessed 19 February 2014], para 16.

65 UN Human Rights Council, A/HRC/23/58 “Report of the Independent International Commission of Inquiry on the Syrian Arab Republic”, 4 June 2013, paras 20, 143 – 146, 149 – 151.

66 United Nations A/67/931, 15 July 2013, Promotion and protection of human rights: implementation of human rights instruments, “Protection of and assistance to internally displaced persons: situation of internally displaced persons in the Syrian Arab Republic”, para 7.

67 Ibid, para 158. See also, Max Fisher, Washington Post, “This map of Syria shows why the war will be so difficult to end”, available at, <http://www.washingtonpost.com/blogs/worldviews/wp/2014/02/12/this-map-of-syria-shows-why-the-war-will-be-so-difficult-to-end/>, [accessed 17 March 2014]

68 Guiding Principles, Principle 1.

IDPs with additional burdens to exercise their rights.<sup>69</sup> In Syria, discussing the development of a special protection regime to protect Anabasis as an IDP is almost an absurdity. As noted above, this is due to the fact that the government pursues a policy of displacement and the lack of rule of law, in addition to the government's diminished ruling capacity. Consequently, Anabasis finds herself at the bottom of the barrel. The inherent vulnerabilities of being an IDP aggravate the suffering that is derived from the violations against human rights and humanitarian law. As a result, since she is deprived of even the most rudimentary requirements of livelihood, she becomes dependent on humanitarian assistance provided by the local or international community.

It should be mentioned that, as the manual also underscores, in situations of armed conflict the sectarian nature of civil wars might also constitute a source of discrimination. Similarly, in Syria the sectarian characteristics of the conflict draw a baseline for discriminatory treatment. Although Anabasis is an Alewite, while she is in Atmeh she is among the people whom the government perceives as the enemy. As a result, she suffers from the targeting of this group through indiscriminate attacks against the camp.

Principle 4 establishes the right not to be discriminated among the displaced population. As the Atmeh Camp is ruled by the Free Syrian Army, and the government has no effective control over this facility, the actual responsibility for the fulfillment of Principle 4 remains with the Free Syrian Army and the humanitarian organizations involved with assistance projects. In the case of Anabasis, there is no indicator that she has been discriminated against while receiving aid or benefiting from protection. However, due the fact that this camp is governed by the Free Syrian army, Anabasis is under constant threat of discrimination if her identity as an Alewite is revealed. As the UNHCR reports, the perception of enmity in Syria has its source in various factors, from family links and geographical roots to physical appearance.<sup>70</sup> Although Anabasis covers her head to look like a Sunni woman, we cannot foresee the consequences of not being able to hide her identity while she is in Atmeh Camp.

This risk is also inherent in the activities of the humanitarian actors, especially the Maram Foundation, a charity organization that was established by Syrian-Americans after the break of the humanitarian crisis in Syria.<sup>71</sup> The Maram Foundation has been present in the camp showing efforts to improve the conditions in the camp of Atmeh.<sup>72</sup> However, as is to be expected, they are also quite politicized on the side of the Free Syrian Army.<sup>73</sup> Though in the case of Anabasis we do not see any indicator that she has received discriminatory treatment,

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69 The manual, p. 16.

70 UNCHR, "International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update II", 22 October 2013, p. 8, footnote 56.

71 Please consult to the official web page of this organization. Available at, <http://maramfoundation.org/about-us/> [accessed 26 March 2014]

72 Please consult to the official web page of this organization. Available at, <http://maramfoundation.org/1/projects/> [ accessed 26 March 2014]

73 In their official web page, there is an article identifying the situation as a "genocidal repression" and defining Asad as a war machine. Please see, "*Help the Syrian People*," available at, <http://maramfoundation.org/help-the-syrian-people/> [ accessed 26 March 2014]

the politicization of the actors and the sectarian nature of the conflict suggest that there is a potential risk of discrimination.

## 4.2. Substantial Articles

Guiding Principles combine freedom of movement within one's country with the freedom to choose one's residence; furthermore, they declare the right of IDPs not to be arbitrarily displaced.<sup>74</sup> Principle 5 establishes the obligation of all parties to prevent arbitrary displacement, while Principle 6 establishes that displacement is arbitrary not only when it “aim[s] at.... altering the ethnic, religious ... composition of the affected population” in cases of armed conflict, but also if it is a form of collective punishment.<sup>75</sup> Earlier, it was stated that the Syrian Republic pursues displacement as a tactic of war. It is also known that both parties try to control the demographic characteristics of areas by using collective punishment as a method of warfare.<sup>76</sup>

Although Anabasis is forced to leave her home in fear of attacks of the non-state actor, the Syrian government also fails to meet her responsibility to protect Anabasis from displacement.<sup>77</sup> Additionally, as Principle 8 points out, the “right to life, dignity and security” should be respected during displacement. In situations of armed conflict, the State bears responsibility for complying with this principle by, for example, establishing escape routes to safety; providing shelter, hygiene, health, safety, and nutrition; respecting family unity and voluntary return.<sup>78</sup> However, the Syrian Government does not facilitate the dangerous journey of Anabasis to Atmeh. Consequently, she finds herself within the incubus. During her stay in Atmeh, she relies solely on non-state actors, whose actions brought about her displacement in the first place, for both protection and assistance.

Overall, it could be soundly argued that the security of Anabasis is not effectively protected. Her inherent right to life is threatened by the indiscriminate attacks of the Syrian Government, and she is under continuous threat of violence while she is in Atmeh. The attack targeting Atmeh village particularly violates her right to life as an IDP articulated by Principle 10. This principle restates the prohibition of indiscriminate attacks and targeting of IDP settlements.<sup>79</sup> Additionally, this attack violates Principle 11, which prohibits attacks that aim to “spread terror among displaced persons.”<sup>80</sup>

Movement related rights are articulated in Principles 12, 14, and 15. These principles declare that IDPs are able to move freely once they have been displaced, and, thus, have the

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74 The manual, p.44.

75 Guiding Principles, P. 6/2 paragraphs a and b.

76 United Nations General Assembly, A/HRC/24/L.38 “The continuing grave deterioration of the human rights and humanitarian situation in the Syrian Arab Republic”, 24 September 2013, available at, <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G13/173/89/PDF/G1317389.pdf?OpenElement> [ accessed 19 February 2014]

77 Manual, pp. 49 – 51.

78 Manual, p. 51.

79 Guiding Principles, Principle 10/2 paragraphs a and d.

80 Guiding Principles, Principle 11/2 paragraph c.

right to escape from danger.<sup>81</sup> In order to bring this about, Principle 14 articulates that IDPs should be free to move in and out of camps.<sup>82</sup> Although Anabasis does not encounter any obstacles while entering the camp, and internment is not reported as a practice in the camp of Atmeh, in effect it is impossible for Anabasis to move outside the camp. This fact is a result of the surrounding environment of the camp: trapped in between closed borders on one side and widespread violence on the other.

Principle 15 articulates her rights to leave her own country and seek asylum elsewhere,<sup>83</sup> yet it is widely known that there is no such right to enter another State's territory unless the consent of that State is provided. Thus, rights covered by Principle 15 cannot be materialized as long as Turkey keeps her borders closed.<sup>84</sup>

It is another fact that as an IDP her right to freedom of movement is inherently violated, given that she was forced to change location contrary to her will. Although her naively written story<sup>85</sup> does not show any difficulties of movement until she arrives in the camp, she will not be able to move in or out of the camp, nor will she be able to seek asylum. Consequently, her movement related rights are violated since she is surrounded by the barbed wire of borders and violence of a lawless conflict.

Principle 18 articulates the right of Anabasis to an adequate standard of living. The components of this right are quite interlinked, and any of the listing is accepted as non-exhaustive. Yet the most relevant components for Anabasis might be determined as the right to food, water, shelter, and health and sanitation.

The right to adequate food consists of both of "availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals" and "accessibility of such food."<sup>86</sup> In the case of Anabasis, accessibility of food is interrupted since she lacks the ability to access a food market on her own as a result of her displacement.<sup>87</sup> Since the Syrian Government does not possess effective control over Atmeh Camp, she relies solely on humanitarian assistance for the availability and accessibility of food. Luckily, in Atmeh camp the food is made physically and economically available to IDPs.<sup>88</sup> However, it is the sufficiency of the food that should be called into question.

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81 Manual, p. 81.

82 Guiding Principles, Principle 14/2.

83 Guiding Principles, Principle 15.

84 Guiding Principles, Principle 15.

85 Though I am not a writer and this paper does not aim to impress the reader with the literary supremacy of the pieces, I have to apologize for the naive tone of the story. I myself am one of those lucky ones who have not experienced a situation of armed conflict. Yet I am aware of the fact that this part of the story is quite far from the reality in Syria.

86 UN Committee on Economic, Social and Cultural Rights (UNCESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999, available at: <http://www.refworld.org/docid/4538838c11.html> [accessed 28 March 2014], Para 8

87 Manual, p. 107.

88 Manual, p. 114.

In situations of emergency which also characterize the situation in Syria, food assistance aims at providing the minimum amount of calories to “save lives and to maintain health and nutrition status”.<sup>89</sup> This threshold should be equivalent with the minimum of right to food which is can be defined as "the minimum essential level required to be free from hunger".<sup>90</sup> Whether or not the food provided in Atmeh Camp meets the requirement of this minimum requires a detailed analysis. Nevertheless, a mere two meals per day, consisting of lentil soup and one piece of bread are likely to fail to free Anabasis from hunger.

The right to an adequate standard of living includes the right to adequate water, consisting of both potable water and sanitation.<sup>91</sup> In greater detail, the right to water entitles everyone to sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic uses.<sup>92</sup> In cases of emergency, the availability and accessibility of a sufficient amount of potable water, free from harmful microorganisms or chemicals, is crucial in order to maintain the physical integrity of the population.<sup>93</sup> Additionally, sanitation services should be made available and accessible in respect of the dignity and safety of the displaced population.<sup>94</sup> According to the Sphere Handbook, drainage is also an element of this right, which has further implications on the right to health and shelter.

Although there is not sufficient information on the amount of water that is distributed in Atmeh, we have enough in hand to question the quality of water, sanitation, and drainage. The Sphere Handbook provides that if the short term use of water has negative health effects, it is an indicator that water supplies and sanitation are not in accordance with expected standards.<sup>95</sup> Also, the flooding of tents and paths points out that the drainage system is not in line with the standards.<sup>96</sup> The flooding, the state of the sanitation facilities, and the symptoms from which Anabasis suffers strongly suggest that the safety of water, adequacy of sanitation, and drainage in Atmeh fall short of meeting the internationally recognized standards that safeguard human rights protection in emergency situations.

The right to basic shelter and housing is also enshrined in Principle 18.<sup>97</sup> Access to basic shelter is defined as one of the essential components of this right.<sup>98</sup> However, as The Manual recognizes, in the case of massive and sudden displacement, IDPs do not receive any

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89 UNHCR, UNICEF, WFP and WHO, "Food and Nutrition Needs in Emergencies", Rome, 2003. Available at, <http://whqlibdoc.who.int/hq/2004/a83743.pdf>, p.15. [ accessed 28 March 2014]

90 UN Committee on Economic, Social and Cultural Rights General Comment (hereinafter UNCESR) No.12, Para 17.

91 The manual, p. 117.

92 UNCESCR, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11, available at: <http://www.refworld.org/docid/4538838d11.html> [accessed 28 March 2014]

93 The manual provides that 15 litre per day is the widely accepted minimum standard. The Manual, pp 123-124.

94 Ibid, p. 126.

95 The Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response, Water supply standards, available at: <http://www.spherehandbook.org/en/water-supply-standard-2-water-quality/>

96 Sphere Handbook, p. 256.

97 Guiding Principles, Principle 18/2 paragraph b.

98 UNCESCR, General Comment No. 14 (2000) "The right to the highest attainable standard of health" para 43, c. Available at, [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/40d009901358b0e2c1256915005090be?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/40d009901358b0e2c1256915005090be?Opendocument) [ accessed 03 April 2014 ]



assistance and create collective self-settlement centers without the benefit of prior planning.<sup>99</sup> In this case, which is identical to the establishment of the camp of Atmeh, the right to shelter has wider implications, involving not only the adequacy of the dwelling but also certain traits of the settlement. This also could be explained thusly: the entire settlement, rather than their individual dwellings, is the home of these displaced people, as some domestic and basic needs are met publicly through communal facilities scattered throughout the camp environment. In this context, the components of this right are shelter, settlement, and non-food items.<sup>100</sup>

According to the manual the settlement should be managed in a manner that safeguards the health, movement-related rights, and security of the IDPs<sup>101</sup> without discrimination.<sup>102</sup> Key actions for the purpose of security are defined as being distant from violence and maintaining the civilian character of the settlement.<sup>103</sup> In Atmeh, both of those aspects deserve to be questioned. First of all, it is a fact that the indiscriminate attacks make it impossible to find a safe location for settlement. The attacking of Atmeh village within eyesight of the camp is a proof of this fact. Additionally, as a result of the protection of the Free Syrian Army and the politicization of the major humanitarian actors involved with the camp management, it is likely untrue that the camp is a civil environment. As discussed earlier, these aspects also cast doubts on the compliance with the principle of non-discrimination as laid down by the Principle 4.

As for the appropriateness of the living space provided in Atmeh, it could easily be asserted that sharing a tent with 10 other people does not satisfy even basic human rights standards. It is accepted that "All affected individuals have an initial minimum covered floor area of 3.5m<sup>2</sup> per person."<sup>104</sup> Though in emergency settings the requirement is flexible, this standard is expected to be met as soon as possible. Apart from the space, the tents should be able to protect the inhabitants from the elements. For example, they should "have a reasonable slope for rainwater drainage with large overhangs" in order to make sure that the inhabitants are protected from rainwater.<sup>105</sup> In Atmeh, the shelters are over-crowded and are flooded after rainy days. Anabasis' right to adequate basic shelter is, therefore, not secured. Moreover, the non-food items such as bedding, clothing, and personal hygiene items provided in Atmeh may not be sufficient or gender-sensitive.<sup>106</sup> Although she was placed in a tent where only women and children live, the non-food items might not provide for her particular needs as a woman. If that is the case, this practice is also classified as a discriminatory treatment.

The last component of the Principle 18 is the right to health. This right aims at protection of both the physical and mental health of individuals without discrimination.<sup>107</sup> The substantial components of this right involve the "underlying determinants of health, such as

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99 The Manual, p. 131.

100 Sphere Handbook, Chapter 8, minimum standards in shelter, settlement and non-food items.

101 Movement related rights, and right to health is dealt separately, here I will briefly analyze the security issues.

102 Ibid, p. 135.

103 Ibid.

104 Sphere Handbook, p. 258.

105 Ibid, pp 260 – 261.

106 Ibid, p. 269.

107 See The Manual, p.145 for a list of international treaties covering this right.

food and nutrition, housing, access to safe and potable water and adequate sanitation.”<sup>108</sup> However, the availability of health care remains the core component, as this is essential if the right to treatment and “urgent medical care” are to be fulfilled.<sup>109</sup> In the camp of Atmeh, the lack of safe potable of water, drainage, and inadequate sanitation threatens the physical well-being of Anabasis. Add to this the lack of the healthcare facility at Atmeh, and her deprivation is aggravated even further.

Principle 19 declares that the health care services should be compatible with the different needs and vulnerabilities in different groups, in terms of gender, age, and disability. According to this principle, available healthcare services should provide sufficient services to female IDPs.<sup>110</sup> Therefore, the availability of mere urgent medical care is not sufficient to meet human rights standards, as health services should be informed with the vulnerabilities and needs of different groups. However, it is unnecessary to go beyond this point since such services are not made available to Anabasis.

The next relevant principle is Principle 22, which specifies certain instances of discrimination in the case of displacement.<sup>111</sup> This issue was discussed under the general prohibition of discrimination, though it provides another perspective for the story of Anabasis. As a result of belonging to a stigmatized religious group,<sup>112</sup> Anabasis feels to the need to hide her identity by covering her head as is the common practice among Sunni Muslim women in Syria. This is a simple gesture that expresses the fear of persecution of Anabasis within the Atmeh Camp. As a result of this fear, practicing her religion in accordance with the Alewite traditions is out of the question in her mind. As a generic character whose family is killed by the Free Syrian Army, she is also expected to hold opinions that contrast with the common position of the people of Atmeh Camp.<sup>113</sup> However, based on that same fear, those opinions are not to be expressed. Consequently, in fear of impairment of her personal security,<sup>114</sup> she cannot exercise her freedoms of “thought, conscience, religion or belief, opinion and expression.”<sup>115</sup>

Finally, the last principles that apply to the story of Anabasis are the principles governing humanitarian assistance. Although it is initially established by Principle 2 and reaffirmed by Principle 25/1 that the primary duty to provide IDPs with protection and assistance lies with the state of jurisdiction, when this obligation is not met by the governments, the responsibility to protect the IDPs shifts to the international community.

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108 UNECSR, General Comment No. 14, E/C.12/2000/4, para. 4.

109 Ibid, para. 16. See also The manual, p. 146.

110 Guiding Principles, Principle 19/2.

111 Guiding Principles, Principle 22.

112 This statement is an oversimplification of the situation in Syria. There are many other elements than the distinction deriving from the creeds. Kurdish people, for example are not fighting against neither of the groups whereas certain Sunni Jihadist groups known to attack other Sunni groups within Free Syrian Army. Regardless of this complicated characteristics of this non-international conflict, I believe that, the statement above is not false.

113 “Persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression”, UNOHCR, General Comment No. 34, 12 September 2011, para 7.

114 “No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions.”, UNOHCR, General Comment No. 34, 12 September 2011, para 9.

115 Guiding Principles, Principle 22/a.

Article 25/2 formulates this by asserting that the international community has “the right to offer their services in support of the internally displaced.”<sup>116</sup> It is stated that exercising this right should not be deemed as an unfriendly act, and the state of jurisdiction should not withdraw her consent without legitimate reasons.<sup>117</sup> Also, the state of jurisdiction is obliged to protect the security of the humanitarian agencies and facilitate the assistance.<sup>118</sup> Finally, humanitarian agencies of a general character are called to pay attention to the IDP community and their distinct vulnerabilities while providing aid.<sup>119</sup> These principles are mainly derived from international humanitarian law that constitutes the “harder” ground for the assistance that Anabasis benefits from.<sup>120</sup> In the following paragraphs, we are to see the effectiveness of this protection in the case of Anabasis.

The first problem that I will tackle is the problem of consent, derived from the principle of non-intervention, which has a dogmatic character within international law.<sup>121</sup> The reader should notice that I only mentioned the Maram Foundation as the humanitarian actor managing the camp of Atmeh as well as providing aid for the community through charity activities. It should also come to attention that the color of the tents in Atmeh is white, not blue, which would signify the existence of the UNHCR in a refugee camp environment.<sup>122</sup>

The Maram Foundation is a recently founded charity which stands with the Free Syrian Army in the context of the Syrian civil war. It is understood from their literature that they are a group of people who came together in response to the humanitarian crisis. Thus, they lack the requisite experience to handle an issue as complex as humanitarian assistance. Additionally, it should also be noted that the Maram Foundation is not partnered with the UN in Syria.<sup>123</sup>

Novice and politicized, the charity also lacks the financial means to carry out such a costly task. The charity carries out fundraising campaigns and is solely dependent on private

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116 Guiding Principles, Principle 25/2.

117 Ibid.

118 Guiding Principles, Principle 25/3 and Principle 26 which restates the principle of distinction.

119 Guiding Principles, Principle 27.

120 Additional Protocol II Art. 18/2 establishes this in the context of non-international armed conflict. Please note that the material I assess is the Guiding Principles therefore I do not go to the sources that it was developed from. It is argued that, the practice developed the "rudimentary" treaty provisions which came closer to the provisions found in the Guiding Principles. For the evolution of humanitarian law please see, Jean-Marie Henckaerts, "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict," *International Review of the Red Cross*, Volume 87, Number 857, March 2005, p. 189.

121 M. R. Alborzi, *Evaluating The Effectiveness Of International Refugee Law: The Protection Of Iraqi Refugees*, Martinus Nijhoff Publishers, Leiden / Boston, 2006, P. 205.

122 Mooney Erin, "The concept of internal displacement And the case for internally displaced persons as a category of concern", *Refugee Survey Quarterly*, Vol. 24, Issue 3, p. 8.

123 2014 Syria Regional Response Plan, Strategic Overview; available at [http://ops.unocha.org/Reports/compendium/temp/FinalReport\\_TOC\\_BM\\_CoverPage\\_aa5f7904-ba21-42cc-ac7f-9cb689e35953.pdf](http://ops.unocha.org/Reports/compendium/temp/FinalReport_TOC_BM_CoverPage_aa5f7904-ba21-42cc-ac7f-9cb689e35953.pdf) [accessed 16 April 2014]

The system disables the link within three days therefore the previous link will not be accessible to the reader. However the accuracy of the information could be checked here by creating another report.

<http://ops.unocha.org/creport.aspx?appealid=1044>

For the list of partners in Syria see also, See also, <http://data.unhcr.org/syrianrefugees/partnerlist.php> [accessed 16 April 2014]

donors.<sup>124</sup> It is clear that humanity is one of the main drives of the Maram Foundation for their golden efforts to aid the displaced population in Atmeh camp, and there is no doubt whatsoever that those efforts are the sole source of subsistence for tens of thousands of people. However, since impartiality and neutrality are also fundamental qualities for humanitarian assistance,<sup>125</sup> the operations of this noble organization pose questions as to their commitment to these principles. The private nature of the charity might also result in some complications regarding the accountability and transparency of this organization. It is obvious that without proper analysis of the operations of Maram Foundation, these problems cannot be fully discussed or analyzed. However, I invite the reader to consider the context in which the Maram Foundation runs its operations. Is it possible to remain impartial in a civil war of a sectarian nature? Is it possible to remain neutral when the targeting of civilian populations requires humanitarian groups to rely on groups that are party to the conflict, simply for protection?

Still, as discovered in the earlier passages, the operations of the Maram Foundation fail to meet the standards governing humanitarian aid. The lack of compatible organizations that actually represent the international community is one of the main reasons of this failure. This insufficiency has two main reasons, and one of them might be explained by the lack of consent of the Syrian Government. International humanitarian organizations are not allowed to effectively access the territory of Syria. When they are inside, there are certain areas that made inaccessible to them.<sup>126</sup> The lack of consent is evident in the fact that the date of the entrance of the very first UN Humanitarian Convoy to Syrian territory, departing from the Turkish border, was only the 20<sup>th</sup> of March, 2014.<sup>127</sup> It should be remembered that Turkey is the bridge between the east and west and accordingly should be the most convenient area to transport such aid. It is, therefore, striking that UN Convoys were allowed to enter Syrian territory after the lapse of three years of civil war. Moreover, it is terrorizing that this lack of consent is not only a passive attitude but appears in the form of the targeting of humanitarian personnel. So far, 45 people have lost their lives while trying to deliver aid to Syrian civilians.<sup>128</sup>

It would not be accurate, however, to state that international humanitarian actors have not been present in Syria. For example, the International Federation of Red Cross and Red Crescent have been one of the major actors acting through Syrian Arab Red Crescent (hereinafter SARC) from the very beginning of the conflict. They first focused on their primary duty to provide emergency health services; however, they have also been providing relief items.<sup>129</sup> UN mandated efforts have also been carried out under the Syria Arab Republic

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124 Please see the webpage of the Foundation, <http://maramfoundation.org/> [ accessed 17 April 2014]

125 Please see the Guiding Principles in its annex; UN General Assembly, A/RES/46/182, 19 December 1991 available at, <http://www.un.org/documents/ga/res/46/a46r182.htm> [accessed 13 April 2014]

126 European Commission, Humanitarian aid and Civil Protection, Syria Crisis, Facts and Figures as of 12 March, available at, [http://ec.europa.eu/echo/files/aid/countries/factsheets/syria\\_en.pdf](http://ec.europa.eu/echo/files/aid/countries/factsheets/syria_en.pdf)

127 Luke Vargas, Talk Radio News Services, “[Syria Aid Crosses Turkish Border For First Time Since 2011](#)”, 20 March 2014. Available at, [http://www.talkradionews.com/united-nations/2014/03/20/syria-aid-crosses-turkish-border-first-time-since-2011.html#.U0LqX\\_1\\_uSo](http://www.talkradionews.com/united-nations/2014/03/20/syria-aid-crosses-turkish-border-first-time-since-2011.html#.U0LqX_1_uSo)

128 "Syrian Arab Republic Humanitarian Assistance Response Plan 2014", 15/12/2013, p. 11. Available at, [https://docs.unocha.org/sites/dms/CAP/2014\\_Syria\\_SHARP.pdf](https://docs.unocha.org/sites/dms/CAP/2014_Syria_SHARP.pdf) [accessed 17 April 2014]

129 Joint statement - Syria crisis, 3 years on: the International Red Cross and Red Crescent Movement calls for an end to the humanitarian tragedy, 14 March 2014, available at, <http://www.ifrc.org/en/news-and-media/press->

Humanitarian Assistance Response Plan (SHARP) in collaboration with the Syrian Government.<sup>130</sup> SHARP is an emergency relief plan, initially drafted by the Syrian Government, which has been revised three times since its first appeal by December 2012.<sup>131</sup> This plan employs the cluster approach, which is a comprehensive method of high-level coordination that addresses each category of needs regarding humanitarian aid. The coordination is brought about by the UN Office for the Coordination of Humanitarian Affairs (OCHA), and the main actors are UNHCR, UN International Children's Emergency Fund (UNICEF), UN World Food Program (WFP), UN World Health Organization (WHO), UN Population Fund, and The United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).<sup>132</sup> UN Agencies also act through accredited International non-governmental organizations such as the International Organization for Migration and the Danish Refugee Council.<sup>133</sup> Moreover, SARC and local charities play an important role for the materialization of the objectives set forth in the plan.<sup>134</sup> In SHARP 2014, it is reported that despite the prima facie consent of the Syrian Government and concerted efforts of international and local community, the lack of safe and regular access to certain areas, lack of security for humanitarian personnel, and the lack of aid partners within Syria challenge the effectiveness of the humanitarian assistance.<sup>135</sup>

The funding of this response plan is provided through the Central Emergency Response Fund and Emergency Response Fund of the UN.<sup>136</sup> OCHA reports that, as of today, the gap between required funds and obtained financial support is 5.3 billion US dollars.<sup>137</sup> This gap might also explain why the color of the tents in Atmeh is white instead of UNHCR blue.

What is more appalling about this gap is what it says in terms of the extent to which responsibility to protect displaced people is shouldered by the international community. In a report presented by the Heinrich Böll Foundation, it is alleged that the amount that the European Union will spend on introducing high-tech "smart borders" which gathered pace after the Arab Spring could cost "€2 billion or more."<sup>138</sup> This costly shift creates another

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[releases/middle-east-and-north-africa/syria/syria-crisis-3-years-on-the-international-red-cross-and-red-crescent-movement-calls-for-an-end-to-the-humanitarian-tragedy/](#) [accessed 16 April 2014]

Please see also, Frequently asked questions regarding their activities. <http://www.ifrc.org/en/what-we-do/disaster-management/responding/ongoing-operations/crisis-in-syria/frequently-asked-questions/> [accessed 16 April 2014]

130 UN OCHA, "Revised Syria Humanitarian Assistance Response Plan (SHARP) January - December 2013"

Available at, <http://www.unocha.org/cap/appeals/revised-syria-humanitarian-assistance-response-plan-sharp-january-december-2013> [accessed 17 April 2014]

131 Ibid.

132 Main actors are listed according to the financial distribution of funds. Please see "Syrian Arab Republic Humanitarian Assistance Response Plan 2014", 15/12/2013, p. 6 for the full list.

133 Ibid, p. 5.

134 See generally, Ibid.

135 Ibid, p. 11.

136 Ibid, p. 12.

137 UN OCHA, "Syria: UN welcomes Kuwaiti donation, massive gaps still remain" Available at, <http://www.unocha.org/top-stories/all-stories/syria-un-welcomes-kuwaiti-donation-massive-gaps-still-remain>. [accessed 17 April 2014]

138 Heinrich Böll Stiftung, "Borderline The EU's New Border Surveillance Initiatives Assessing the Costs and Fundamental Rights Implications of EUROSUR and the "Smart Borders" Proposals", p.1, 7. Available at:

dilemma. The funds that might have been utilized to aid persons who “would be refugees” once they leave Syria are being spent to protect the fortresses from them. Consequently, the people who seek international assistance cannot secure their most basic rights in their home country while at the same time, even if they manage to flee, they have nowhere to go.

Finally, Turkey's contribution to this dilemma as the neighboring State should be clearly articulated. First, Turkey closed her borders after receiving large groups of displaced persons in order to prevent the right to seek asylum and the right to leave to materialize. Turkey also provides “zero point aid delivery” from the northern border of Syria.<sup>139</sup> Zero point delivery is a way to circumvent the problem of consent. The Turkish Red Crescent and the Foundation for Human Rights and Freedoms and Humanitarian Relief delivers aid from the border to groups like the Maram Foundation for further distribution within refugee camps.<sup>140</sup> Thus, while creating the environment that resulted in the establishment of border camps like Atmeh, Turkey also contributes to the maintenance of those camps. Although the efforts of the Turkish Government might be deemed sensible, the downside of these efforts is the political will aimed at the containment of Syrian people within Syria, in the hopes that Turkey will not have to bear the responsibility stemming from international law.

Under these circumstances, the right to provide humanitarian aid cannot be fully realized. However, to explore the potential of this phenomenon, I invite the reader to imagine that the issues of consent and funding are solved. Even in this case, because of the lack of determination of international actors to effectively and genuinely intervene with the Syrian civil war, humanitarian agencies would fail to protect Anabasis. This failure would be rooted in their lack of mandate to address the security issues in Atmeh Camp.

In order to briefly examine this argument, I would like to list the UN level efforts that addressed this fundamental issue. It is well known that the UN Security Council was not able to act under Chapter VII in regards to Syria and the most that the UN could do was to “condemn” the gross violations of human rights and humanitarian law.<sup>141</sup> By 21 April 2012, a United Nations Supervision Mission in Syria (UNSMIS) was created to monitor the cessation of the armed conflict.<sup>142</sup> It should be noted that UNSMIS was unarmed, and its mandate has come to an end as of 19 August 2012.<sup>143</sup> The latest resolution, from February 2014, concerns itself with reminding the Syrian government of its responsibility to protect civilians under her

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[https://www.boell.de/sites/default/files/DRV\\_120523\\_BORDERLINE\\_-\\_Border\\_Surveillance.pdf](https://www.boell.de/sites/default/files/DRV_120523_BORDERLINE_-_Border_Surveillance.pdf) [accessed 17 April 2014]

139 Relief Web, “Delivery of humanitarian aid has started at the Syrian border zero point”, available at, <http://reliefweb.int/report/turkey/delivery-humanitarian-aid-has-started-syrian-border-zero-point> [accessed 17 May 2014]

140 Brookings-Bern Project on Internal Displacement, *Turkey and Syrian Refugees: The Limits of Hospitality*, November 2013, available at: <http://www.refworld.org/docid/52fa36674.html> [accessed 18 May 2014], p. 22.

141 Please see the list of UN Resolutions relevant to Syrian civil war, Available at; <http://www.securitycouncilreport.org/un-documents/search.php?IncludeBlogs=10&limit=15&tag=%22Other%22+AND+%22Syria%22&ctype=Syria&rttype=Other&cbtype=syria> [accessed 13 April 2014]

142 United Nations S/RES/2043 (2012), 21 April 2012, available at, <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Syria%20SRES%202043.pdf> [accessed 13 April 2014]

143 Please see, <https://www.un.org/en/peacekeeping/missions/unsmis/> [accessed 15 April 2014]

jurisdiction.<sup>144</sup> Although this last resolution helped humanitarian passage, the fact that indiscriminate attacks are ongoing in Syria remains. Hence, Anabasis runs the risk of being targeted by either the Syrian Government, as occurred while she was in Atmeh camp, or the non-state parties to the conflict. Consequently, even if all of those standards analyzed above were met, Anabasis could have been a "well fed dead" in the camp of Atmeh.<sup>145</sup>

## 5. The Outcome

The test of Anabasis demonstrated that, soft(er) law fails to provide security and does not meet the minimum of adequate standards living. The reasons might be summarized as denial of international humanitarian law, lack of responsibility sharing among the international community, and the sovereign rights of the Arab Republic of Syria over her territory.

This outcome is not specific to the story of Anabasis but inherent in the IDP protection system. For example, Puong takes the Bosnian example and notes that although the aim was creating a safe environment within Bosnia, "very quickly, it appeared that... people were not safe, and could only save their lives by leaving their homes."<sup>146</sup> She further asserts that humanitarian aid failed to protect IDPs in Bosnia Herzegovina because it had not been backed by a real threat of force.<sup>147</sup>

Moreover, Orchard concludes that humanitarian aid is destined to fail in cases of "regime-induced displacement" due to the requirement of consent of the local government, security issues, and the utilization of humanitarian aid to avoid taking other necessary measures.<sup>148</sup> Considering the fact that regime-induced IDPs would be refugees if they were to cross internationally recognized borders, utilization of IDP protection by states to avoid their responsibilities deriving from refugee law is not a far-fetched argument.<sup>149</sup> For example, the UN report articulates that "preventing mass migration is one of the acknowledged objectives of the food assistance provided in emergency situations."<sup>150</sup> Although containment of persons who suffer from the fear of persecution might not be the primary objective in every IDP protection arrangement, Atmeh or other camp settings along the border areas still serve for the containment of those persons within their country. This is a fact in the case of Syrian IDPs

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144 United Nations S/RES/2139 (2014), 22 February 2014, available at, [http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_res\\_2139.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2139.pdf) [accessed 14 April 2014]

145 Hugo Slim, Andrew Bonwick, "Protection, An ALNAP guide for humanitarian agencies", London, August, 2005, p. 24. Available <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2346.pdf> [accessed 05 March 2014]

146 Catherine Puong, *The International Protection of Internally Displaced Persons*, Cambridge University Press, New York, 2010, p. 170

147 Ibid.

148 Orchard, p. 19.

149 Alexander Betts, "Institutional Proliferation and the Global Refugee Regime", *Perspectives on Politics*, Vol. 7, No. 1 (Mar., 2009), p. 53. Available at, <http://www.jstor.org/stable/40407214> . [Accessed 04 February 2014]

150 UNHCR, UNICEF, WFP and WHO, "Food and Nutrition Needs in Emergencies", Rome, 2003, p. 15. Available at, <http://whqlibdoc.who.int/hq/2004/a83743.pdf> [ accessed 28 March 2014]

living in Atmeh or other border camps in Syria that are aided by the Turkish government to avoid their entrance into Turkish territory.

Finally, the failure to uphold the responsibility to protect by the international community results in poor conditions in the camps. As a result, “poor sanitation, lack of clean water and overcrowding” are regular characteristics of IDP camps and settlements.<sup>151</sup>

Consequently, IDP protection fails to effectively protect human rights of the forcibly displaced while simultaneously serving to contain displaced peoples and disregarding the responsibilities of states derived from refugee law.

### III. Temporary Protection in Turkey

#### 1. Introduction

Turkey, in respect to the principle of non-refoulement, reacted to the mass influx of Syrian refugees with an open door policy.<sup>152</sup> However, upon the rising of numbers of refugees and due to security concerns, Turkey differed from this policy. Since then, Turkey has been supporting the accommodation of Syrian people fleeing the civil war in camps like Atmeh, established along the Syrian side of the border.<sup>153</sup>

The protection awarded to Syrians has been characterized as de facto and temporary, in line with the Turkish regulations regarding the mass-influx cases.<sup>154</sup> There was no assessment of status on an individual basis of persons fleeing the conflict; instead, they were settled in “temporary accommodation centers” established in border areas.<sup>155</sup> Turkish Disaster and Emergency Management Presidency (hereinafter AFAD) have been coordinating the governmental efforts along with the local Governorships.<sup>156</sup>

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151 Erin, p. 9.

152 AFAD, “Syrian Refugees in Turkey, 2013: Field Survey Results”, p.1, .available at, [https://www.afad.gov.tr/Dokuman/TR/61-2013123015505-syrian-refugees-in-turkey-2013\\_print\\_12.11.2013\\_eng.pdf](https://www.afad.gov.tr/Dokuman/TR/61-2013123015505-syrian-refugees-in-turkey-2013_print_12.11.2013_eng.pdf) [accessed 26 April 2014]

153 Mazlum-Der, “TÜRKİYE’DE SURIYELİ MÜLTECİLER - İstanbul Örneği- Tespitler, İhtiyaçlar ve Öneriler”, p. 5, available at, [http://istanbul.mazlumder.org/webimage/suriyeli\\_multeciler\\_raporu\\_2013.pdf](http://istanbul.mazlumder.org/webimage/suriyeli_multeciler_raporu_2013.pdf) [accessed 26 April 2014]

154 Cavidan Soykan , The New Draft Law on Foreigners and International Protection in Turkey, Oxford *Monitor of Forced Migration*, Volume 2, Number 2, p. 40.

155 Ibid.

156 Mülteci Hakları Koordinasyonu, "Yok Sayılanlar; Kamp Dışında Yaşayan Suriye’den Gelen Sığınmacılar İstanbul Örneği", available at, <http://www.ihd.org.tr/index.php/raporlar-mainmenu-86/el-raporlar-mainmenu-90/2723-yok-sayilanlar-kamp-disinda-yasayan-suriyeden-gelen-siginmacilar-istanbul-ornegi.html> p. 9. [accessed 26 April 2014]



These camps, or as the Turkish Government refers to them, “temporary accommodation centers”, are rated “five stars”.<sup>157</sup> It is reported that accommodation arrangements in these camps are in line with international standards. Healthcare, primary education, along with adult training services is made available to persons who reside in the camps. In order to meet the nutritional needs of the population, a monthly stipend in the form of electronic cards allows residents to make purchases from grocery stores in the camps.<sup>158</sup>

Though the efforts of the Turkish Government in providing high standards in these camps should be lauded, there are also concerns regarding some aspects in relation to the location and the governance of these facilities. The most common concern is transparency: Turkish authorities consistently denied access to camps by alleging that, aside from occasional visits, the security and privacy of the population residing in camps would be at stake. Mazlumder, Amnesty International, and the Brookings Institute report a similar pattern of behavior.<sup>159</sup> Moreover, the proximity of some camps to borders raises security concerns.<sup>160</sup> Finally, practices resembling internment have been reported.<sup>161</sup>

Registration is a key point for Syrian Refugees to benefit from available protection arrangements in Turkey. Until recently, registration of Syrians and the provision of ID documents have only been carried out in border areas. However, in response to the rising number of urban refugees, registration points in cities were launched in 2013.<sup>162</sup> Although the number of those centers has been increased, and the government is aiming at launching sufficient number of those centers in every city where Syrian refugees are known to reside, efforts fall short of meeting the urgent need of registering the Syrian population in cities.<sup>163</sup>

Currently, the number of urban refugees far outnumbers the number of Syrian refugees who reside in a camp environment. AFAD confirms these proportions and states that “one in three refugees out of the camps has no registration at all.”<sup>164</sup> As a result, the vast majority of them do not benefit from any assistance from governmental bodies. Consequently their fundamental human rights are at stake.<sup>165</sup>

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157 Mac McClelland, "How to Build a Perfect Refugee Camp", New York Times, 13 February 2014, available at, [http://www.nytimes.com/2014/02/16/magazine/how-to-build-a-perfect-refugee-camp.html?\\_r=0](http://www.nytimes.com/2014/02/16/magazine/how-to-build-a-perfect-refugee-camp.html?_r=0) [accessed 28 April 2014]

158 Osman Bahadır Dinçer, Vittoria Federici, Elizabeth Ferris, Sema Karaca, Kemal Kirişçi, and Elif Özmenek Çarmıklı, Turkey and Syrian Refugees: The Limits of Hospitality, Brookings Institutes and International Strategic Research Organization (USAK) publication, November 2013, pp. 14-15.

159 Amnesty International, Amnesty International Briefing: “Turkey: National authorities and the international community must act in partnership to meet the needs of Syrian refugees”, p. 8.

160 Ibid.

161 Mazlum-Der, p.9.

162 Amnesty International, Briefing: , p. 9.

163 Ibid.

164 AFAD, Syrian Refugees in Turkey, p.21.

165 See Generally, AFAD, Syrian Refugees in Turkey; Mülteci Hakları Koordinasyonu, Yok sayılanlar, pp 10-25; Mazlumder, pp. 10-14; Brookings&USAK, pp.17-20.

## 2. Temporary Protection

There is not a single definition of temporary protection in the literature. Yet it is referred to as “an emergency response to the mass movements of asylum-seekers.”<sup>166</sup> This kind of movement might occur in situations of, for example, armed conflicts and natural disasters. UNHCR acknowledges the relevance of temporary protection, especially where there are few parties to the Refugee Convention or it is a hardship to apply the Convention, owing to the nature of mass-influx.<sup>167</sup>

In 1985, Perluss and Hartman argued that providing temporary refuge had become a norm of customary law and addressed the need of further scrutiny on the limits of this obligation deriving from customary international law.<sup>168</sup> To date, the need of determining the legal source as well as limits of this de facto protection regime has not been met.<sup>169</sup> The relationship, however, between refugee law and temporary protection is debated. UNHCR does not accept a de jure suspension of the regime of the Convention. However, the inability to process asylum applications is recognized as an indicator as to whether or not a case of mass-influx exists. Therefore, it could be argued that the regime of temporary protection is enacted when the Refugee Convention cannot function and is ceased in a de facto manner.<sup>170</sup>

The State, responding to such instant and large scale flows is nonetheless expected to uphold the principle of non-refoulement by neither directly or indirectly returning persons to life threatening conditions. Providing the minimums of housing, food, healthcare, and sanitary services should also be conceived of as part of this emergency response.<sup>171</sup> In other words, at all times, the response of the receiving state should be compatible with her international obligations.<sup>172</sup>

UNHCR currently advocates for regional arrangements rather than solitary national undertaking of the financial and other burdens of temporary protection.<sup>173</sup> For example, in the Syrian Humanitarian crisis, a regional response plan has been launched along with SHARP, with the aim of sharing the responsibility of countries facing a mass-influx of Syrian refugees

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166 UNHCR, "Summary Conclusions on Temporary Protection", ( July 2012), available at, <http://www.refworld.org/pdfid/506d908a2.pdf> [ accessed 06 May 2014]

167 UNHCR, Division of International Protection, Guidelines on Temporary Protection or Stay Arrangements, February 2014, availble at, <http://www.refworld.org/pdfid/52fba2404.pdf> [ accessed 06 May 2014]

168 D. Perluss and J. Hartman, Temporary Refuge: Emergence of a Customary Norm, *Virginia Journal Of International Law*, Vol. 26:3, 1986, p. 6. Content downloaded/printed from HeinOnline (<http://heinonline.org>) Sat Dec 21 20:15:40 2013

169 Alice Edwards, Temporary Protection, Derogation And The 1951 Refugee Convention,, *Melbourne Journal Of International Law*, Vol 13, 2012, p.14.

170 Ibid, p. 18.

171 UNHCR, Division of International Protection, Guidelines on Temporary Protection or Stay Arrangements, February 2014, availble at, <http://www.refworld.org/pdfid/52fba2404.pdf> [ accessed 06 May 2014]

172 European Union, Council of the European Union, "Council Directive 20 01/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof, 7 August 2001", available at: <http://www.refworld.org/docid/3ddcee2e4.html> [accessed 8 May 2014]

173 See, Guidelines on Temporary Protection.

like Jordan, Iraq and Turkey.<sup>174</sup> Turkey is one of the states that has received a large number of refugees arriving from Syria. Following an introduction of the legal framework governing international protection in Turkey, I will test the human rights protection capacity of temporary protection using Turkey as an example model.

### 3. Protection of the Forcibly Displaced in Turkey

Turkey ratified the 1951 Refugee Convention with temporal, geographical, and other substantial reservations.<sup>175</sup> While ratifying the 1967 Protocol, the temporal reservation was withdrawn; however, other reservations regarding geographical and substantial application of the Convention were maintained.

The substantial reservation is a statement noting that the rights of the refugees enshrined in the Convention cannot be interpreted in a way that results in exceeding rights of Turkish nationals.<sup>176</sup> The geographical reservation restricts the application of refugee status for people coming from Europe.<sup>177</sup> Thus, Turkey unburdened herself from the legal obligations derived from the Refugee Convention and its Protocol.

Turkey has been long criticized for lacking a coherent primary legislation for refugee protection. Until recently, a 1994 dated by-law<sup>178</sup> governed the protection of the forcibly displaced population in Turkey. However, the legal framework applicable to persons who seek refuge in Turkey has recently been changed. On 11 April 2014, the Foreigners and International Protection Act no. 6458 (hereinafter LFIP) came into effect, dramatically transforming the Turkish asylum system.<sup>179</sup> Although LFIP incorporates certain principles of international human rights law into the practice of asylum law, its impact might be limited in cases of mass-influx.<sup>180</sup>

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174 UN, 2014 Syria Regional Response Plan, available at <http://www.unhcr.org/syriarrp6/http://www.unhcr.org/syriarrp6/>, [accessed 08 May 2014]

175 Approval of the Geneva Convention, Code No: 359, 29/08/ 1961 Official Gazette 5/10/1961/10898; Retrieved from Nuray Ekşi, *Yabancılar Hukukuna İlişkin Temel Konular*, Beta Basım AŞ, İstanbul, 2006, p. 54; footnote n. 3.

176 M. Tevfik Odman, *Mülteci Hukuku*, AÜ SBF İnsan Hakları Merkezi Yayınları No.15, Ankara, 1995, p. 169.

177 European means citizen of a European Council Member States, See, Ekşi, p. 57.

178 "Regulation on the formal and substantial rules that will be applied to foreigners who seek asylum in Turkey or request for a residence permit in Turkey in order to seek asylum elsewhere and foreigners who come to our borders to seek asylum in groups and demographic movements that might occur." Official Gazette, 30 November 1994 No. 22127. Hereinafter "The 1994 By-Law"

179 Law No. 6458 on 2013 of Foreigners and International Protection , 4 April 2013, (hereinafter LFIP) unofficial translation of LFIP is available at: <http://www.refworld.org/docid/5167fbb20.html> [accessed 27 April 2014]

180 This argument will be explained below.

I would like to further elaborate on the Turkish legal framework governing the protection of the forcibly displaced. Albeit lengthy,<sup>181</sup> the reader may need a thorough introduction to be able to comprehend this section of the paper.

### 3.1. 1994 By-Law<sup>182</sup>

Although LFIP was only recently enacted, the evolution of Turkish legislation towards a new system can be traced back to 1994. Still, this transformation has been accelerated by the impact of efforts towards harmonization with the EU *acquis* and by the impact of ECtHR and UNHCR Country Operations.<sup>183</sup>

The early attempts to bring the domestic legal framework in line with international law demonstrate the inexperience and to some extent unwillingness of Turkey to incorporate international law into domestic law. False translations of vital legal terms,<sup>184</sup> confusion of those terms in scholarly writings,<sup>185</sup> and violating the cornerstone principles while applying domestic law<sup>186</sup> are some examples of this—naively put—inexperience.

Following the ratification of the Geneva Convention, issues concerning asylum seekers and refugees were regulated by provisions scattered around various codes and by solely administrative acts that had been kept confidential.<sup>187</sup> As a result of certain political developments, in particular the Iraqi refugee influx following the 2<sup>nd</sup> Gulf War, however, Turkey was compelled to regulate the issue in a more coherent manner.<sup>188</sup> As a result, The By-

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181 Those who are content with the information provided in this section, may move directly to the test of Anabasis.

182 Please note that within the norm hierarchy of Turkish Law By-Laws are of secondary quality. See, Erdal Kuluçlu, "Türk Hukuk Sisteminde Normlar Hiyerarşisi ve Sayıştay Denetimine Etkileri", *Sayıştay Dergisi* No. 71, p. 6. Available at, <http://www.xn—saytay-r9a28a.gov.tr/dergi/icerik/der71m1.pdf>, [ accessed at 06 May 2014]

183 Lami Bertan Tokuzlu, *Non-Refoulement Principle In A Changing European Legal Environment With Particular Emphasis On Turkey, A Candidate Country At The External Borders Of The EU*, Ph. D. Thesis, pp. 359-360. Kirişçi argues that UNHCR country operations drove this transformation. See, Kemal Kirişçi, "Turkey's New Draft Law on Asylum: What to Make of It?" In: *Turkey, Migration and the EU: Potentials, Challenges and Opportunities* edited by Seçil Paçacı Elitok and Thomas Straubhaar, Series Edition HWWI Volume 5, Available at, [http://hup.sub.uni-hamburg.de/volltexte/2012/118/chapter/HamburgUP\\_HWWI5\\_Migration\\_Kirisci.pdf](http://hup.sub.uni-hamburg.de/volltexte/2012/118/chapter/HamburgUP_HWWI5_Migration_Kirisci.pdf), [ accessed 26 April 2014]

184 Persecution has been translated as "takibat" that actually means prosecution. The Code approving the Refugee Convention reflects this error. Also, 1994 By-Law makes the same mistake. Bülent Çiçekli, "Mülteci Sığınmacı ve Göçmenler: Sınıflandırma ve Yasal Statünün Belirlenmesine İlişkin Sorunlar" in, *Current Developments in Citizenship, Immigration, Refugee Law and Law of Foreigners, International Symposium Proceedings 15 and 16 May, Anadolu University, Eskişehir, Türkiye Barolar Birliği Yayınları N. 175, Ankara, 2010*, p. 336. f.n. 28.

185 Odman, p. 188-191.

186 An example is provided by Frelick, "...The Turkish police took him to the Iranian embassy together with his identity papers, including a card identifying him as a member of a banned, royalist political opposition party ..." Bill Frelick, *Barriers to Protection: Turkey's Asylum Regulations*, *International Journal of Refugee Law*, Vol. 9 No. 1, Oxford University Press, 1997, Downloaded from <http://ijrl.oxfordjournals.org/> at Raoul Wallenberg Institute on April 23, 2014, p.21.

187 Odman, p. 181.

188 For the political environment led to the adoption of the By-Law see, Tokuzlu, pp. 353-357.

Law on Refugees and Asylum Seekers was enacted in 1994. The emphasis in this regulation is on the quandary of mass-influx, corresponding with the political concerns that delivered The By-Law in the first place.

### **a. Individual Protection**

The 1994 By-Law employs the definition of the Refugee Convention, blending it with the geographical limitation stipulated in Article 1.B.(1) of the Convention. The definition of Article 3 is read as:

“Refugee(mülteci): As a result of events occurred in Europe, owing to a justified fear of prosecution<sup>189</sup> for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of her<sup>190</sup> nationality and is unable to benefit from the protection of her country or, owing to that fear, is unwilling to benefit from the protection of that country; or if she does not have a nationality and is outside the country of that she has been residing is unable or, unwilling to return to it.”<sup>191</sup>

In order for refugee status to be recognized, the following proceedings had to be executed: forcibly displaced persons who lawfully enter Turkish territory would apply to Governorships of the place in which they are currently present, whereas persons who used illegal means to enter Turkey had to avail themselves to the Governorship of the location through which they entered Turkey within five days.<sup>192</sup> Following this application, identification of the applicant, interview for the sake of status determination, and additional proceedings upon the request of the Ministry of Interior would all be administered. Provided that the case is settled in favor of the refugee, he or she would either be accommodated in a guesthouse or be invited to reside in an area designated by the ministry.<sup>193</sup> The By-Law, however, does not indicate a procedure for the right to legal remedy against screened-out cases but is content with indicating that he/she would be removed from Turkey should his/her application is denied.<sup>194</sup>

It should also be noted, although Europeans may obtain a de jure refugee status in Turkey, Bulgarians, Chechens or Bosnians had not been granted a legal status but were treated as “guests.” Their cases were dealt with in respect to other legal categories as part of the legal framework applicable to foreigners.<sup>195</sup>

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189 The erroneous translation have been addressed above.

190 Turkish is a gender neutral language, I opt for the female pronoun as the Refugee Convention opts for the male pronoun.

191 The 1994 By-Law, Art.3.

192 The 1994 By-Law, Art.4.

193 The 1994 By-Law, Art 5 and Article 6.

194 The 1994 By-Law, Art 6.

195 Tokuzlu, p. 357.

The term “Asylum Seekers” was defined in the very same article and applied to people whose circumstances were one and the same as refugees but are Non-Europeans.<sup>196</sup> Çiçekli addresses this fundamental distinction by stating that, “while European de facto refugees had the possibility to become de jure refugees, it is not possible for the asylum seekers according to Turkish law to obtain such status.”<sup>197</sup> Consequently, in line with the geographical reservation to the Refugee Convention, there have been two different regimes that govern European and non-European people seeking refuge in Turkey. Still, the process of status determination required an identical process but displayed a consequential difference.

Individuals of Non-European origin could not receive international protection in Turkey; however, they were able to reside in Turkey on a temporary basis to seek protection elsewhere. Protection elsewhere corresponds with “Third Country resettlement” and was dealt with by the UNHCR while Turkish authorities handled cases concerning status determination.<sup>198</sup> Consequently, there has been parallel processing of asylum applications by both UNHCR and Turkish authorities, which has proven to be problematic. Also, the limited period of five days, spelled in the original version of 1994 By-Law, hindered many people from accessing asylum procedures.<sup>199</sup> Furthermore, another chronic problem has been reported as the impatience of the Turkish authorities regarding the processing of applications by UNHCR.<sup>200</sup> Both this parallel processing and this impatience have led to the violation of the principle of non-refoulement in various cases.<sup>201</sup>

As for the legal remedy available for screened-out cases, in theory, despite the silence of 1994 By-Law on how to challenge the decisions of deportation, resorting to administrative and judicial mechanisms was possible. However, it is proven that those remedies available in the Turkish legal system are not effective in practice.<sup>202</sup>

Frelick further reports that, security concerns of enforcement agencies in Turkey overrode the protection aspect and colored the application of this By-Law.<sup>203</sup> For example administrative detention of applicants has become the norm, and when persons are detained, their access to asylum procedures in effect were denied.<sup>204</sup> Soykan compiles the characteristics of this process, saying, “...deferring or deterring asylum seekers through both informal and formal mechanisms. At the informal level, ‘illegal forcible returns’ defer the arrival of asylum seekers onto the Turkish territory, while the indefinite administrative

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196 The 1994 By-Law, Art. 3

197 Çiçekli, p.339.

198 Çiçekli, p. 352.

199 The time constraint evolved from 5 days, to ten days, gradually transforming into an “appropriate time” clause. Ekşi, pp 59 – 61.

200 Frelick, p. 14.

201 Ibid.

202 Abdolkhani and Karimnia v. Turkey Appl. No. [30471/08](#), Council of Europe: European Court of Human Rights, September 2009, See also, Odman, p. 187.

203 Frelick, p.14.

204 Amnesty International, “Stranded Refugees Denied Protection in Turkey”, Amnesty International Publications, London, UK, 2009, p. 14.

detention works as a formal deterrent together with its degrading conditions which, in turn, create another informal deterrent effect on potential applicants”.<sup>205</sup>

As a result of these systemic deficiencies both inherent in the letter of 1994 By-Law and the mentality behind the implementation, ECtHR convicted Turkey several times in relation to her obligations under the European Convention of Human Rights.<sup>206</sup>

## **b. Mass-Influx**

Article 8 of the 1994 By-law stipulates that, provided that there are not any political decisions, when people appear at Turkish borders in groups to seek refuge in Turkey, eliminating their admittance to Turkish territory is the main course of action.<sup>207</sup> This article underscores the security concerns of Turkey, even to the detriment of the principle of non-refoulement. The Turkish position in the 1970 UN Territorial Asylum Conference is in line with this “contingent application of the principle of non-refoulement in mass-influx situations”.<sup>208</sup> Tokuzlu reports Turkey's assertion in this conference: provided that there are security concerns in the cases of mass-influx, the principle of non-refoulement could be disregarded.<sup>209</sup>

The following Chapter of the By-Law set forth rules concerning the reception and identification of persons, establishment of camps in close vicinity of borders, settlement and containment in the camps, and disciplinary measures.<sup>210</sup> Although there are provisions as to the religious freedoms, healthcare, death and burial of the asylum seekers settled in the camps, other civil and social rights are subject to the general legal framework.<sup>211</sup> Odman addresses the obscurity of the 1994 By-Law in reference to the procedures of reception and standards of treatment of persons in mass-influx cases.<sup>212</sup> In this chapter of the 1994 By-Law, whenever an elaborate regulation is required, it is delegated to administrative bodies to set the details out by circulars or directives. Additionally, the 1994 By-Law did not lay down a legal framework for the civil and social rights of the forcibly displaced; therefore, rules governing their legal rights and obligation were scattered around various codes, regulations, and other

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205 Soykan , p. 43.

206 Jabari v. Turkey, Appl. No. 40035/98, Council of Europe: European Court of Human Rights, 11 July 2000; D. and Others v. Turkey. Appl.No. 24245/03, Council of Europe: European Court of Human Rights, . 22 June 2006; Mamatkulov and Abdurasulovic v. Turkey, Appl. No., 46827/99; 46951/99, Council of Europe: European Court of Human Rights, 6 February 2003, Dbouba v. Turkey, Appl. No. 15916/09, Council of Europe: European Court of Human Rights, 13 July 2010, Ghorbanov and Others v. Turkey Appl. No. 28127/09, Council of Europe: European Court of Human Rights, 3 December 2013.

207 The Bylaw, Art. 8.

208 Guy S. Goodwin-Gill, "The Principle of Non-Refoulement'. Its Standing and Scope in International Law", A Study prepared for the Division of International Protection Office of the United Nations High Commissioner for Refugees, July, 1993, p. 1, available at, <http://repository.forcedmigration.org/pdf/?pid=fmo:1085> [accessed 26 April 2014]

209 Tokuzlu, p.390.

210 Articles 9-15 of the By-Law.

211 Aydoğan Asar, Türk Yabancılar Mevzuatında Yabancı ve Hakları, Turhan Kitabevi, Ankara, 2006, pp. 379-380.

212 Odman, pp.183 – 184.

regulatory legal tools.<sup>213</sup> The lack of a comprehensive legal regime tailored for this vulnerable group has been problematic in respect to their effective protection.

Moreover, taking a look at the recent history of Turkey,<sup>214</sup> it is observed that the reaction of Turkey regarding mass-influxes has been colored by the security narrative, as well as with the ethnicity and religious affiliations of those groups. While welcoming Bulgarian, Bosnian, and Kosovan refugees, and allowing Kurdish refugees fleeing Iraq in 1988, Turkey fell back to the security narrative and kept her borders closed during the second Gulf War.<sup>215</sup> A Study of Migration Policy Institute explains these differing policies in the “context of nation building with the intention of establishing a homogeneous identity.”<sup>216</sup>

In summation, although the 1994 By-Law does not provide this title, a temporary protection regime has been established in Turkey. However, its compliance with Turkey's obligations deriving from international law has been polluted by security concerns, political interest, and arbitrary implementation.

### **3.2. Newborn: Law on Foreigners and International Protection**

As previously stated, the evolution of Turkish asylum law has been accelerated by the impact of EU accession efforts and decisions of ECtHR, as well as UNHCR operations in Turkey. In fact, this transformation is called the “Europeanization of the Turkish Asylum System”.<sup>217</sup> The efforts to align Turkish legislation with the EU Acquis and ECtHR judgments were initially delivered in the 2006 Directive No. 57 of 22 June 2006 from the General Directorate of Security of the Ministry of Interior.<sup>218</sup> The Implementation Directive altered the application deadline with a “without delay” clause, allowed asylum applications at Turkish borders, clarified procedural aspects regarding the duration of residence permits, suspended deportation orders, and introduced subsidiary and humanitarian grounds for international protection.<sup>219</sup>

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213 Odman, pp. 161-162 and. pp. 170-191. Also, Çiçekli, pp., 354-359.

214 For a striking tragedy, see Struma accident. Ofer Aderet, "The lone survivor of a Jewish Refugee Ship" Hareetz, 24/02/2014, available at, <http://www.haaretz.com/weekend/week-s-end/the-lone-survivor-of-a-jewish-refugee-ship-1.414588> [ accessed 07 May 2014]

215 Helsinki Yurttaşlar Derneği, Sivil Toplum Kuruluşları için Mülteci Destek El Kitabı, see "Tarihsel Arka Plan", available at, <http://www.hyd.org.tr/multecielkitabı/default.asp> [ accessed 07 May 2014]

216 Ahmet İçduygu and others, Migration Policy Center, Country Profile: Turkey, p. 16. Available at, [http://www.migrationpolicycentre.eu/docs/migration\\_profiles/Turkey.pdf](http://www.migrationpolicycentre.eu/docs/migration_profiles/Turkey.pdf) [accessed 24 April 2014]

217 For example, Nurcan Özgür Baklacioğlu, “Building “Fortress Turkey”: Europeanisation of Asylum Policy in Turkey”, The Romanian Journal of European Studies, 7-8, 2009; Nuray Ekşi in her latest publishing on Law on Foreigners and International Protection, Beta AŞ, İstanbul, April 2014; Kemal Kirişçi, The limits of conditionality and Europeanization: Turkey’s dilemmas in adopting the EU acquis on asylum, 2007, Umut Aydin & Kemal Kirişçi, "With or Without the EU: Europeanisation of Asylum and Competition Policies in Turkey", South European Society and Politics, 18:3, 375-395, DOI: 10.1080/13608746.2013.799729.

218 Hereinafter "Implementation Directive"

219 See generally, Kemal Kirişçi, "Turkey’s New Draft Law on Asylum: What to Make of It?"



Although the Implementation Directive was praised due to these rather liberal provisions, the application in the field did not reflect the same value. The application of the Implementation Directive demonstrated similar issues which, according to Baklacioğlu, are a result of the narratives of fight against “illegal migration”<sup>220</sup> and security-dominated state practices.<sup>221</sup> Although The Implementation Directive was followed by circulars and administrative regulations aiming at compliance with EU Acquis, ECtHR kept delivering judgments against Turkey as a result of on-going human rights violations regarding asylum law practices.<sup>222</sup> By 2009, preparatory works for meeting the objective of a “special asylum law and single institutional body in the area of migration and asylum” had begun.<sup>223</sup> Those efforts, in turn, delivered LFIP by April 2013. The majority of the provisions of LFIP have come into force a year later, as recently as 11 April 2014.

LFIP finally provides a comprehensive legislation for foreigners and a primary legal source for asylum claims. The enactment of this legislation in the midst of a refugee influx, according to many writers, deserves compliments.<sup>224</sup> However, the emphasis in LFIP is on individual asylum claims rather than mass-influx situations. The political environment in 1994 delivered The By-Law, which designated the majority of its articles to cases of mass-influx, whereas the 2014 LFIP almost solely regulates individual applications.

Before the substantial provisions at the beginning of LFIP, Article 4 stipulates the principle of non-refoulement. This customary norm finally finds its place within Turkish Law, and its placing suggests that the norms of LFIP will be applied in respect to this principle.

### **a. Law of Foreigners**

The second chapter of LFIP lays down the general legal framework applicable to foreigners. This chapter starts with establishing the conditions of entry. Entering from designated points, possessing a passport or a document that substitutes a passport,<sup>225</sup> or possessing a visa obtained from Consulates abroad or issued at the borders are criterion to legally enter Turkey.<sup>226</sup> Failing to submit a passport, providing false documents or an insufficient validity period on those documents prevents persons from entering Turkish territory. Also, foreigners who have not been issued a visa might be denied entry to Turkey. Finally, possessing requisite documents does not force the authorities to allow the foreigner to enter Turkish territory per se; discretion of the authorities on admitting persons prevails.<sup>227</sup>

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220 The author uses "irregular migration" however "illegal migration" is more articulate given the State's practice.

221 Baklacioğlu, p. 4.

222 Baklacioğlu, p. 3; Kirişçi, "Turkey's New Draft Law on Asylum: What to Make of It?" pp 76-78.

For a recent ruling of ECtHR see for example, *Ghorbanov and Others v. Turkey* Appl No. 28127/09, Council of Europe: European Court of Human Rights, December 2013.

223 Baklacioğlu, p. 1.

224 Brookings Enstitüsü & Uluslararası Stratejik Araştırmalar Kurumu (USAK) "Suriyeli Mülteciler Krizi Ve Türkiye Sonu Gelmeyen Misafirlik, Karınca Ajans Yayıncılık Matbaacılık, Ankara, November 2013, p. 32.

225 For documents replacing a passport, see Ekşi, *Yabancılar ve Uluslararası Koruma Hukuku*, pp 72 – 76.

226 See Art. 7 of the LFIP.

227 Ekşi, *Yabancılar ve Uluslararası Koruma Hukuku*, p. 79.

If a person wishes to remain in Turkey for more than 90 days, he/she must obtain a residence permit.<sup>228</sup> However, by virtue of Art. 20, persons who benefit from international protection are exempt from this rule. Residence permits are classified regarding the duration (short term, long term) and certain categories of persons (family, student, humanitarian, and victim of human trafficking).<sup>229</sup> It should be noted that humanitarian grounds appears as another safeguard against refoulement, embedded in the substantial provisions to protect persons who are unable to benefit from international protection. However, the elimination of beneficiaries of international protection from obtaining a long term residence permit stands as a barrier against the integration of, in particular, refugees.<sup>230</sup>

Foreigners might be subject to deportation on the grounds exhaustively listed by law.<sup>231</sup> Still, the principle of non-refoulement and other humanitarian reasons constitutes a legal insurance against expulsion, and legal remedies are made available against such orders that ipso facto prevent executing a deportation order.<sup>232</sup>

Administrative detention of foreigners has been a matter that Turkey struggled to reconcile with her human rights law obligations.<sup>233</sup> Through LFIP, this practice receives a legal ground, along with the rights of those who are being detained.<sup>234</sup> According to LFIP, persons who are to be deported might be taken under administrative detention and kept in “removal centers” to be established by the Migration Directorate, the novice administrative body specializing in migration.<sup>235</sup> The maximum duration of administrative detention is officially six months but might be extended for another six months of time under certain circumstances. Also, the right to appeal against this practice has been set out, and a decision regarding this appeal is guaranteed to be delivered within 30 days.<sup>236</sup> However, appealing against administrative detention does not ipso facto eliminate its execution. Additionally, legal aid, receiving assistance from UNHCR, access to basic healthcare services, and freedom of correspondence are among vital rights and freedoms settled in LFIP.<sup>237</sup> However, LFIP also provides the legal ground for the restriction of the freedom of movement of conditional refugees and persons benefiting from subsidiary protection. It is established that those persons might be asked to reside in a certain area and be obliged to periodically report to authorities.<sup>238</sup>

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228 Ibid, p.85.

229 Ibid, p. 87.

230 See Article 42/2 of LFIP.

231 Overstaying more than ten days. See LFIP, Art. 54/8 and 54/13. See also Art.54 for other legal grounds of expulsion.

232 See Art. 55 and 56 of LFIP.

233 Cases dealt by ECtHR which involves violation of Article 5. of the Convention as a result of the arbitrariness of the administrative detention are: Abdolkhani and Karimnia v. Turkey, Z.N.S. v. Turkey, Alipour and Hosseinzagdan v. Turkey, D.B. v. Turkey, Dbouba v. Turkey, Charahili v. Turkey, Ranjbar et others v. Turkey, Tehrani et other v. Turkey. See, Ekşi, *Yabancılar ve Uluslararası Koruma Hukuku*, 126.

234 Ibid, 129.

235 See articles 57 – 59 of LFIP.

236 Magistrates Court Judge is competent to handle these matters. See Art. 57/6 of LFIP.

237 See Article 57/7 for the right to legal aid, and Article 59 for rights to be exercised in removal centers.

238 Ekşi, *Yabancılar ve Uluslararası Koruma Hukuku*, p.181.

## **b. International Protection of Individuals**

LFIP acknowledges Turkey's share of the responsibility to protect forced migrants and employ the concept of “international protection” (Uluslararası Koruma) that consists of subsidiary protection, protection of refugees, and conditional refugees.<sup>239</sup>

A refugee is defined by Article 61 of LFIP by a translation of the definition stated in the Refugee Convention.<sup>240</sup> The status of conditional refugee corresponds with the term “asylum seeker” of the 1994 By-Law and is utilized to define non-European persons seeking refuge in Turkey. The conditionality of this status also corresponds with the 1994 By-Law and remains as Third Country Resettlement. Subsidiary protection is a category designed to fill protection gaps and is applicable “to individuals who cannot be called ‘refugees’ or ‘conditional refugees,’ but who, however, are unable to return to their countries where they might face the death penalty, torture or inhuman or degrading treatment or punishment, or where there is ongoing generalized violence or armed conflict.”<sup>241</sup> Finally, an interim status of “applicant of international protection” has been established in order to enable those persons who are awaiting a decision regarding their cases to benefit from a limited regime of protection.

Although, Turkey was expected to withdraw the geographical reservation, LFIP upholds Turkey's concerns and incorporates the distinction between Europeans and non-Europeans into this new legislation.<sup>242</sup> Consequently, the binary characteristic of the regime of Turkish international protection is maintained, along with the parallel proceedings of Turkish authorities and UNHCR regarding third country resettlement. However, each category is subject to a similar application process, which will be summarized below.

The application for international protection is received by administrative authorities, and applicants are immune from the regular legal framework governing the entry and/or residence concerning foreigners in Turkey. Proceedings regarding unaccompanied children will primarily consider the best interest of the child,<sup>243</sup> and persons with special needs will receive special treatment in relation to their situation.

Article 68 establishes that administrative detention for applicants is strictly exceptional and might only be applied in accordance with the reasons stated in this article. The reasons set out in the second sentence of this article are as follows: in the case of serious

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239 See Art. 3 of LFIP.

240 Art. 61 of LFIP is read as: “A person who as a result of events occurring in European countries and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it shall be recognized as a refugee following the refugee status determination procedures.”

241 Soykan, p. 41.

242 Kirişçi, p. 64.

243 See Art. 66 and Art. 67 of LFIP.

doubt regarding fallacy of the documents, verification of the personal data of the applicant, being caught while trying to enter Turkey illegally, securing the application process, and posing a serious threat against public order and security. The duration of this detention shall not exceed 30 days, and should the applicant appeal against this act, the Magistrates judge must deliver a judgment within five days. When compared with the regular detention of persons to be deported, it is observed that the legislation upholds the right of displaced persons to seek international protection.<sup>244</sup>

The following article lays down the registration of an international protection application and production of a document issued upon registration that protects the applicant from refoulement. The application might be deemed inadmissible on grounds of arrival from a first country of asylum or third safe country, replicate applications without providing new facts, or re-applying personally after having already been included in a family application.<sup>245</sup> Provided that the application is admissible, an interview for status determination should be scheduled no later than 30 days afterward. Following this interview, an applicant ID is issued for the applicant and accompanying persons for the duration of six months.

The decision regarding the application is also tied to a six month period, and the following articles stipulate procedural safeguards. Apart from temporal limitations, administrative and legal remedies against screened-out cases are clearly articulated.<sup>246</sup> Additionally, non-refoulement of persons during status determination and appeals processes, right to a legal counsel as part of the legal aid scheme, and right to information are among distinctive provisions.<sup>247</sup> Moreover, the status determination process in this new law places the applicants in the center and aims at enabling applicants to express themselves to the best of their abilities.<sup>248</sup> Also, persons with special needs and unaccompanied children are designed as categories of priority.<sup>249</sup> Finally, upon recognizing International Protection, an ID that substitutes a residence permit along with traveling documents is issued.<sup>250</sup>

However, the attached rights and freedoms to the international protection identification document will differ in relation to the determined status. For example, refugees benefit from a three year long residence permit, whereas conditional refugees and subsidiary protection beneficiaries may reside in Turkey for one year only.<sup>251</sup> Additionally, conditional refugees and subsidiary protection beneficiaries might be obliged to reside in a particular region, whereas refugees have an unrestricted freedom of movement within the country.<sup>252</sup> Also, refugees are issued travel documents, while conditional refugees or persons benefiting from subsidiary protection must apply for such document with no guarantee that they will be

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244 Compare with Art. 57 of LFIP.

245 Art. 72. See Articles 74 and 75 for details regarding grounds of third safe country and first country of asylum.

246 Soykan, p. 42, see also Article 80 of LFIP.

247 See LFIP, Art. 70 informing the applicant, Art. 80 remedies, Art. 81 Legal Services and Counselling.

248 LFIP Art. 75.

249 LFIP Art. 66 Unaccompanied children, Art. 67. Persons with special needs, and Art. 75.

250 LFIP Art. 83 and Art. 84.

251 Ibid.

252 LFIP Art. 82.

granted the right to leave.<sup>253</sup> As for rights and obligations of persons benefiting from international protection, although access to primary education and the possibility to be granted social assistance are common provisions, the right to work stands apart for different categories of international protection.<sup>254</sup> Applicants who await a decision regarding status determination might apply for a work permit after residing in Turkey for six months, whereas refugees and persons benefitting from subsidiary protection may freely work, save for restrictions for certain occupations.<sup>255</sup>

UNHCR is one of the main organizations cooperating in the application of this law. While the right of individuals to contact UNHCR is recognized, UNHCR also possesses the right to access applicants. Additionally, the UNHCR database constitutes a primary resource to consult for country of origin information. Finally, UNHCR is designated as a natural member of the Migration Advisory Board and may be represented in the International Protection Evaluation Commission.<sup>256</sup> Consequently, cooperation among Turkish authorities and UNHCR will not be limited to execution of the third country resettlement. Turkish authorities will rely on information compiled by UNHCR and benefit from the expertise of this organization. As a result of the inclusion of UNHCR within the domestic structure, administrative agencies will likely turn to UNHCR as one of the major actors regarding the governance of forced migration in Turkey.

### **c. Temporary Protection in LFIP**

According to Article 2 of LFIP, “protection provided to foreigners who cannot return to the country which they have been forced to leave and have come to Turkey in masses” is in the scope of this new law.<sup>257</sup> Therefore, the weak and vague position of the 1994 By-Law, which did not explicitly numerate the protection afforded in mass-influx situations, is fixed by the enactment of LFIP.

However, it is surprising to see the limited room spared for temporary protection in LFIP. First of all, it should be kept in mind that international protection corresponds with “refugee, conditional refugee or subsidiary protection status.”<sup>258</sup> Hence, temporary protection does not constitute a form of international protection. The exclusion of temporary protection from the scope of international protection further entails that Turkey maintains the discretionary character of this kind of protection. Moreover, the rights and freedoms attached to forms of international protection will not be applicable for persons who benefit from temporary protection.

As for the issue of temporary protection, Article 91 does no more than reiterate the definition which is already listed in previous articles, despite being titled “temporary

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253 LFIP Art. 94.

254 Explanation regarding temporary protection is below.

255 LFIP, Art. 89, LFIP, Art. 92/2.

256 LFIP Art. 104 and Art. 105.

257 LFIP, Art.2

258 LFIP, Art 3.

protection.” The second sentence of this article clarifies that the essence of temporary protection will be determined by a regulation of Board of Ministers.<sup>259</sup>

#### **d. Applicable Law for the test of Anabasis**

According to Turkish geographical reservation to the Refugee Convention, Syrian refugees coming from Europe cannot qualify as “refugees” in domestic law. Additionally, despite the fact that the 1994 By-Law regulates mass-influx cases in detail, the Turkish Government avoided implementing a solid legal framework for the protection afforded to Syrian refugees. Rather than a binding framework, the Turkish government has tinged the legal language with kindheartedness and hospitality. The translation of refugees in this case is “Syrian guests.”<sup>260</sup> Although AFAD argues that, “Naturally those (Syrian) refugees have legal status,” a guest is not determined as a legal subject in Turkish law.<sup>261</sup>

Until April 2012, the legal source of the protection afforded to Syrian refugees remained unclear. Mazlum-Der reports that, although by this date it was declared that Syrian refugees were afforded “temporary protection,” the Circular on this matter had not been publicized. This confidentiality also applied to the March 2012 Directive no.62 on the Reception and Accommodation of Syrian Refugees.<sup>262</sup> Actually, the avoidance of the Ministry of Interior to publicize the regulatory frameworks in the Official Gazette indicates that these regulations are not classified as clarification of application of laws but are deemed operational regulations.<sup>263</sup> Therefore, the ambiguity of the source of protection is not merely a suspicion but also a legal question.

Nevertheless, despite the status of Syrian refugees having already been determined from April 2012, an AFAD Circular on the healthcare of the Syrian refugees dated 2012 still referred to Turkey’s “Syrian Guests.”<sup>264</sup> Although the confusion regarding their status is ongoing among various authorities, it is accepted that, from April 2012 and onwards, as part of international law, the EU Directive on Temporary Protection is applicable to Syrian people who seek refuge in Turkey.<sup>265</sup>

As for domestic law, regardless of the attitude of the Turkish Government, 1994 By-Law should be applicable in this case of mass-influx. Confidential guidelines on the reception

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259 LFIP, Art 91.

260 Please see the report drafted by Euro Mediterranean Human Rights Network, “Syrian Refugees in Turkey: A Status in Limbo”, October 2011, p. 2 and pp. 7-9.

261 AFAD, Syrian Refugees in Turkey, p. 20.

262 Mazlumder, 8.

263 Art.124 of Turkish Constitution does not necessarily oblige Turkish legislative body to publicize Directives. Tanör and Yüzbaşıoğlu, agrees with Teziç, and employ the distinction of directives regulating application of laws are to be public however directives regarding the operations of administrative authorities might not be publicized. See, Bülent Tanör, Necmi Yüzbaşıoğlu, 1982 Anayasası'na göre Türk Anayasa Hukuku, Beta Basım AŞ, Eylül, 2004, İstanbul, p. 379.

264 Circular of AFAD, 18 January 2013 No. 2013/1 title “Suriyeli misafirlerin sağlık hizmetleri”, available at, <https://www.afad.gov.tr/TR/IcerikDetay.aspx?ID=44> [accessed 30 April 2014]

265 Nuray Ekşi, Yabancılar ve Uluslararası Koruma Kanunu Tasarısı, Beta Basım AŞ, İstanbul, 2012, p.173.

and accommodation of Syrian Refugees,<sup>266</sup> the circular enabling Syrian refugees to access primary and preventive healthcare services,<sup>267</sup> the circular of Ministry of Interior regarding the exemption of refugees and asylum seekers from residence permit fee,<sup>268</sup> and the latest arrangements of Ministry of Work and Social Security regarding the work permits of Syrian persons are legal resources of temporary protection afforded to Syrian persons.

As of 11 April 2014, however, LFIP became the main body of law governing the treatment of Syrian refugees who benefit from temporary protection in Turkey. However, regulations that will determine the operational details of temporary protection are not yet drafted. As a consequence of the administrative regulations listed above, as long as they do not run against LFIP, it will remain in force. Moreover, specific acts and regulations, for example the Law on the Work Permits of Foreigners<sup>269</sup> and the By-Law on its application,<sup>270</sup> will coexist along with the LFIP. It should also be noted that the Fees Act constitutes an important element since it regulates the fees that are charged for proceedings conducted by the government.

Be it guests, migrants, asylum seekers or refugees, Syrian people who seek refuge in Turkey are foreigners, according to the construction of Turkish law.<sup>271</sup> Article 12 of the constitution employs the term “everyone” to benefit from the rights and freedoms laid down by the constitution. However, Art.16 of the Constitution establishes that the rights and freedoms of foreigners may be restricted by law, as long as those restrictions are in line with international legal standards.<sup>272</sup> Currently, LFIP is the body of law that executes this divergent legal regime applicable to foreigners. Additionally, principles and procedures laid down in Civil Code, Penal Code, administrative law, as well as labour law are applicable, unless specific regulations concerning foreigners trump the conflict of relevant norms.

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266 This Guideline is kept strictly confidential, so much that it is referred as the “ghost”.

Ministry of Interior, 30.March 2012 No. 62, Title "Türkiye'ye Toplu Sığınma Amacıyla Gelen Suriye Arap Cumhuriyeti Vatandaşlarının ve Suriye Arap Cumhuriyetinde İkamet Eden Vatansız Kişilerin Kabulüne ve Barındırılmasına İlişkin Yönerge". Not available.

267 Circular of AFAD, 18 January 2013 No. 2013/1 title “Suriyeli misafirlerin sağlık hizmetleri”. This circular enabled Syrian Refugees to access healthcare services in border areas, however by an amendment of 9 September, 2013 the application of this circular covered all 81 provinces across Turkey. See, UNHCR Turkey “Sıkça Sorulan Sorular Türkiye’deki Suriyeli Mülteciler” available at, [http://www.unhcr.org.tr/uploads/root/faq\\_-\\_turkish.pdf](http://www.unhcr.org.tr/uploads/root/faq_-_turkish.pdf) [ accessed 30 April 2014] The Amending Circular of the Vice-President. 09 September 2013, No. 2013/8, Title: “Suriyeli Misafirlerin Sağlık ve Diğer Hizmetler Hk.” a link is available at, “<http://www.tkhk.gov.tr/TR,1825/genelgeler.html>” [accessed 30 April 2014]

268 Circular of Ministry of Interior, Date 23 March 2010, Title " Mülteci ve Sığınmacılar ile ilgili Genelge" No. 2010/23, available at [http://www.icisleri.gov.tr/default.icisleri\\_2.aspx?id=4537](http://www.icisleri.gov.tr/default.icisleri_2.aspx?id=4537) [accessed 30 April 2014]

269 Law on the Work Permits of Foreigners, ( Yabancıların Çalışma İzinleri Hakkında Kanun)No. 4817, published in the Official Gazette 06 March 2003, No. 25040, available in English at, [http://www.csgb.gov.tr/csgbPortal/ShowDoc/WLP+Repository/yabancilar/dokumanlar/ing\\_4817](http://www.csgb.gov.tr/csgbPortal/ShowDoc/WLP+Repository/yabancilar/dokumanlar/ing_4817) [accessed 30 April 2014]

270 By-Law on the Application of Law on the Work Permits of Foreigners ( Yabancıların Çalışma İzni Hakkında Kanunun Uygulama Yönetmeliği), published on the Official Gazette on 29 August Friday, No. 25214, available at, <http://www.resmigazete.gov.tr/eskiler/2003/08/20030829.htm#3>

271 Ekşi, Yabancılar ve Uluslararası Koruma Kanunu, p. 37.

272 Tanör, Yüzbaşıoğlu, pp. 145-146.

Finally, as a result of the monist characteristics of Turkish law, international treaties approved in accordance with the established procedures possess the status of Law within the domestic legal system.<sup>273</sup> Furthermore, the supremacy of the international treaties concerning fundamental rights and freedoms is established.<sup>274</sup> The prevalence of international law has also been accepted as a fundamental legal principle by the Constitutional Court of Turkey.<sup>275</sup> Consequently, international law, especially human rights treaties such as the Refugee Convention and the ECHR, possess a practical legal weight in Turkish judiciary.

Below, we are to carry out the test of Anabasis to determine the effective protection afforded by those norms in Turkish domestic law, which to some extent is also rooted in international law.

#### 4. Istanbul

*Anabasis walks into Turkey and leaves Syria behind. Haste invites mistakes, and she forgets her documents in the tent while attempting to use the chaos that the attack created to make her escape.*

*While the group was walking towards the gathering point in Reyhanlı, there were discussions on what to do in Turkey. Reyhanlı<sup>276</sup> was not a safe place for Syrians: after the burning of cars in the town,<sup>277</sup> resentment against refugees has grown.<sup>278</sup> Women, lowering their voices, exchanged stories of abuse in the camps.<sup>279</sup> Another one argued, “The camps are like prisons!” and suggested Antep as the final destination.<sup>280</sup> A woman sighed, “Cities are not safe for us either.”<sup>281</sup> Anabasis decided to follow her own plan and departed to Istanbul.<sup>282</sup>*

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273 See Art. 90/4 of the Constitution of Turkey. Turkish Constitution in English can be accessed in [http://global.tbmm.gov.tr/docs/constitution\\_en.pdf](http://global.tbmm.gov.tr/docs/constitution_en.pdf).

274 Art. 90/5 of the Constitution.

275 Tanör, Yüzbaşıoğlu, p. 465.

276 Reyhanlı is a district of Hatay province. While a humanitarian NGO, "Support to Life" reports that Reyhanlı accommodates around 35.000 Syrian Refugees, Disaster and Emergency Management Presidency of Turkey (hereinafter AFAD) reports there are 60.000 refugees in the city of Hatay. Please see, AFAD, Syrian Refugees in Turkey, 2013, Field Survey Results, p. 17. Also, Şenay Özden, Syrian Refugees in Turkey, MPC Research Reports 2013/05, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole (FI): European University Institute, 2013., p. 2. available at, <http://www.migrationpolicycentre.eu/docs/MPC-RR-2013-05.pdf> [accessed 22 April 2014]

277 Matthew Weaver, The Guardian, “ Turkey Blames Syria over Reyhanlı Bombings”, 12 May 2013, available at, <http://www.theguardian.com/world/2013/may/12/turkey-blames-syria-reyhanli-bombings> [ accessed 22 April 2014]

278 Please see Mazlum-der's report regarding the incident occurred in Reyhanlı. İnsan Hakları ve Mazlumlar İçin Dayanışma Derneği (Mazlumder), Hatay/Reyhanli Ön İnceleme Raporu: 13/05/2013 Hatay’ın Reyhanli İlçesinde 11.05.2013 Tarihinde Meydana Gelen Patlamalar Sonucu Çok Sayıda İnsanın Hayatını Kaybemesine İlişkin Vaka Ön İnceleme Raporu, Available In Turkish at, [Http://Www.Mazlumder.Org/Faaliyetler/Detay/Basin-Aciklamalari/1/--Mazlumder-Hatay-Reyhanli-On-Inceleme-Raporu/9964](http://www.Mazlumder.Org/Faaliyetler/Detay/Basin-Aciklamalari/1/--Mazlumder-Hatay-Reyhanli-On-Inceleme-Raporu/9964)

279 Yok Sayılanlar; p. 10.

280 Mazlumder, "Türkiye’de Suriyeli Mülteciler”

281 Forms of forced marriages are widely reported in border provinces. Please see the report of Turkish Human Rights Association, para 8 under the heading of "İnceleme Heyetinin Yaptığı Tespitler", İnsan Hakları Derneği, (Human Rights Foundation), Suriye’de Yaşanan Çatışmalı Süreç İle Bunun Neticesinde Yaşanan Göçün Hatay’da Halk Üzerindeki Yansımaları İle İlgili Araştırma-İnceleme Raporu, available in Turkish at,



*After a long trip, Anabasis arrives in Istanbul and makes her way to a neighborhood called Aksaray, where she knew of a family who settled there after fleeing the conflict.<sup>283</sup> She meets the father and is taken to their small basement that they share with another family of five.<sup>284</sup> Anabasis tells them that she has an aunt in Sweden and is willing to go there. Being determined, she convinces the father to put her in contact with certain people. Since attending school is not an option,<sup>285</sup> the father suggests that she join the girls of the family to work in a textile workshop until she leaves Istanbul.<sup>286</sup>*

*The next morning, Anabasis and the father go to a cafe in Aksaray to meet “the man.”<sup>287</sup> He introduces his tariff that ranges from 400 to 10.000 US Dollars depending on the “services.”<sup>288</sup> Anabasis accepts the deal and decides to try the land border from Edirne.*

*The following day, she follows others to work. It is the first time that she feels sincerely welcomed after leaving her home. The employer, rubbing his hands, says, “May Allah bless Syrians!”<sup>289</sup> Only after a couple of days, the employer starts groping Anabasis, and tells her that if she resists, she will lose her job.<sup>290</sup> Once pay day arrives, however, he rubs his hands against each other, yet gives nothing. Dependent on the girls’ income, the families and Anabasis fail to pay the rent. Hospitality has its limits; the landlord forces them to leave the apartment. Having nowhere to go, they join the ones living in tents on an empty lot.<sup>291</sup>*

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<http://www.ihd.org.tr/index.php/raporlar-mainmenu-86/el-raporlar-mainmenu-90/2640-suryede-yaanan-catimali-suerec-le-bunun-netcesnde-yaanan-goecuen-hatayda-halk-uezernde-k-vansimalari-le-lgl-aratirma-nceleme-raporu.html> [ accessed 23 April 2014], See also, Brenda Stoner, "Syrian women refugees humiliated, exploited in Turkey", Al Monitor, 12/03/2014, available at, <http://www.al-monitor.com/pulse/originals/2014/03/syria-refugees-women-exploitation-harassment.html#> [accessed 23 April 2014]

282 Yok Sayılanlar, p. 10.

283 Ayça Örer, "İstanbul'da bir küçük Suriye", Radikal, 14/09/2013, available in Turkish at, [http://www.radikal.com.tr/turkiye/istanbulda\\_bir\\_kucuk\\_suriye-1150720](http://www.radikal.com.tr/turkiye/istanbulda_bir_kucuk_suriye-1150720) [ accessed 23 April 2014]

284 AFAD, Syrian Refugees in Turkey, p. 10.

285 Mazlumder, p.17.

286 IRIN News, "TURKEY: Syrian refugees choosing to work risk exploitation", 26/12/2012. Available at, <http://www.irinnews.org/report/97125/turkey-syrian-refugees-choosing-to-> [accessed 16 February 2014]

287 Tanya Talaga, Toronto Star, "Human Smuggler or modern day Robin Hood?", 18/04/2014, available at, [http://www.thestar.com/news/world/2014/04/18/human\\_smuggler\\_or\\_modernday\\_robin\\_hood.html](http://www.thestar.com/news/world/2014/04/18/human_smuggler_or_modernday_robin_hood.html) [accessed 23 April 2014]

288 Deborah Amos and Rima Marrouch, Parallels, " With The Help Of Smugglers, Syrian Refugees Sneak Into Europe, 07/12/2013. available at, <http://www.npr.org/blogs/parallels/2013/12/07/248742786/with-the-help-of-smugglers-syrian-refugees-sneak-into-europe> [accessed 23 April 2014] See also, Daniel Trilling, " The road to nowhere: the Syrian refugees left out in the cold by Europe", New Statesman, 21/01/2014, available at, <http://www.newstatesman.com/2014/01/road-to-nowhere-syria> [ accessed 23 April 2014]; "Syrian refugees fall prey to human smugglers, con men", Today's Zaman, 22/10/2013, available at, <http://www.todayzaman.com/news-329498-syrian-refugees-fall-prey-to-human-smugglers-con-men.html> [accessed 23 April 2014]

289 Cumali Önal, Today's Zaman, "Plight of Syrian refugees now visible in Istanbul parks", 22/09/2013, available at; [http://www.todayzaman.com/newsDetail\\_getNewsById.action?newsId=326903](http://www.todayzaman.com/newsDetail_getNewsById.action?newsId=326903) [accessed 16 February 2014]

290 Brenda Stoter, Al Monitor Pulse of Middle East, 12 March 2014, available at, <http://www.al-monitor.com/pulse/originals/2014/03/syria-refugees-women-exploitation-harassment.html> [ accessed 30 April 2014]

291 Oğuz Yeter, Gazete Vatan, "İstanbul'un Göbeğinde Dram", 17/11/2013, Available at, <http://haber.gazetevatan.com/istanbulun-gobeginde-dram/584818/1/gundem>. [Accessed 16 February 2014]

*A few days later, Turkish police appear. They force Anabasis and others away and set fire to their tents.<sup>292</sup> Following their neighbors from the camp, they arrive in central slums and settle in a derelict house.<sup>293</sup> Anabasis restively waits to hear from the man. Once he makes the call, she meets him and leaves for Edirne, where her journey to Europe will begin.*

#### **4.1. Anabasis v. Turkish Judiciary**

As briefly noted above, Anabasis benefits from the rights and freedoms laid down by the Turkish Constitution, albeit with certain restrictions as a result of being a non-citizen. By virtue of the right to legal remedy stipulated by Article 36 of the Turkish Constitution, she may seek justice by turning to the Turkish Courts. Also, Article 40 of the Constitution entitles her to request prompt access to the competent authorities when her fundamental rights and freedoms are violated.

##### **a. Substantial Claims**

###### **i. Right to Education**

Article 42 of the Constitution protects everyone from the deprivation of the right to education. It is acknowledged that this right also covers secondary and higher levels of education.<sup>294</sup> In addition, it is established by law that equal opportunity in education is one of the core principles of the Council of Higher Education Institution.<sup>295</sup> While the 1994 By-Law prescribes that the education of asylum seekers is subject to the general legal framework, LFIP covers the general legal framework applicable to foreigners and specifically entitles children to the right to education.<sup>296</sup> Furthermore, LFIP stipulates that the right to education cannot be restricted for foreigners, and their access to education should be promoted.<sup>297</sup>

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292 Idris Semen, "O Mülteci Kampı Artık Yok", Radikal, 29/04/2014, available at, [http://www.radikal.com.tr/turkiye/o\\_multeci\\_kampi\\_artik\\_yok-1189148](http://www.radikal.com.tr/turkiye/o_multeci_kampi_artik_yok-1189148); See also, Haber Sol, "Suriyeli Mültecilerin Çadırlarını Zabıta Yaktı", 28 April 2014, Available at, <http://haber.sol.org.tr/devlet-vesiyaset/suriyeli-multecilerin-cadirlarini-zabita-yakti-haberi-91620> [accessed 30 April 2014]

293 Özlem Güvemli, "Enkazda Yaşam Savaşı", Cumhuriyet, 16/01/2014, Availabel at, [http://www.cumhuriyet.com.tr/haber/siyaset/30455/Enkazda\\_yasam\\_savasi.html](http://www.cumhuriyet.com.tr/haber/siyaset/30455/Enkazda_yasam_savasi.html) [accessed 30 April 2014]

294 Constitutional Court of Republic of Turkey, Dec.No. 2012/1334, 17/09/2013, Paras 28 and 29 available at the Official Gazette, <http://www.resmigazete.gov.tr/eskiler/2013/10/20131030-14.pdf> [accessed at 30 April 2014]

295 See Art.5/e of the Law on Higher Education, Yüksek Öğretim Kanunu No.2547, 4/11/1981, available at, [http://www.yok.gov.tr/web/guest/icerik/-/journal\\_content/56\\_INSTANCE\\_rEHF8BIsfYRx/10279/17031](http://www.yok.gov.tr/web/guest/icerik/-/journal_content/56_INSTANCE_rEHF8BIsfYRx/10279/17031) [accessed 2 May 2014]

296 LFIP, Art. 34/4 and Art. 59/1-d.

297 LFIP, Art. 90/2 and Art. 96/3.

However, according to the Fundamental Law on National Education, the subject of the right to education is determined as the Turkish citizens.<sup>298</sup> Moreover, the Constitutional Court accepts that the State does not have a positive obligation to provide higher education to everyone.<sup>299</sup> Therefore, the right to “higher education” has limited enforceability in Turkey, even for citizens of Turkey.

The Committee on Economic, Social and Cultural Rights puts forth that access to education is among the most serious issues that forcibly displaced persons face.<sup>300</sup> Additionally, by the enactment of LFIP, promotion of the right to education should be a prominent legal principle, yet, as noted above, administrative regulations for the application of LFIP are not yet in force. It should also be noted that the Council of the Higher Education adopted a Circular for the year of 2012-2013, admitting Syrian “guests” to universities in seven cities, covering only border areas. It is reported, however, this Circular failed to lead operations in western cities where, like Anabasis, hundreds of thousands of Syrian people reside.<sup>301</sup> Besides, this Circular has not established a rule but constituted an exception that had already lost its legal and practical weight.

The language of the education also constitutes a barrier for Anabasis.<sup>302</sup> Albeit limited, there are programs taught in Arabic in Turkey.<sup>303</sup> Should Anabasis find a higher education institution, however, she will be expected to provide documentation regarding her identity as well as her qualifications. To obtain such documents is nearly impossible for Anabasis, given the fact that there is an ongoing war in Syria.<sup>304</sup> Finally, financial issues will add another barrier regarding her access to education. Students of foreign origin have been prohibited from working during their studies until the enactment of LFIP.<sup>305</sup> Currently, undergraduate students are allowed to work after their first year as a student if they are able to obtain a work permit.<sup>306</sup>

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298 See Art. 7 of The Fundamental Law on National Education, No. 1739, 14/6/1973, available at [http://mevzuat.meb.gov.tr/html/temkanun\\_1/temelkanun\\_1.html](http://mevzuat.meb.gov.tr/html/temkanun_1/temelkanun_1.html) [ accessed 30 April 2014]

299 Ibid, para 29.

300 Doc. E/C.12/TUR/CO/1, para. 12.

301 Yok Sayılanlar, p. 17.

302 This is a controversial issue in both legal and political fora in Turkey. A trade Union has been shut down, as a result of setting the right to be taught in one's mother tongue. See; Case Of eğitim Ve Bilim Emekçileri Sendikası v. Turkey, No.20641/05, 25/09/2012, available at, [http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{\"fulltext\":\[\"Eğitim-Sen\"\],\"itemid\":\[\"001-113410\"\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{\) [ accessed 20 April 2014]

303 See for example for a list of university programmes in Turkey, <http://www.hangiuniversite.com/bolumler/> [ accessed 02 May 2014]

304 See the long list of requirements, [http://studyinturkey.com/content/sub/undergraduate\\_admissions.aspx](http://studyinturkey.com/content/sub/undergraduate_admissions.aspx) [ accessed 02 May 2014]

305 See By-Law on Students of Foreign Origin Art. 10; Türkiye'de Öğrenim Gören Yabancı Uyruklu Öğrencilere İlişkin Yönetmelik, published in the official Gazette on, 30.4.1985 No: 18740, available at, [http://www.yok.gov.tr/web/guest/icerik/-/journal\\_content/56\\_INSTANCE\\_rEHF8BIsfYRx/10279/17831](http://www.yok.gov.tr/web/guest/icerik/-/journal_content/56_INSTANCE_rEHF8BIsfYRx/10279/17831) [ accessed 30 April 2014]

306 See LFIP Article 41.

Thus, in Turkey, where the positive obligation to provide higher education is limited, Anabasis would likely be unable to access to education as a “guest” whose rights cannot surpass the rights of the host.<sup>307</sup>

## ii. Sexual Abuse at Work

The Constitution entitles everyone with the right to protect “his/her corporeal and spiritual existence.”<sup>308</sup> Penal Law, reflecting this principle, prescribes imprisonment for persons who violate one's sexual integrity from three months up to seven years.<sup>309</sup> In the case of sexual harassment, if the incident occurs within a relationship of a hierarchical character, imprisonment cannot be less than one year of time. Nevertheless, if the acts violating one's sexual immunity involve physical contact, except for penetration, the type of the crime becomes “ordinary sexual assault.”<sup>310</sup> Prosecution of claims of this sort is tied to the complaint of the victim.<sup>311</sup> Furthermore, Labour Law acknowledges sexual abuse as a ground for rightful termination of a labour contract.<sup>312</sup> Finally, civil law provides the ground for compensation in relation to the mental anguish or financial loss of the victim.<sup>313</sup>

Sexual abuse in the work place is reported to be a common phenomenon in Turkey.<sup>314</sup> Gerni reports findings of sexual abuse among women who work in the textile industry.<sup>315</sup> In relation to this social environment, rooted in the lack of sufficient protective mechanisms, the CEDAW Committee is “concerned about the situation of various disadvantaged groups of women, including... migrant women and women asylum-seekers.”<sup>316</sup>

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307 This report states that none of the interviewees are not able to continue their education in Turkey. Yok Sayılanlar, p. 17.

308 Constitution of Republic of Turkey, Art. 17/1.

309 See and compare Articles 102 and 105 of the Penal Code No.5237, 26/09/2004. Available in English at, [http://www.justice.gov.tr/basiclaws/Criminal\\_Code.pdf](http://www.justice.gov.tr/basiclaws/Criminal_Code.pdf) [accessed 02 May 2014]

310 Yrd. Doç. Dr. İlhan Üzülmöz, Cinsel Dokunulmazlığa Karşı Suçlar, p. 1, Available at, <http://www.ceza-bb.adalet.gov.tr/makale.htm> [accessed 02 May 2014], See also, Gerçek Çakıcı, Yargıtay Kararlarıyla Cinsel Taciz Suçu, AUHFD, 60 (1), 201, p. 50, available at, <http://dergiler.ankara.edu.tr/dergiler/38/1584/17171.pdf> [accessed 02 May 2014]

311 Yrd. Doç. Dr. İlhan Üzülmöz, Cinsel Dokunulmazlığa Karşı Suçlar, p. 1, Available at, <http://www.ceza-bb.adalet.gov.tr/makale.htm> [accessed 02 May 2014], See also, Gerçek Çakıcı, Yargıtay Kararlarıyla Cinsel Taciz Suçu, AUHFD, 60 (1), 201, p. 50, available at, <http://dergiler.ankara.edu.tr/dergiler/38/1584/17171.pdf> [accessed 02 May 2014]

312 See Labour Act, Art 24/2 d. No. 4857, 22/05/2003. Available in English at, <http://en.hukuki.net/index.php?topic=27.0> [accessed 02 May 2014]

313 See Art. 25 of The Civil Code, No. 4721, 22./11/2001, Available at, <http://www.tbmm.gov.tr/kanunlar/k4721.html> [accessed 02 May 2014]

314 See Shadow Report submitted to CEDAW Committee on 32<sup>nd</sup> Session, p. 13, Kadının İnsan Hakları (KİH) and Yeni Çözümler Vakfı, Birleşmiş Milletler Kadına Karşı Her Türlü Ayrımcılığın Önlenmesi Sözleşmesi (CEDAW) Türkiye Gölge Raporu 32. B.M. CEDAW Komitesi Oturumu'na sunulmak üzere, Ocak 2005, Available at, [http://eski.bianet.org/2005/01/01\\_k/golgerapor.doc](http://eski.bianet.org/2005/01/01_k/golgerapor.doc) [accessed 03 May 2014].

315 G. Mine Gerni, İşyerinde Cinsel Taciz: Erzurum İlinde Bankacılık Seklörü Ozerine Bir Uygulama, Ankara Üniversitesi SBF Dergisi, no. 56, p. 21, available at, [http://www.politics.ankara.edu.tr/dergi/pdf/56/3/2\\_mine\\_gerni.pdf](http://www.politics.ankara.edu.tr/dergi/pdf/56/3/2_mine_gerni.pdf) [accessed 03 May 2014]

316 United Nations CEDAW/C/TUR/CO/6, 16 August 2010, para 38. Available at, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/485/60/PDF/N1048560.pdf?OpenElement> [accessed 02 May 2014]

Unfortunately, the only specific legislation addressing violence against women contends itself with the specific case of domestic violence.<sup>317</sup> Additionally, effectively protecting women from sexual violence becomes even harder, given the fact that Turkish case law regarding the evaluation of evidence and consent is inconsistent.<sup>318</sup> The presumption of male innocence and the right to prove an allegation of a woman are quite evident in these cases. Still, the general outlook of a case and whether or not the victim has a reason for aspersion are among criterion that has affected Turkish judges.<sup>319</sup>

Therefore, if we were to predict an outcome of Anabasis' case, considering this inconsistent case law, it would be the dismissal of her claims. Apart from the difficulties of collecting additional evidence, the requirement of complaint of the victim strengthens this position, due to the barriers before Anabasis regarding access to justice.

### iii. Right to a fair wage and social security

By virtue of Articles 49, 55, and 60, the Turkish Constitution establishes the right to work and social security, and guarantees that workers receive a fair wage, among other social benefits.<sup>320</sup> The Constitutional Court also acknowledges the inherent bond between the concept of social security and an adequate standard of living.<sup>321</sup> Moreover, the case law of the Constitutional Court acknowledges the link between the right to life and social and economic duties of the State.<sup>322</sup> Although freedom of contract is also a cornerstone principle in Turkish Law, the right to a minimum wage sets the limit of this liberty.<sup>323</sup> According to the Supreme Court, the right to a fair wage is the essential right of the employee, and paying the wage is the main obligation of the employer.<sup>324</sup> This main obligation is stipulated in both Turkish

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317 Specific legislation tailored to combat violence against women is called "Protection of Family and Prevention of Violence Against Women" and it solely regulates specific legal actions and protection schemes to be triggered in domestic violence cases. See, Ailenin Korunması Ve Kadına Karşı Şiddetin Önlenmesine Dair Kanun, No 6284, 8/3/2012 Available at, <http://www.resmigazete.gov.tr/eskiler/2012/03/20120320-16.htm> [accessed 02 May 2014] Also, Ministry of Women and Family has been renamed in 2011, and its title has been changed as "Ministry of Family and Social Policies". See, Burçin Belge, "Kadın Bakanlığı Kaldırıldı, Kadın Örgütleri Öfkeli", Bianet, 08/06/2011, available at, <http://www.bianet.org/bianet/kadin/130585-kadin-bakanligi-kaldirildi-kadin-orgutleri-ofkeli> [accessed 03 May 2014]

318 For a highly publicized ruling, also approved by the 14<sup>th</sup> Department of Penal Law of the Supreme Court by its decision no. 2011/12479, 2011/1056, is the case of N.Ç. Information regarding this controversial case is found in English at, Rachel Courtis, The Case of N.Ç.: A Turkish Child's Presumed Consent to Prostitution, HR Brief, 10/02/20102, Available at, <http://hrbrief.org/2012/02/the-case-of-n-c-a-turkish-child%E2%80%99s-presumed-consent-to-prostitution/> [accessed 03 My 2014]

319 See Generally, Leyla Çakıcı Gerçek, Yargıtay Kararlarıyla Cinsel Taciz Suçu AUHFD, 60 (1) 2011:47-82, available at, <http://dergiler.ankara.edu.tr/dergiler/38/1584/17171.pdf> [accessed 02 May 2014]

320 See The 5<sup>th</sup> Section of the Turkish Constitution.

321 Rulling of the Constitutional Court, 26.10. 1988, E. 1988/19, K. 1988/33.retrieved from Kaboğlu, Anayasa'da sosyal haklar: Alanı ve sınırları, p.19.

322 Doç.Dr.Ali Karagülmez, "Anayasa Makemesi Kararlarında Sosyal Devlet ve Sosyal Haklar" p. 199.

323, Şahin Çil, "Avrupa Sosyal Şartı ve Yargıtay Kararları", p. 2. This article written by judge Çil could be accessed from the web page of the Constitutional Court, See, [http://www.anayasa.gov.tr/files/insan\\_haklari\\_mahkemesi/sunumlar/ym\\_2/CiIESCyargitayKararlar.doc](http://www.anayasa.gov.tr/files/insan_haklari_mahkemesi/sunumlar/ym_2/CiIESCyargitayKararlar.doc) [accessed 03 May 2014]

324 Nineth Division of the Civil Law Department of the Supreme Court, No. 2008/ 14546 E, 2010/ 193 K, 18.1.2010

Contract Law and Labour Law.<sup>325</sup> In the case of employers failing to comply with this primary obligation, the employee possesses the right to terminate the contract and earns the rights of compensation.<sup>326</sup> Thus, the responsibility of the State laid down by the Constitution is shared with the employers. For example, the Social Insurance and Universal Health Insurance Law and the Law of Employment and Trade Unions Law establish short periods of time to register an employee,<sup>327</sup> and if the employer fails to meet these requirements, he or she faces sanctions.<sup>328</sup> Moreover, the Penal Code prescribes imprisonment for persons who exploit others by benefiting from the destitution of those involved.<sup>329</sup>

The right to work of foreigners, however, is conditional, tied to a permit granted by the Ministry of Employment and Social Security.<sup>330</sup> The application for a work permit may be filed by the prospective employer of a foreigner who has a residence permit with a valid duration of six months minimum.<sup>331</sup> The decision to issue a work permit requires taking the person's education, the company's contribution to the national economy, and the situation of the labor market into account.<sup>332</sup> However, refugees and conditional refugees are not subject to the duration clause and applications concerning their work permit should also be exempt from other conditions.<sup>333</sup> While monetary sanctions are prescribed for both the employee and the employer in the case of carrying out a labour contract without a work permit,<sup>334</sup> the employee might also be subjected to expulsion as a result of working without the proper permits.<sup>335</sup>

Against the backdrop of this elaborate legal background and somewhat progressive case law, the materialization of the right to work, in the form of a right to a fair wage and social security, hits the flexibly-built wall of the informal labour market in Turkey. ILO refers to "informal employment" as one of the key labour market challenges in Turkey.<sup>336</sup> The scope of the problem in the textile industry is discussed by Güloğlu in a study that found the vast

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325 Turkish Debt Code Art. 401, No. 6098, 11/1/2011, Available at, <http://www.resmigazete.gov.tr/eskiler/2011/02/20110204-1.htm> [accessed 02 May 2014]

326 See Art. 24/II.d of Labour Act of Turkey, No. 4857, 22.05.2003, available in English at, <http://www.ilo.org/public/english/region/eurpro/ankara/download/labouracturkey.pdf> [accessed 03 May 2014]

327 This short article published in the Turkish Bar Association provides an outlook for the informal labour market and social security. For reference, please note that the new legislation of Law on Social Insurance and Universal Healthcare is now in force differing from the content of the article. See Generally, M.Kemal Oktar, Kayıtdışı İstihdam ve Sosyal Güvenlik, TBB Dergisi, Sayı 53, 2004, available at, <http://tbbdergisi.barobirlik.org.tr/m2004-53-49> [accessed 03 May 2014]

328 See the lengthy provision of Art.102 of the Social Insurance and General Health Insurance Law, 5510, 31/05/2006, available in English at, [http://www.sgk.gov.tr/wps/wcm/connect/1513fcb9-6954-42f1-9711-1708b08ff3a0/SOCIAL\\_INSURANCE\\_AND\\_UNIVERSAL\\_HEALTH\\_INSURANCE\\_LAW.pdf?MOD=AJPERES](http://www.sgk.gov.tr/wps/wcm/connect/1513fcb9-6954-42f1-9711-1708b08ff3a0/SOCIAL_INSURANCE_AND_UNIVERSAL_HEALTH_INSURANCE_LAW.pdf?MOD=AJPERES) [accessed 03 May 2014]

329 See Article 117 of the Penal Code.

330 In principle. See Ekşi for the limited number of authorities which might conduct such an act. Ekşi, Yabancılar ve Uluslararası Koruma Kanunu, p. 211.

331 Please note that, the residence permit should be obtained within Turkey.

332 Ibid, p. 212.

333 Ibid.

334 Ibid, p. 227.

335 See LFIP, Art.54/9.

336 Available at, [http://www.ilo.org/global/research/global-reports/world-of-work/2013/WCMS\\_214952/lang-en/index.htm](http://www.ilo.org/global/research/global-reports/world-of-work/2013/WCMS_214952/lang-en/index.htm) [accessed 03 May 2014]

majority of the textile workers interviewed were informally employed.<sup>337</sup> Moreover, informal employment of irregular migrants in Turkey is also a widely reported phenomenon.<sup>338</sup>

Anabasis and many other Syrians in Turkey find themselves in the middle of these problems. Obtaining a work permit could save Anabasis from this form of labor; however, she would not meet even the initial criteria of possessing a residence permit. Besides, these proceedings are commenced by an employer and cost more than hiring someone from the local labor pool. Additional criterion adds more pressure to the applicants, and all of the cited reports find that none of the interviewees possessed a work permit. As a stop-gap measure against the exploitation of Syrian guests, the Ministry of Employment and Social Security made an announcement concerning the elimination of duration and other criterion for foreigners of Syrian origin in regards to obtaining a work permit.<sup>339</sup> Although this is a commendable action, it is odd that the government also employs an informal course of action to combat informal labour market and exploitation. An “announcement” is not an administrative regulation but is a mere declaration, one that has very little impact on the dissemination of information and is not enforceable. Furthermore, this “announcement” also requires a residence permit and an employer who is willing to bear the additional costs for a Syrian worker. Consequently, this “announcement” falls short of effectively protecting the Syrian population from exploitation.

However, a mere phone call to the Employment and Social Security Ministry or the Tax office would trigger an investigation of a person who is alleged to be violating his obligations in relation to social security law.<sup>340</sup> This time, Anabasis could benefit from the fact that her interests overlap with the interest of the Republic of Turkey to collect taxes. However, lack of documentation, language barrier and details that will be elaborated under procedural aspects strain the actual compensation of her suffering.

#### **iv. Right to Housing**

Right to housing is also established by the Constitution.<sup>341</sup> The Law on Collective Housing,<sup>342</sup> the Slums Law,<sup>343</sup> and the Law on Transformation of Areas Under the Risk of

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337 Guloglu, "The Reality of Informal Employment in Turkey", Ithaca, NY: Cornell University, School of Industrial and Labor Relations, International Programs, p. 30, Available at, <http://digitalcommons.ilr.cornell.edu/intl/9/> [accessed 04 May 2014]

338 Ibid, p.18.

339 Please consult the website of the Ministry, "Suriye uyruklu yabancılara çalışma izni verilmesi. Detaylar için bakınız" <http://www.csgeb.gov.tr/csgebPortal/yabancilar.portal?page=duyurular> [accessed 03 May 2014]. Upon the confusion of the date of dissemination of this announcement, I also consulted to the news portals and concluded that the Ministry published this announcement in March, 2013. See, Sol Portal, "Artık Onlar da Çalışabilecek", 13/03/2013 <http://haber.sol.org.tr/devlet-ve-siyaset/artik-onlar-da-turkiyede-calisabilecekler-haberi->, [accessed 03 May 2014], See also, Eksi, Yabancılar ve Uluslararası Koruma Kanunu, pp. 217-218, f.n. 244.

340 One may call “170”, and denounce persons who disobeys tax and social security law. See, [http://www.alomaliye.com/2008/cumhur\\_sinan\\_alo170.htm](http://www.alomaliye.com/2008/cumhur_sinan_alo170.htm) [accessed 12 May 2014]

341 The Article under the “right to housing title” is read as, “The State shall take measures to meet the need for housing within the framework of a plan that takes into account the characteristics of cities and environmental conditions, and also support community housing projects.”

Natural Disaster<sup>344</sup> are regulations aimed at fulfilling housing needs, providing infrastructure of slum areas, and bringing about a secure living environment. As for private law, the right to housing is protected against seizure with the claim of abode,<sup>345</sup> and the right to tenure is protected by debt law by laying down provisions regarding the determination of the rent, strictly limiting legal grounds of eviction.<sup>346</sup>

In principle, persons who apply for international protection bear their living costs themselves, including housing. Yet, it is also declared that the State may establish admittance and accommodation centers.<sup>347</sup> In parallel, according to the 1994 By-Law, persons who approach Turkish borders in groups are accommodated in the camps.<sup>348</sup> In the same vein of this legal framework, administrative circulars refer to Syrian persons who do not live in a camp environment as “Syrian guests whose housing needs are taken care of by them.”<sup>349</sup>

In general, housing rights have proven to be problematic in Turkey. First of all, Article 57 of the Constitution takes the individual out of the picture, so much so that The Constitutional Court feels the need to clarify that the intent of Article 57 was to establish the right to housing.<sup>350</sup> Kaboğlu concludes that Turkey falls short of effectively protecting housing rights,<sup>351</sup> and Çoban argues, even in times of facilitating the right to housing, housing is deemed as a mere dwelling and isolated from its kinship with other social and cultural rights.<sup>352</sup> Against the backdrop of the Constitutional ground of this freedom, the legislation facilitates neither the right to housing nor the safeguarding of social justice in civil society. For example, acting with the mandate of social housing, the Collective Housing Administration launched the urban transformation in Sulukule that resulted in the eviction of tenants of Roma origin from their traditional neighborhood.<sup>353</sup>

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342 Law on Collective Housing, (Toplu Konut Kanunu)No. 2985, 2/3/1984, Available at, <http://www.toki.gov.tr/docs/mevzuat/2985SAYILIKANUN.pdf> [ accessed 04 May 2014]

343 Slums Law, (Gecekondu Kanunu), No: 775, 20/7/1966 Available at, <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.775.pdf> [ accessed 04 May 2014]

344 Transformation Of Areas Under The Risk Of Natural Disaster (AFET Riski Altındaki Alanların Dönüştürülmesi Hakkında Kanun) No. 6306, 16/5/2012, Available at, <http://www.csb.gov.tr/gm/dosyalar/belgeler/belge547/20120531-1.htm>, [ accessed 04 May 2014]

345 Dr. Cenk Akil, Yargıtay Kararları Işığında Haline Münasip Evin Haczedilmezliği (MESKENİYET) İddiası (İİK M. 82/12) (In The Light Of Court Decisions Claim To Abode (Turkish Execution And Bankruptcy Code Art. 82/12), AUHFD, 60, 4, 201, Pp. 775-808.

346 Debt Code of Republic of Turkey, No. 6098, 11.01.2011, See Section IV. Articles 343-346 and 350-355. Available at, <http://www.resmigazete.gov.tr/eskiler/2011/02/20110204-1.htm> [ accessed 04 May 2014]

347 See Art. 100 of LFIP.

348 See Article 12 and Article 15 of the 1994 By-Law, respectively.

349 AFAD, 09/09/2013 dated circular.

350 Decision of the Constitution Court of Republic of Turkey, No. 1985/11, 1986/291, 11.12.1986

351 İbrahim Ö.Kaboğlu, "Yerleşme Özgürlüğü ve Konut Hakkı" in Muzaffer Sencer'e Armağan, İnsan Hakları Yıllığı Cilt 17-18, 1995-1996, p. 169.

352 Aykut Namık Çoban, Cumhuriyetin İlanından Günümüze Konut Politikası, Ankara Üniversitesi SBF Dergisi No. 67-3, 2012, pp 103-104. available at, <http://www.politics.ankara.edu.tr/dergi/pdf/67/3/4.pdf> [ accessed 04 May 2014]

353 See for further information about Sulukule; Hacer Foggo, The Sulukule Affair: Roma against Expropriation, *Roma Rights Quarterly*, No.4 , 2007, pp 41-47.



Finally, it is known that rents in areas populated by Syrian guests are inflated, and even if the civil court intervenes with the matter, the outcome of such a lawsuit would likely fail Anabasis.<sup>354</sup> The reason for that is the attitude of the Civil Division of the Supreme Court, which lets the invisible hand of the market rule the tenancy contracts by weighing the freedom of contract and the market value of the apartments.<sup>355</sup> Also, when tenants are informally evicted, the right to property of the owner hinders taking any additional legal action by relying on a contractual right over the same property. As for settling in open areas, the right to property of third parties as well as public order prevents recognition of any kind of legal protection.

In summation, the right to housing of Anabasis is not effectively protected in Istanbul. Although there are accommodation centers in border areas, isolation from the world and security concerns for women and Alewites convinced not just a few, but hundreds of thousands of Syrian people to settle in cities like Istanbul. Anabasis and other urban refugees, by refusing to be a subject of the government's containment policies, are deprived of the basic necessities of a dignified life. The avoidance of public authorities is evident in the actions of police officers who evicted a group of 300 who settled in an empty lot. Evicted persons reported that the police left immediately after setting their tents on fire, and that they were not advised on how to meet their need for housing.<sup>356</sup>

#### **v. Freedom of Residence and Inviolability of Domicile**

Freedom of residence and inviolability of domicile is also listed among constitutional rights.<sup>357</sup> Both depriving someone of his or her freedom of movement and violation of the privacy of domicile are sanctioned with imprisonment.<sup>358</sup> Also, financial loss and mental anguish suffered as a result of those acts might be compensated in both civil and administrative courts.

Although LFIP prescribes a specific regime for the freedom of residence of foreigners,<sup>359</sup> settling on a lot that might be subject to private property is beyond the ordinary protection of this freedom, and a tent might not qualify as a “domicile” that possesses the quality of inviolability.<sup>360</sup> Besides, if the area in which Anabasis and others are settled is

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354 See for example, Hurriyet Daily News, "Syrian refugee inflow doubles house prices in Turkish border cities", Doğan News Agency, Gaziantep, available at, <http://www.hurriyetdailynews.com/syrian-refugee-inflow-doubles-house-prices-in-turkish-border-cities.aspx?pageID=238&nID=63204&NewsCatID=345> [Accessed 23 April]

355 See for a ruling weighing conditions determined while drafting the contract. 3<sup>rd</sup> 3<sup>rd</sup> Chamber of the Civil Division of the Court of Cassation, (Yargıtay 3.Hukuk Dairesi) No. 2003/6633, 2003/7601, 17.06.2003, available at, [http://www.kararevi.com/karars/1535\\_yargitay-3-hukuk-dairesi-e-2003-6633-k-2003-7601#.U2aTF\\_1\\_uSo](http://www.kararevi.com/karars/1535_yargitay-3-hukuk-dairesi-e-2003-6633-k-2003-7601#.U2aTF_1_uSo) [ accessed 04 May 2014]

356 See footnote n.131.

357 See Art. 23 and Art. 21 of the Turkish Constitution.

358 See Art. 109 and Art.116 of The Penal Code, respectively.

359 Because of the weakness of the claims and incompatibility with the content of freedom of residence, I decided not to repeat the explanations in relation to the freedom of residence that were delivered in the section of “Law of Foreigners.”

360 See, Murat Tezcan, "Konut Dokunulmazlığını İhlal Suçu, (M.161), *Leges Hukuk Dergisi*, August, pp. 20-36.

subject to private property, this act is classified as trespassing and is subject to sanctions according to penal law that might also lead to one's civil liability.<sup>361</sup>

## vi. Personal Security and Right to Property

Personal inviolability and the right to property are among fundamental rights,<sup>362</sup> and these rights are protected by penal, administrative, and civil law. Causing someone physical suffering and damaging one's property are defined as crimes in Penal Code<sup>363</sup> and, provided that this act is committed by State agents taking a full remedy action, compensation may be sought.<sup>364</sup> As for the right to property of foreigners, although there are certain restrictions for acquisition of property,<sup>365</sup> those restrictions only apply to limited real rights or property of real estate.<sup>366</sup>

Although personal inviolability is an uncontested civil right, the Law on the Obligations and Authority of the Police Art. 19 prescribe that the police may use force in the case of resistance.<sup>367</sup> As for the right to property, because the tents are used while committing the offence of trespassing, their destruction might be in line with the object of prevention of crime.<sup>368</sup> State agents, however, are liable on grounds deriving from penal and civil law for the damages they cause, should the limits of fulfilling their duty be exceeded. However, in Turkey, immunity of the State Agents is still an obstacle before the rule of law. In fact, this immunity is the norm, according to Özdil.<sup>369</sup> Moreover, in relation to the growing resentment against Syrians among the host population, there is not a single piece of legislation in relation to hate crimes; therefore, Anabasis is not protected against the threat posed by the local community. Consequently, a legal action of Anabasis regarding her property rights, personal inviolability during the eviction, and protection against the potential threat from her host community would likely fail Anabasis.

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361 See Art. 154 of the Penal Code.

362 Article 17 and Article 35 of the Constitution, respectively.

363 See Articles 151 – 152 of the Penal Code.

364 See Article 13 of the Administrative Procedural Code ( İdari Yargılama Usulü Kanunu), No. 2557, 6.1.1982, available at, [http://mevzuat.meb.gov.tr/html/17580\\_2577.html](http://mevzuat.meb.gov.tr/html/17580_2577.html) [ accessed 04 May 2014]

365 Ekşi, Yabancılar ve Uluslararası Koruma Kanunu, p. 287.

366 Ibid, p. 281.

367 See Law on the Obligations and Authority of The Police (Polis Vazife ve Selahiyeti Hakkında Kanun) No.2559, 4/7/1934, Available at, <http://www.mevzuat.gov.tr/Metin.Aspix?MevzuatKod=1.3.2559&MevzuatIliski=0&sourceXmlSearch=> [ accessed 05 May 2014]

368 See By Law on the items of crimes (Suç Eşyası Yönetmeliği), Published in Official Gazette No. 25832, on No. 01.06.2005, Available at, <http://www.mevzuat.gov.tr/Metin.Aspix?MevzuatKod=7.5.8200&sourceXmlSearch=&MevzuatIliski=0>, [ accessed 05 May 2014]

369 Koray Özdil, in "Cezasızlık Zırhını Aşmak: Türkiye’de Güvenlik Güçleri ve Hak İhlalleri" ed. by Mehmet Atılğan and Serap Işık, TESEV publications, 2011, see "Tesev Sunuş", available at <http://www.aciktoplumvakfi.org.tr/pdf/cezasisizlik.pdf> [ accessed 05 May 2014]

## 4.2. The right to Remedy: Procedural and Psychological Barriers

In order to finalize this analysis, after going through the main substantial claims that the story of Anabasis might bring forward, barriers before access to justice should also be addressed. Issues of practical hardships stand before the realization of the right to a legal remedy. This fact is addressed in the literature, and it has been concluded that very few asylum seekers are able to gain access to the courts.<sup>370</sup>

Foremost, Anabasis does not possess an ID Document. Therefore, filing an application to courts that requires an identity number would not be possible. Without a valid ID, one might argue that a lawyer initiate the judicial proceedings for Anabasis; however, Ekşi notes that under similar circumstances, Notaries are known to deny issuing a power of attorney.<sup>371</sup> On the contrary, the argument of registering with the Turkish asylum system is more than valid. Still, registration for Syrians who left border areas has remained inaccessible for three years of time. Although the Government took some steps by establishing registration points, those attempts came too late, resulting in various human rights abuses as compiled in the story of Anabasis.

Even if Anabasis had an ID, language would still stand as a barrier before her.<sup>372</sup> Although the language barrier might be overcome by the right to an interpreter, this right only exists in penal procedural law yet is absent in civil and administrative law.<sup>373</sup> Moreover, judicial fees,<sup>374</sup> the professionalization of the Turkish justice system,<sup>375</sup> the centralization of the Courts,<sup>376</sup> and the legal culture of written procedures bring forward additional complications regarding access to justice. Therefore, language, intellectual, and financial barriers pile up before Anabasis and build a stone wall against materializing those rights and freedoms that, at a glance, Turkish Law seems to be benevolent about.

Another note should be made on the psychological barriers that Anabasis would face. During her story, Anabasis is in the position of an irregular immigrant in Turkey. Due to her ignorance and fear, taking legal action is a hardship for Syrian guests. Additionally, being a guest has particular connotations in the Middle East. To quote a Turkish saying, “guests eat

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370 Tokuzlu, p. 376.

371 Nuray Ekşi, *Yabancılar ve Uluslararası Koruma Hukuku*, p. 243.

372 Durmuş Tezcan, "Tercümandan Yararlanma Hakkı", p. 695, available at, <http://dergiler.ankara.edu.tr/dergiler/42/480/5598.pdf> [accessed 06 May 2014]

373 Please see and compare, Art. 202 of the Code of Criminal Procedure (Ceza Muhakemesi Kanunu), No. 5271, 04/12/2004, available at, <http://www.ceza-bb.adalet.gov.tr/mevzuat/5271.htm>, Code of Administrative Procedural Law (İdari Yargılama Usul Kanunu), No. 2577, 6/1/1982, available at, [http://mevzuat.meb.gov.tr/html/17580\\_2577.html](http://mevzuat.meb.gov.tr/html/17580_2577.html) [accessed at 06 May 2014]

For civil law see the article, Suha Tanrıver, "Hukuk Yargısı (Medeni Yargı) Bağlamında Adil Yargılanma Hakkı" *TBB Dergisi*, No. 53, 2004, P. 211.

374 See Art. 120 of the Civil Procedural Law.

375 The new Code of Civil Procedure No.6100 introduced shorter periods of time to respond a claim. I am of the opinion that this is an evolution towards professionalization of the justice system.

376 There used to be local courts in all central locations in Istanbul, however currently they have been collected in two central courts.

what they are given, not what they want.” Therefore, framing the status of Syrian refugees with an informal concept, such as a guest, depoliticizes their status and hinders them from formulating hardships they face within the discourse of legal rights. I believe that this depoliticization plays an important role for many Syrians who feel gratitude for their lives despite the abuses they face during their stay in Turkey.

Finally, a skeptic might rightfully take the floor again and propose an individual petition before the Constitutional Court.<sup>377</sup> However, even if we could make the pile of stumbling blocks mentioned above disappear, the right to individual petition before the Constitutional Court is limited with the rights enshrined in the ECHR. Consequently, for example, as a social right, the right to housing cannot be brought before the Constitutional Court.<sup>378</sup> Given the general political and legal environment regarding the facilitation of housing rights in Turkey, should the skeptic bring forward the close link between the right to life and housing in the story of Anabasis, I would suggest another badge: the optimist.

## 5. The Outcome

The story of Anabasis puts forth that temporary protection in Turkey is not effectively protecting the human rights of the “guests”. The avoidance of the government to act in accordance with the fluid nature of the movement of Syrian people within Turkey might be the main reason of this outcome. However, the reasoning behind this avoidance is rooted in the will of containment of Syrian people in border areas, preferably in camps. Moreover, discretionary and informal arrangements fail to bring forward a rights-based approach and leave Anabasis “with no means and no alternative sources of support.”<sup>379</sup> Furthermore, the problems of rule of law and limited enforceability of social rights in Turkey aggravate the already difficult conditions of Syrian people. As a result, the misery of persons is never alleviated and only changes in form. The level of suffering, especially in urban environments, echoes in the form of the will to go back to Syria.<sup>380</sup> The international community, however, leaves Anabasis with the limited resources of Turkey, as they do not share the responsibility to protect her.

Like the previous chapter, the outcome of this test is not specific to the situation of Anabasis. For example, Perluss-Hartman argues that the customary norm of providing temporary protection imposes the obligation of non-refoulement; however, neither the rights attached to the norm nor the legal status of persons who benefit from these arrangements are clear.<sup>381</sup> Jane McAdam points to the fact that the mere recognition of the principle of non-

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377 See Art.148/3 of the Constitution of Turkey.

378 Kaboğlu, p. 32.

379 *Regina v. Secretary of State for the Home Department (Appellant), ex parte Adam (FC) (Respondent); Regina v. Secretary of State for the Home Department (Appellant), ex parte Limbuela (FC) (Respondent); Regina v. Secretary of State for the Home Department (Appellant), ex parte Tesema (FC) (Respondent) (Conjoined Appeals)*, [2005] UKHL 66, United Kingdom: House of Lords (Judicial Committee), 3 November 2005, available at, <http://www.refworld.org/docid/43fc2d1a0.html>, para 8, [accessed 20 May 2014]

380 Yok Sayılanlar, p.

381 Perluss, Hartman, p. 555, p. 571.

refoulement is not sufficient to materialize human rights of the refugees.<sup>382</sup> On the other hand, human rights law might also fail to protect the social rights of the displaced persons, as the ECtHR put forth in *Muslim v. Turkey*: “Article 8 did not go so far as to impose a general obligation on States to provide refugees with financial assistance to enable them to maintain a certain standard of living”.<sup>383</sup> Hathaway, in recognition of this issue, concludes that refugee-specific rights are the most relevant, especially in relation to the social rights of the refugees.<sup>384</sup> However, available resources for the forcibly displaced in order to safeguard their social rights are usually limited, as a result of avoiding sharing the responsibility of States to protect the forcibly displaced.

In summation, temporary protection, while serving for the forcibly displaced persons to be contained in regions in close vicinity to their homes, does not provide a legal status that is designed to address the particular vulnerabilities of forcibly displaced persons.

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382 Jane McAdam, “The Legal Status of Persons Whom Refugee Convention Do not Apply”, in *Complementary Protection in International Refugee Law*, Published to Oxford Scholarship Online, 2007, p.10 [accessed 21 December 2013]

383 *Muslim v. Turkey*, Appl.No. 53566/99, Council of Europe: European Court of Human Rights, 26 April 2014, available at <http://sim.law.uu.nl/sim/caselaw/Hof.nsf/e4ca7ef017f8c045c1256849004787f5/25c45fbecf1417ccc1256fee004adcc3?OpenDocument> [accessed at 25 April 2014]

384 James Hathaway, *The Rights Of Refugees Under International Law*, Cambridge University Press, Cambridge, 2005, P. 54.

## IV. Human Rights of the Forcibly Displaced: Protection at the Borders

### 1. Introduction

Human rights law, as the most developed and institutionalized legal framework of international law, constitutes a valuable tool for effective protection of the forcibly displaced by compensating the normative gaps of refugee law with its densely interpreted norms, while supporting the refugee law regime with its active machinery.<sup>385</sup> Safeguarding human rights of refugees by relying on the generalized and universal norms of human rights law constitutes the dominant practice, so much so that the question of “whether the rights regime set by the Refugee Convention retains any independent value in the modern era of general guarantees of human rights”<sup>386</sup> is still argued.

Indeed, the distinctive regime of refugee law is a tribute to the fundamental quality and objective of human rights law and is inseparable from the general framework. First, refugee law itself is derived from the idea that “human beings shall enjoy fundamental rights and freedoms without discrimination.”<sup>387</sup> Hence, while putting general norms of human rights law into the context of asylum, the Refugee Convention praises the universality of human rights and effective protection of those rights. The effective protection of human rights for example, freedoms such as religion, association, and movement, along with rights of non-discrimination, legal remedy, and labor—are affirmed in the Refugee Convention. These rights and freedoms for persons who are in an unfavorable position as a result of being deprived from a States' protection must be allowed to materialize.<sup>388</sup> Furthermore, Refugee Convention set out a supervisory mechanism; however, it does not possess the machinery that the general human rights instruments already provide. As a result, human rights law mechanisms are utilized to interpret and to some extent expand the protection of refugees. For the expansion, upholding the extra territorial application of human rights obligations of States, irrespective of the exclusion clauses in the Refugee Convention, is a remarkable example.<sup>389</sup>

Although the Universal Declaration of Human Rights is the only general human rights law instrument that recognizes the right to seek asylum,<sup>390</sup> at the universal level, the

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385 Hathaway, p. 120.

386 Ibid.

387 UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html> [accessed 9 May 2014], Preamble, also cites Universal Declaration of Human Rights.

388 Catherine Dauvergne, “Refugee Law and the Measure of Globalisation”, *Law In Context*, Vol. 22, No 2, April 2005, p. 65.

389 See, *Chahal v. UK* also, Matthew J. Gibney, “The state of asylum: democratization, judicialization and evolution of refugee policy in Europe”, *New Issues in Refugee Research*, Working Paper No.50, Refugee Studies Centre, University of Oxford, United Kingdom, October 2001, available at, <http://www.unhcr.org/3bf102204.html> [accessed 09 May 2014]

390 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Art. 14.

International Covenant on Civil and Political Rights and Convention against Torture shelters the principle of non-refoulement. It is also observed that regional human rights law instruments played a more progressive role in expanding the protection afforded by Refugee Law.<sup>391</sup>

It is almost uncontested, however, that ECtHR is the most effective within its jurisdiction, considering its judicial machinery as well as its case law that fill the vacuums inherent in the Refugee Law regime.<sup>392</sup> ECtHR utilized the non-derogatory prohibition of torture, inhuman and degrading treatment to deduce the responsibility of non-refoulement.<sup>393</sup> Moreover, the absolute nature of this prohibition served for an indiscriminate application dismissing the exclusionary provisions of refugee law.

Below, we are to test the protection afforded to Anabasis by ECtHR, the most suitable tool to protect the rights of the refugees, at the frontiers of the fortress that constitute its principle area of jurisdiction.

## 2. Crossing the Bridge

*Anabasis arrives in Edirne, a small town near the land border between Greece and Turkey. Although the land border had been fenced-in at the beginning of this year,<sup>394</sup> she manages to jump over the tall barbed wire and keeps on walking in the forests throughout the night.<sup>395</sup>*

*In the morning, Anabasis arrives at a village. In no time, her arrival to the village is noticed by the police.<sup>396</sup> The police approach Anabasis and force her into a van. The police keep her locked back in the van, and once the sun sets again, Anabasis notices that they are changing locations.<sup>397</sup> Officers, whose faces are covered, let her out and tie her hands with*

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391 Jane McAdam, *Forced Migration, Human Rights and Security*, Hart Publishing, Oxford, March 2008, p. 264.

392 Jane McAdam, "The Scope of Ill-Treatment under the ECHR and ICCPR" in *Complementary Protection In International Refugee Law*, Published To Oxford Scholarship Online: Mar-12 2007, pp. 3-4, Content Downloaded From Oxford Scholarship Online ([www.oxfordscholarship.com](http://www.oxfordscholarship.com)). [ Accessed 21 December 2013]

393 Also called the Soering principle.

394 UN OHCHR, Press Release of UN Special Rapporteur on the human rights of migrants fourth country visit, 03 December 2012; the Special Rapporteur notes that "... The enhanced border controls at the Greek-Turkish land border under operation "Aspida" ("Shield") initiated in August 2012, which included the deployment of approximately 1800 border police officers, coupled with the construction of a fence and the Frontex operation "Poseidon Land" ..."

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12858&LangID=E>, [ accessed at 27 December 2013]

395 Please see the video as the woman confirms the practices cited from Pro Asyl's report. Grant H., Domokos J, "The refugee challenge: can you break into Fortress Europe? - interactive", The Guardian; available at <http://www.theguardian.com/global-development/ng-interactive/2014/jan/refugee-choices-interactive>, 14/01/2014, [accessed 14 January 2014]

396 Pro Asyl, p.7.

397 Ibid, p. 29.

plastic handcuffs.<sup>398</sup> This time, they force Anabasis to a dingy, and once they arrive at the riverfront, she is told to step down and wait for the Turkish police to come and collect her. Then the officers sail away back to their country.<sup>399</sup>

Turkish police arrive in less than an hour and take Anabasis to a camp in Edirne. Anabasis is released from the camp after a couple of weeks. However, due to the difficulties she experienced in Istanbul and rumors of the possibility of reaching Greece through the sea, she decides to travel to Canakkale to follow her pursuit of reaching Europe.

**“Thalassa! Thalassa!”<sup>400</sup>**

Anabasis gets into the inflatable boat, along with many others from Canakkale. The boat moves along the waves of the Aegean Sea for hours, and when people of the boat finally see an island, they cheer happily. The delight, however, leaves fear in its wake when they notice a boat steadily approaching them.<sup>401</sup> Men of that boat ignore the people's cry for help; instead, they remove their engine, take their fuel and drag them into the dark.<sup>402</sup> After a couple of hours of drifting in the dark waters, Turkish officers come and collect the people from the boat.<sup>403</sup>

### **3. Anabasis v. Greece**

In this part, I will take the story of Anabasis before the ECtHR. Though briefly, I will touch upon both the procedural and substantial aspects that might be involved in this scenario.

#### **3.1. Procedural Issues**

##### **a. Jurisdiction**

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398 Ibid, p. 31.

399 Ibid, p. 18.

400 ‘*The Sea! The Sea!*’. In the original work of Xenophon, when the Greek soldiers arrive at a sea shore they think that they arrived Greece. They cheer: “The Sea!, The Sea!”. Although the sea is affiliated with what is home for them, that was the black sea in northern Anatolia, they haven't yet arrived home.

Refugees, taking all the risks to reach a safe haven through the Aegean sea are destined to experience a similar disappointment. Deaths at the sea has become a regular part of our newspapers.

401 Pro Asyl, p. 23.

402 Ibid.

403 As I promised my supervisor that Anabasis will survive, she, by mere chance, is not one of the thousands of people being killed in the Aegean sea.

See, European Council of Refugees and Exiles, *The ECRE/ELENA Information Note on Syrians seeking protection in Europe*, 29 November 2013, also affirms the push back practice and ill treatment at Aegean sea, available at, <http://ecre.org/component/downloads/downloads/824.html> , p. 7. [accessed 14 January 2014]. The story is a compilation of stories reported in pUsh Back of Pro ASYL, previously cited; Pro Asyl, pp 23 – 26.



In order to be able to decide on a matter, ECtHR has to determine whether the issue falls under her jurisdiction. Article 1 of ECHR establishes that “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” Benchmark rulings of *Soering* and *Bankovic* clarified that jurisdiction is primarily territorial.<sup>404</sup>

In her first push back through Evros River, as a result of being present in Greek territory, *Anabasis* falls under the jurisdiction of Greece. Provided that the narrative of *Anabasis* is found credible, primary territorial application of the European Convention will undoubtedly also trigger the Court's jurisdiction over the matter. As for her second push back from the Aegean Sea, territoriality of jurisdiction still prevails, as soon as *Anabasis* enters Greek territorial waters the state's jurisdiction is activated.<sup>405</sup> Even if we lacked sufficient evidence to prove *de jure* jurisdiction of Greece over the matter, *de facto* jurisdiction doctrine, as in recent judgments of *Hirsi Jamaa and others v. Italy*, *Al Skeini v. UK*, as well as *Medyedev v. France*, could have been utilized to bring about the jurisdiction of the ECHR.<sup>406</sup>

## **b. Admissibility**

The admissibility criterion laid down by Article 35 of the ECHR requires exhaustion of domestic remedies before applying. ECtHR also establishes a six month time-limit, starting from the exhaustion of domestic remedies.

The exhaustion of domestic remedies should be governed by the flexibility principle in the case of *Anabasis*.<sup>407</sup> A recent example in the context of forcibly returned refugees is *Hirsi Jamaa And Others v. Italy*.<sup>408</sup> In this recent judgment, ECtHR ruled that since the applicants were forcibly returned without being provided an opportunity to seek for asylum, domestic remedies were not made available to them. Note that, however, in *Demopoulos and Others v. Turkey*, the Court found that being outside of the territory of a State does not itself enable the flexibility of application of Article 35 (3) of The Convention. Nevertheless, when the State itself illegally and immediately removes persons from her territory to make the domestic remedies inaccessible and unavailable to persons, restraining admissibility would result in abounding the object and purpose of ECHR, which might be put as the effective protection of human rights.<sup>409</sup>

While the exhaustion of domestic remedies is not set in stone, the time limit of six months is applied more strictly. Since there was no remedy made available to *Anabasis*, the general rule of filing the complaint before ECtHR “no later than the passage of six months

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404 *Banković and Others v. Belgium and 16 Other Contracting States*, No: 52207/99, *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161

405 Marian, Ilie. "International Law Regarding Enforcement Powers At Sea." *Contemporary Readings In Law & Social Justice* 4.1, 2012, Academic Search Complete, p. 58.

406 *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004; *Öcalan v. Turkey* [GC], no. 46221/99, ECHR 2005-IV

407 Please see a compilation of the Court's case law in; Council Of Europe/European Court Of Human Rights, *Practical Guide On Admissibility Criteria*, Last Updated In 2011, pp 17-21.

408 *Hirsi Jamaa and others v. Italy*, no. 27765/09, 23 February 2012.

409 *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 and others, ECHR 2010, p.31.

after a final decision made by the national authorities” will also be applied in accordance with the circumstances.<sup>410</sup> Yet, as there was no effective remedy in the case of Anabasis, the starting date of the six month time-limit will be the date that the alleged violations had occurred.<sup>411</sup> Thus, the six month time-limit will start from the removal of Anabasis from the Evros and/or Aegean Sea.

The Court ruled that continuous situations constitute the sole exception to the six month rule.<sup>412</sup> When there are separate incidents that come to an end at a certain moment, this exception, however, does not apply.<sup>413</sup> As a result, as the grounds for the submission of Anabasis are two separate push backs that had come to an end, Anabasis will not be able to exempt herself from the time limit. Thus, the Court will address her claims only if her petition reaches the it within the time limit calculated from each separate push back.

### **3.2. Substantial Claims**

In order to briefly analyze substantial claims, I follow the structure of the *Hirsi Jamaa and others v. Italy*, grouping the possible allegations under two main headings. Some of the claims are resultant of the conduct of State agents of Greece, and the remainders pertain to whether returning Anabasis to Turkey and/or Syria would result in violation of ECHR.

#### **a. State Conduct**

In regards to the conduct of State agents Articles 2 (right to life), 3 (prohibition of torture), 5 (deprivation of liberty), 8 (right to family life and personal integrity), Article 4 of the 4<sup>th</sup> Protocol (collective expulsion), and 13 (right to effective remedy) are at stake.

Particularly in her second push back, the life of Anabasis was at risk since her boat was left adrift at sea. It is clearly established that, under Article 2, not only deprivation of life but also protection of life of persons under the State's jurisdiction is incumbent upon States.<sup>414</sup> As for Article 3 of the ECHR, during her two push backs it is clear that Anabasis has been subjected to treatment “as deliberately causes severe suffering, mental or physical, which... is unjustifiable [and]... may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience.”<sup>415</sup> Moreover, Anabasis, while in the Greek village, is detained for many hours. According to Article 5/1 of the Convention, arbitrary deprivation of liberty is against the Convention. Although, according to Greek domestic laws, this measure might be prescribed by law, the manner that the detention is carried out is relevant for the lawfulness of the deprivation of liberty and may constitute a violation of

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410 *Dennis And Others v. The United Kingdom*, No: 76573/0,02/07/2002.

411 *Meryem Çelik and Others v. Turkey* Appl.No. 3598/03, September 2013.

412 *Ananyev and Others v. Russia*, No: 42525/07 60800/08, 10 January 2012.

413 *Ibid*.

414 *Paşa and Erkan Erol v. Turkey*, No. 51358/99, 12 December 2006.

415 *Greek v. UK* cited at, Jane McAdam, *The Scope of Ill-Treatment under the ECHR and ICCPR*, in: *Complementary Protection in International Refugee Law*, Oxford University Press; 2007. p. 5.

Article 5.<sup>416</sup> The Court articulated this in *Amuur v. France*, wherein it decided that, provided that the mere function of this detention is “deprivation of the asylum-seeker of the right to gain effective access to the procedure for determining refugee status,” it is in violation of Article 5.<sup>417</sup> Should the Court decide that ill-treatment is below the threshold of Article 3, Article 8 of the ECHR could take effect and condemn unjustified interference with the private life of Anabasis regarding her physical and moral integrity during the push backs.<sup>418</sup>

Finally, Anabasis has been forcibly returned with a group of people without being provided the opportunity of accessing asylum procedures in the State. Therefore, Article 4 of the 4<sup>th</sup> Protocol might have been violated.<sup>419</sup> Finally, regarding Article 13420, as in *Jabari v. Turkey*,<sup>421</sup> returning asylum seekers without assessing their asylum claims results in violation of the right to a legal remedy.<sup>422</sup>

## **b. Non- Refoulement**

Although ECHR is silent about the principle of non-refoulement, the non-derogatory prohibition of torture embodied in Article 3 of the ECHR accommodates claims of refoulement. The principle is accepted as part of customary law and might be roughly formulated as the prohibition of expulsion if persons would face ill treatment upon their return.<sup>423</sup> ECtHR upheld the rule of law by enforcing State Party's obligations in accordance with the effective protection of the human rights scheme and first produced what we now call the “Soering principle.” This was followed by a consistent case law that transmitted the absolute nature of the prohibition of torture to the principle of non-refoulement.<sup>424</sup>

Consequently, under ECHR, Greece has an absolute duty not to return people who would face a real risk of harm upon their return. If Anabasis were to be put on a return flight to Syria, condemning Greece for this act would be less problematic. UNHCR declared that Syrians are to be provided international protection due to the real risk that they will face as they are returned to the humanitarian crisis which has spread throughout their country.<sup>425</sup> However, Anabasis is—albeit illegally—returned to Turkey, which ratified the Geneva Convention and, despite the deficiencies of its asylum system, is consistently praised for its

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416 *Saadi v. UK*, Appl no. 13229/03, 29 January 2008.

417 *Amuur V. France*, No. 19776/92, 25 June 1996, Para. 44.

418 *Bensaid V. The United Kingdom*, No: 44599/98, 06 February 2001, Para. 46.

419 Giuffr , Mariagiulia “Watered Down Rights On The High Seas: *Hirsi Jamaa And Others v. Italy* (2012)”, *International Law Quarterly*, Vol. 61, July 2012, p. 738.

420 Note that, article 13 is applied in conjunction with other substantial provisions.

421 *Jabari v. Turkey*, No: 40035/98, 11 July 2000.

422 The right to a legal remedy will be further discussed below.

423 McAdam, *The Scope of Ill-Treatment under the ECHR and ICCPR*, p. 2.

424 *Soering Cited Above, Chahal V. The United Kingdom*, No: 22414/93 [GC], 15 November 1996; *Case Of Ramzy V. The Netherlands* No: 25424/05, Judgment (Struck Out Of The List), 20 July 2010, *Othman (ABU Qatada) V. The United Kingdom*, No: 8139/09, 17 January 2012. See also, McAdam, *The Scope of Ill-Treatment under the ECHR and ICCPR* p. 3.

425 UNHCR, *International Protection Considerations with regard to people fleeing the Syrian Arab Republic*, Update II, October 2013, para 11.

“hospitality” towards Syrian refugees.<sup>426</sup> In comparison to *Hirsi Jamaa and Others, Anabasis v. Greece* might fail to meet the threshold of “serious and irreparable”<sup>427</sup> harm as a result of coming from a safe third country of asylum. For example, in *Muslim v. Turkey*, the Court ruled that the applicant has chosen to flee to Turkey himself, and the living standards of the applicant in Turkey did not compel him to leave Turkey, which did not result in a violation of Article 3 or Article 8 of the Convention.<sup>428</sup>

Finally, there should be little doubt that Greece will also rely on bilateral arrangements with Turkey<sup>429</sup> for the justification of the returning of Syrian persons who “illegally” entered Greek territory. Greece, by the sole act of summarily returning *Anabasis* without assessing her asylum claims, violates her obligations deriving from Article 3 of ECHR.

This brief analysis of the facts of this virtual case indicates that the case of *Anabasis v. Greece* would more likely result in a favorable outcome. However, I will discuss the impotent nature of human rights law even in the case of the most favorable judgment of the ECtHR in the following section.

### 3.3. The Right to Legal Remedy

In this section, I attempt to reveal potential stumbling blocks inherent in the regime of ECHR that counteract with the progressive case law of ECtHR to materialize in tangible rights and freedoms for the forcibly displaced. First, I will try to present the actual difficulties while addressing procedural aspects of ECtHR as far as they concern the problem of access to the Court. Secondly, by using the case of *Anabasis*, I will look into the actual meaning of a favorable outcome for a forcibly displaced person.

Access to justice stands as a real barrier before forcibly displaced persons who are, similar to stateless persons, deprived of a state's protection and, therefore, experience

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426 Council of Europe, Commissioner for Human Rights, Human Rights Note, 20 December 2013, available at: [http://www.coe.int/en/web/commissioner/-/syrian-refugees-a-neglected-human-rights-crisis-in-europe?redirect=http%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2Fcommissioner%2Fhome%3Bjsessionid%3D60463A53C941171C22103B340FC21E6D%3Fp\\_p\\_id%3D101\\_INSTANCE\\_8EfTacFqd2H9%26p\\_p\\_lifecycle%3D0%26p\\_p\\_state%3Dnormal%26p\\_p\\_mode%3Dview%26p\\_p\\_col\\_id%3Dcolumn-1%26p\\_p\\_col\\_count%3D5#8EfTacFqd2H9](http://www.coe.int/en/web/commissioner/-/syrian-refugees-a-neglected-human-rights-crisis-in-europe?redirect=http%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2Fcommissioner%2Fhome%3Bjsessionid%3D60463A53C941171C22103B340FC21E6D%3Fp_p_id%3D101_INSTANCE_8EfTacFqd2H9%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-1%26p_p_col_count%3D5#8EfTacFqd2H9) [accessed 15 January 2014]

427 *R (on the Application of ‘B’) v Sect’y of State for the Foreign and Cth Office* [2004] EWCA Civ 1344, [2005] QB 643. Cited at *ibid*, 28.

428 *Muslim v. Turkey*, Appl. No. 53566/99, Council of Europe: European Court of Human Rights, 26 April 2014, available at <http://sim.law.uu.nl/sim/caselaw/Hof.nsf/e4ca7ef017f8c045c1256849004787f5/25c45fbecf1417ccc1256fee004adcc3?OpenDocument> [accessed at 25 April 2014]

429 Twenty-five bilateral agreements are ratified between Greece and Turkey as to readmission of refugees by Turkey. Report of Pro Asyl cites a newspaper article in Greek language. Although I carried out a limited research regarding these arrangements, I failed to reach any other resource informing the content of this arrangements. Please refer to, Push Back, p. 15.

difficulties producing documents required for the adjudication of their claims.<sup>430</sup> It must be remembered that Anabasis holds no identity documents and is in no position to access material that might be vital to prove her claims.<sup>431</sup> Depending on the legal status of a refugee and where he/she currently resides, these barriers might aggravate the reluctance that this fragile situation creates. Although ECtHR itself accepts that the very “personal circumstances”<sup>432</sup> of the persons are decisive for the right to access justice, the Court's own safeguards fail to correspond with the situation of refugees.

A glimpse at the application stage of the ECtHR would prove us right. To start with, the intellectual barrier of not being acquainted with the procedures of ECHR renders Anabasis incapable of accessing ECtHR in the first place. As a person who does not belong to the “area of justice,” Anabasis could easily be ignorant even of the existence of the ECtHR and her right to individual petition. Even if she did know of its existence, she could not be expected to be aware of ECtHR procedures, which actually could make her application inadmissible. Additionally, although individuals may file their initial submission in languages of State Parties to ECHR,<sup>433</sup> given the fact that forcibly displaced persons do not belong to the States party to ECHR—an assumption encouraged by the North South dimension—the language barrier constitutes another obstacle that needs to be overcome.

Although these two initial barriers effortlessly come to one's mind, it is hard to say that ECtHR effectively addresses these problems. Although ECtHR provides the opportunity of benefiting from legal aid, this aid is only available to persons who file a complaint before ECtHR.<sup>434</sup> Therefore, individuals are on their own to find their way while applying to the Court. Note that the consequences of a false application are even more aggravated as of the 1<sup>st</sup> of January 2014. An incomplete application could result in the lapse of the six month time limit since an incomplete application no longer interrupts the running of the time limit.<sup>435</sup> Consequently, the refugee, Anabasis, might lose her sacred right to access ECtHR once and for all. In fact, the incapability of the ECtHR to accommodate the right of forcibly displaced persons to individual petition is evident in the application of the admissibility criterion. Apart from the continuous violations, “not being aware of the law” or the “impact of the situation” are not legitimate assertions to bring about an exemption from the admissibility criterion.<sup>436</sup>

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430 UN Ad Hoc Committee on Refugees and Stateless Persons, A Study of Statelessness, United Nations, August 1949, Lake Success - New York, 1 August 1949, E/1112; E/1112/Add.1,p. 14, available at: <http://www.refworld.org/docid/3ae68c2d0.html> [accessed 22 December 2013]

431 Article 47 of the Rules of the Court is available at, [http://www.echr.coe.int/Documents/ENG\\_Rule\\_47\\_of\\_the\\_Rules\\_of\\_Court\\_2014\\_1.pdf](http://www.echr.coe.int/Documents/ENG_Rule_47_of_the_Rules_of_Court_2014_1.pdf), [ accessed 15 January 2014]

432 Airey V. Ireland, No: 6289/73, 09 October 1979, para. 25.

433 European Court of Human Rights, “Notes for filling in the application form “, available at [http://www.echr.coe.int/Documents/ENG\\_Notes\\_for\\_Filling\\_in\\_the\\_Application\\_Form\\_2014\\_1.pdf](http://www.echr.coe.int/Documents/ENG_Notes_for_Filling_in_the_Application_Form_2014_1.pdf) [ accessed 15 January 2014]

434 European Court of Human Rights, Council of Europe, “Your application to the ECHR: How to apply and how your application is processed”, available at, [http://www.echr.coe.int/Documents/Your\\_Application\\_ENG.pdf](http://www.echr.coe.int/Documents/Your_Application_ENG.pdf) [ accessed 15 January 2014]

435 European Court of Human Rights, Press Release, Registrar of the Court, *Stricter conditions for applying to the European Court of Human Rights now in force*, ECHR 008 (2014), 09.01.2014

436 Council Of Europe/European Court Of Human Rights, Practical Guide On Admissibility Criteria, Last Updated In 2011, pp 22- 25.

Although unlikely, provided that Anabasis defeats the initial obstacles deriving from procedural issues, I would like to address the fact that even the most favorable outcome of the virtual case of *Anabasis v. Greece* would not help Anabasis to benefit from international protection. As an actual example, I would like to refer to *Hirsi Jamaa and Others v. Italy*. In this complaint filed by refugees from Somalia and Eritrea who were forcibly returned to Libya before entering territorial waters of Italy, the court affirmed the jurisdiction of Italy in its push back operations on the high seas. It held unanimously that Article 3, Article 4 of the Protocol No 4, and Article 13 in conjunction with both Article 3, and Article 4 of Protocol No. 4 of the Convention had been violated.<sup>437</sup> As for the pushed back refugees, they were granted monetary compensation.<sup>438</sup>

Similar to the brief analysis carried out regarding the virtual case of *Anabasis v. Greece*, here, all we see is the acknowledgment of the violations and redress. *Hirsi Jamaa* and other applicants who were still alive and were in touch with their representatives,<sup>439</sup> however, were trapped within the maze of ECHR, no matter how far the interpretation of the principle of non-refoulement goes. The legal regime of human rights law is State-centered and, naturally, judgments of ECtHR focus on the obligations and violations of those States, to the detriment of actual materialization of rights enshrined in the ECHR. In the case of *Hirsi Jamaa and Others*, although the applicants had the right to seek asylum and the right not to be returned where they would face inhuman treatment under ECtHR, their actual need of a normative status (deriving from the deprivation of protection of a State) remained unaddressed. This picture features the incompatibility of human rights law and its procedure when the subject of the violations is a person who is deprived of a State's protection. McAdam upholds this argument by addressing the human rights law mechanisms' impotence for "delivery of actual rights."<sup>440</sup>

According to a human rights blogger, speaking about the backlog of cases that the ECtHR has accumulated is both a "mantra and a cliché."<sup>441</sup> However, when awaiting a judgment under inhuman conditions, especially under the threat of torture or degrading treatment, the need of a speedy trial becomes even more vital. For example, in *Hirsi Jamaa* and other applicants, during the handling of the case, some of the applicants became deceased and the lawyers representing the group lost contact with others.<sup>442</sup> As exemplified in this case, although the Court is undergoing radical reforms even to the detriment of access to justice for the sake of efficiency, the speed of handling the cases is not sufficient for refugees.

Another fundamental problem arises from the mere supervisory role of ECtHR for the actualization of right and freedoms stipulated in the ECHR. If there is another mantra in the ECtHR system, it is the "wide margin of appreciation" left for the States. The Court is not entitled to give precise orders to States; rather, the States benefit from discretion on how to fulfill their obligations in relation to both the norms of ECHR and the rulings of ECtHR. Consequently, even when ECtHR finds violations, the State Party might not use its discretion

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437 *Hirsi Jamaa and others v. Italy*, para 220 and following.

438 *Ibid.*

439 *Ibid.*

440 McAdam, *Status of Persons to Whom the Refugee Convention Does Not Apply*, p. 5.

441 Headway Made in Reducing Backlog of Cases, 28/10/2013,

<http://echrblog.blogspot.se/2013/10/headway-made-in-reducing-backlog-of.html>, [accessed 13 January 2014]

442 Please see the Annex of the decision.

in accordance with the protection needs of the forcibly displaced. A striking example of the abuse of this discretion is the case of *Ahmed v. Austria*.<sup>443</sup> In this case, in spite of a judgment rendered by the Court in favor of Ahmed, Austria did not provide a legal status that would enable him to pursue a normal life within the country. Consequently the applicant, due to the difficulties deriving from the daily life of an irregular immigrant, committed suicide.<sup>444</sup>

Although supervision is the norm, Article 39 of the Rules of the Court creates an exception to this rule. Article 39 stipulates that, “at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.”<sup>445</sup> Interim measures have been widely used to hinder the expulsion of persons before his or her claims are addressed by the ECtHR. The ECtHR utilizes interim measures when an irreparable harm can be foreseen should the applicants be refouled. *Abdollahi v. Turkey*, *F.H. v. Sweden*, *Nivette v. France*, and *Babar Ahmad and Others v. the United Kingdom* are some examples of the application of interim measures.<sup>446</sup> Disregarding a decision involving interim measures results in the violation of the ECHR, as the Court found in *Mamatkulov and Askarov v. Turkey*.<sup>447</sup> By virtue of this provision, the Court can eliminate the discretion of the States by indicating precise measures to be applied immediately and has, thus, been an indispensable rule for the enforcement of the principle of non-refoulement. While the precise and immediate nature of interim measures as well as the scope of its application is promising, it can be concluded that this provision could only provide a limited right to remain during the course of proceedings before the Court. Still, reason calls for arguments tying together the obligation of non-refoulement and this worthwhile tool to attest to the expansion of the application of interim measures of ECtHR for pre-entry cases similar to *Anabasis in Turkey*.<sup>448</sup> However, for the people like *Anabasis* who are outside of the territory of a State, this limited right remains irrelevant due to a lack of a right to entry.

#### 4. The Outcome

As the story demonstrates, ECtHR is incapable of effectively protecting the human rights of *Anabasis*. As long as *Anabasis* is out of the jurisdiction of Greece and therefore the Court, the system remains inaccessible for her. Also, intellectual and language barriers strengthen the impact of the obstacles before her. Finally this test also revealed the fact that,

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443 *Ahmed v. Austria*, No: 25964/94, 17/12/1996.

444 United Nations High Commissioner For Refugees, *Unhcr Manual On Refugee Protection And The European Convention On Human Rights*, P. 12; Footnote N.34, Available At: [Http://Www.Refworld.Org/Pdfid/3f4cd5c74.Pdf](http://www.refworld.org/Pdfid/3f4cd5c74.Pdf) [accessed 15 January 2014]

445 ECtHR, Rules of Court, the most up to date version is available at, [http://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf), p. 21.

446 European Court of Human Rights, Press Unit, Factsheet - Interim measures, January 2013, p. 2, available at [http://www.echr.coe.int/Documents/FS\\_Interim\\_measures\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf) [ accessed 16 January 2014 ]

447 *Mamatkulov and Askarov v. Turkey* No: 46827/99 and 46951/99, 04.02.2005; cited in *ibid*, p. 7

448 In *Hirsi Jamaa and others*, the Court accepted that non refoulement is applicable in this case despite the fact that the applicants have never put their feet on Italian soil. Although it might be argued that the Court was able to conclude that due to the effective control exercised on the applicant during their forcible return at high seas, in his concurring opinion Pinto De Albuquerque by referring to the sole letter of Refugee Convention, set forth that the principle of non-refoulement is applicable before the refugee enters the territory of a state. Please refer to the cited case for the well-established opinion of the judge.

even if Anabasis could access the Court, the dogmatic sovereignty still valid in the European jurisdiction hinders her from benefitting from the protection that she actually needs. Consequently, she is contained outside of Europe.

This specific outcome is not particular to the case of Anabasis since the reasons of those deficiencies are rooted in the general characteristics of the human rights law regime. Also, non-entrée policies disregarding the protection responsibilities of European States make the Court inaccessible for persons who are outside of Europe. The Court, by upholding a dogmatic understanding of sovereignty, as well as by disregarding other international human rights law instruments while interpreting obligations of the States, contributes to the subjugation of its legal authority.

First of all, the individual in Article 34 of ECHR is not a person who is forcibly displaced, and the difference of context obstructs the ability of human rights law to accommodate protection claims of the forcibly displaced. The regular regime can take stricter measures for the sake of efficiency and to safeguard an enduring system. Additionally, this ordinary regime can afford to leave a certain level of margin of appreciation to the States for policy reasons. Neither of these can be suggested in an extraordinary situation necessitating an actual and immediate response. The only provision that comes close to matching the extraordinary circumstances of forced migration is Article 39 of the Rule of The Court. Unfortunately, interim measures are only applicable once a person is present in a State.

Finally, the effect of the judgments of the Court on the domestic level is an issue discussed in the literature. As noted above, McAdam find the ECHR weak in delivery rights, and Lambert states that the outcome of a decision is limited to a mere redress. Consequently, no matter how far Article 3 of ECHR is stretched, the unfavorable position of persons who are forcibly displaced requires a right missing in international law: the right to entry. The obligation of non-refoulement does not translate to a right to entry. Additionally, ECtHR does not interpret the norms of ECHR by taking into account obligations of States deriving from the *lex specialis* of international human rights law. This isolation is rooted in the confidence of being the machinery of a self-contained regime and is evident in the misrepresentation of the context of the forced migration in its judgments, as well as disregarding obligations of states deriving from their responsibility to protect that might involve providing financial aid as well as settlement of the forcibly displaced. However, as addressed above, as long as ECtHR takes the political and territorial sovereignty of the States as a priority, this incompatibility will remain. As a final remark, other general human rights law instruments and their machinery would display similar deficiencies, likely even more starkly. Since the most efficient tool to safeguard human rights of the forcibly displaced fails to provide an effective protection, one cannot expect a more successful outcome from semi-judicial mechanisms of universal instruments.



## V. CONCLUSION

It has been clearly established that the rule of refugee law no longer dominates the regime governing the protection of the human rights of the forcibly displaced. Goodwin-Gill affirms this when he puts forth that “after 1985, containment of [the]... flow of people in their own region has become the response.”<sup>449</sup> Protection of the internally displaced, general human rights law mechanisms, and temporary arrangements, along with other complementary measures, have evolved and replaced the normative framework of refugee law.

This fact is also evident in the language of this paper. The status of Anabasis constantly changes as she advances throughout her journey — so much so that employing the term refugee would be legally inaccurate. In order to be able to eliminate false legal determinations as well as confusion, I turned to the term “forcibly displaced.” This concept is borrowed from social sciences and has no legal content. This shift in the language also communicates the abandoning of a normative legal regime.

Although the form of this study might be contested to be a mere declaration of what is already obvious, I aimed to expose the reality that this evolution produces. In effect, these measures that replace the normative framework of refugee law fail to effectively protect human rights of the forcibly displaced. We have seen that while humanitarian aid falls short to protect the security and the core dignity of displaced persons, domestic arrangements are discretionary, and human rights law is incompatible as well as inaccessible. Taken together, they serve for containment of the forcibly displaced. This failure is rooted in the dogmatic interpretation of sovereignty and the lack of responsibility sharing.

Apart from the specific conclusions, however, sociology of law might suggest that this evolution could bear further implications in relation to the rule of human rights law. The shift from refugee law to proliferated arrangements, as the story of Anabasis naively displays, results in several human rights law violations. In relation to this fact, it might be argued that the evolution of the legal regime could threaten the legitimacy of those arrangements, each rooted in the general human rights law framework. This argument is rooted in the fact that, although the legal norms and institutions are in place, the dignity of persons as the ethos of human rights law is not protected. Although the legitimacy of human rights law might also be contested by other chronic human rights law abuses, it is expected that forced displacement will be persistent as a result of regime changes, climate change and socio-economic inequalities around the globe. Consequently, as the evolution of the social order moves towards displacement, the evolution of the legal regime moves towards a proliferated legal environment that fails to protect the human rights of the displaced. This contradicting evolution of the social order and human rights law might be expected to reproduce these violations over and over again. Finally, this contradiction might result in the destruction of the ethos of human rights law by its own instruments.

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449 Guy S. Goodwin-Gill, “International Law and Human Rights: Trends Concerning International Migrants and Refugees”, *International Migration Review*, Vol. 23, No. 3, Special Silver Anniversary Issue: International Migration an Assessment for the 90's, p. 545 available at, <http://www.jstor.org/stable/2546427> [Accessed 08 February 2014 ]



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