

RIGHTS OF MIGRANTS FROM ISLAMIC AND HUMAN RIGHTS PERSPECTIVE¹

İnsan Hakları ve İslami Perspektiften Göçmenlerin Hakları

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Abstract: The history of humanity constantly bears witness to the phenomenon of migration. Migration can be caused by many different reasons such as social, political, economic, religious, etc., both internal and external. Today, unfortunately, we are witnessing a large number of mass migration in the Islamic geography due to political instability as well as economic or other reasons.

Immigrants, who have to leave their home, country or homeland and live in places they do not know, have the rights set forth in the Universal Declaration of Human Rights as human beings. For this reason, in this study, the rights of migrants have been examined within the framework of international human rights documents and Islamic principles.

In the introduction part, important migrations in history, the Hijrah, which is the turning point of Islamic history, and the subsequent developments are discussed in terms of the migration dimension, and the causes of forced and voluntary migration are briefly examined.

In the second part, the basic rights stated in the international human rights documents regarding the migrants are

Özet: İnsanlık tarihi sürekli olarak göç olgusuna tanıklık etmektedir. Göç, gerek iç gerekse de dış kaynaklı olmak üzere sosyal, siyasi, ekonomik, dini vs çok değişik sebepten kaynaklanabilmektedir. Günümüzde maalesef gerek siyasi istikrarsızlıklar gerekse de ekonomik ya da diğer nedenlerle islam coğrafyasında çok fazla sayıda toplu göçe tanıklık etmekteyiz.

Evini, yurdunu, memleketini bırakıp bilmediği yerlerde yaşamak zorunda kalan göçmenler de bir insan olarak İnsan Hakları Evrensel Bildirgesi'nde belirlenen haklara sahiptir. Bu nedenle bu çalışmada uluslararası insan hakları belgeleri ve islami ilkeler çerçevesinde göçmenlerin hakları incelenmiştir.

Giriş bölümünde tarihte yaşanan önemli göçlere ile İslam tarihinin dönüm noktası olan Hicret ve devamındaki gelişmeler göçmen boyutu itibarıyla ele alınmış, zorla ve gönüllü göçün nedenleri kısaca incelenmiştir.

İkinci bölümde göçmenlerle ilgili olarak uluslararası insan hakları belgelerinde belirtilen temel haklar incelenmiş, göçmenler ile ilgili çalışma yürüten uluslararası organizyonlardan kısaca bahsedilmiştir.

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examined, and the international organizations working on the migrants are briefly mentioned.

In the third part, the human rights of migrants are presented in the light of Islamic principles and principles declared in international documents.

In the conclusion part, the findings we reached in our study were expressed and various recommendations were made to the interlocutors, especially the Organization of Islamic Cooperation and its member countries, regarding the rights of migrants.

Keywords: Human rights, non – refoulement, immigration, rights of migrant, Geneva Conventions, UNHCR.

Üçüncü bölümde islami prensipler ve uluslararası belgelerde belirtilen ilkeler ışığında göçmenlerin insan hakları ortaya konulmuştur.

Sonuç bölümünde ise çalışmamızda vardığımız tespitler dile getirilmiş ve başta İslam İşbirliği Teşkilatı ve üye ülkeleri olmak üzere imuhataplara göçmenlerin haklarıyla ilgili çeşitli tavsiyelerde bulunulmuştur.

Anahtar Kelimeler : İnsan hakları, geri göndermeme, göç, göçmen hakları, Cenevre Sözleşmeleri, BMMYK

I. INTRODUCTION

A- Definition and Concept

Throughout centuries, living conditions which humankind, in particular the Islamic geography, has faced compelled them, voluntarily or involuntarily, to leave their hometowns and to head off to another destination having a different culture, in other words, to migrate. Particularly, collective migrations, which were experienced sometimes, ended an era and opened a new one within the history, and it, sometimes, left lasting impressions by determining or altering the destiny of that new destination.

Named as “*Hijra*” in the Islamic history, migration is a concept which almost all prophets sometimes confronted with their own tribe and sometimes alone². For these reasons, it is considered useful to explain in the beginning of our study, some technical terms, which will be used in the text.

In the first place, the concept of “migration” does not have a generally-accepted definition³, but it may be explained as follows: movement of a person either across an international border (international migration), or within a state (internal migration) for more than one year irrespective of the causes, voluntary or involuntary, and the means, regular or irregular, used to migrate⁴. It is observed that with respect to the doctrine of Islam, lexical meaning of “*hijra*” refers to “*abandoning, leaving, deserting, ending the relation and migrating*”⁵.

“Migrant” refers to a person who has left his/her own country on his/her own will and migrated to another country in order to maintain a more comfortable life⁶. According to the United Nations, while there is no formal legal definition of an international migrant, most experts are generally accepted that a person who migrated -voluntarily or unwillingly- to foreign country or international area, regardless of the

² Ekşi, Ahmet, “İslam Hukuku Bakımından Gayrimüslim Ülkelere Hicret,” Abant İzzet Baysal University, Journal of the Faculty of Theology, Spring 2019, Volume 7, Issue 13, p. 221.

³ International Migration and Human Rights, Global Migration Group, October 2008, (<https://digitalibrary.un.org/record/642516?ln=en> accessed 18 October 2020) p. 7

⁴ https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/migration_en, accessed 12 August 2020; Turkish Language Association, Turkish Dictionary, definition of migration as follows: persons or societies’ heading off or migrating from some place to another or from a place of residence to another on account of economic, social and political reasons (Turkish Historical Society Publishing House, Ankara 1998.

⁵ Ekşi, p. 222.

⁶ Ergül, Ergin, *Avrupa İnsan Hakları Sözleşmesi ve Türk Hukuku'nda Sınır Dışı Etme Geri Gönderme ve Geri Verme*, Yargı Yayınevi, Ankara, 2012, p. 23.

reasons, types and manners⁷. This approach was adopted independently from the reason of migration and the status of migrant. In this respect, the International Organization for Migration includes the refugees in the category of migrants⁸. However, according to this international organization, while each one of the refugees is accepted as a migrant, it must be underlined that each migrant is not accepted as a refugee.

In the 2007 Factbook of the Organisation for Economic Cooperation and Development (OECD), the concept of “migrant” is defined as a person who changed his/her place of residence, took a residence permit for generally one year or more or was recorded in the registry office and aiming at residing in that country for a period much longer than a particular period⁹.

In case of forced migration, the concepts of “refugee” and “asylum-seeker” are used¹⁰. These concepts are different in terms of their meaning in the international law arena. Accordingly, in Article 1 of the 1951 Convention on the Status of Refugees, the United Nations defines the concept of refugee as *“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 is unable or, owing to such fear, is unwilling to return to it.”*

According to the Glossary on Migration prepared by the IOM, the concept of “asylum seeker” is defined as: *“An individual who is seeking international protection. In countries with individualized procedures, an asylum seeker is someone whose claim has not yet been finally decided on by the country in which he or she has submitted it”*¹¹.

In the context of these two concepts, the person who is forcibly obliged to migrate becomes an asylum seeker following the guarantee provided by the host country. After that guarantee becomes official, he/she becomes a refugee and will have the rights of a refugee. Although the concepts of refugee and asylum seeker are defined as noted above according to the international law, it is observed that there are conceptual differences among the countries¹². Accordingly, a generally

⁷ <https://refugeesmigrants.un.org/definitions>, accessed 12 August 2020.

⁸ <https://www.iom.int/who-is-a-migrant>, accessed 14 February 2020.

⁹ OECD Factbook Economic, Environmental, and Social Statistics, OECD Publishing, 2007, (https://www.oecd-ilibrary.org/economics/oecd-factbook-2007_factbook-2007-en accessed 14 February 2020) p. 244.

¹⁰ Ergül, p. 19.

¹¹ https://publications.iom.int/system/files/pdf/iml31_turkish_2ndedition.pdf, accessed 14 February 2020

¹² According to the Turkish law, a foreigner coming from European countries and requesting international protection is called a refugee, while those coming from outside the Europe are called asylum seeker. For detailed definition, see: Article 3 of

accepted definition cannot be made in respect of these terms. For these reasons, the conceptual definitions are mostly left to domestic legislations.

B- The First Great Migration in Islam: Hijra

The Hijra of the Prophet Muhammad (peace be upon him) and the Constitution of Al-Madinah are the two major Islamic references on the issue of migration, as it will be discussed in this study. However, the concept of migration has been extensively developed in Islamic Jurisprudence by various Muslim scholars in light of the later development in Islamic societies and beyond. The matters related to migration are categorized on the five provisions of Islamic law under which migration may be 'obligatory', 'forbidden', 'desirable', 'disliked' or 'permissible'.

Migration can be an obligation upon anybody who is able migrate under given circumstances. Allah Almighty says: *{When the angels seize the souls of those who have wronged themselves, scolding them, what do you think you were doing? they will reply, we were oppressed in the land. The angels will respond, was Allah's earth not spacious enough for you to emigrate? It is they who will have Hell as their home—what an evil destination! Except helpless men, women, and children who cannot afford a way out. It is right to hope that Allah will pardon them. For Allah is Ever-Pardoning, All-Forgiving}* Surat Ani-Nisa, Verses 97-99. According to these verses, Allah orders those who are oppressed in their homeland to emigrate in order to protect their faith and to be able to live a free life from oppression and to be empowered as a pure slave to Allah. Furthermore, the issue of migration in Islam is also linked to the Islamic perspective that all lands belong to Allah, and human beings are sworn in for its reconstruction and improvement. Therefore, migration is sometimes a necessity in the pursuit of the task of succession over the land of Allah, as stated in the verses above: "was Allah's earth not spacious enough for you to emigrate?".

Almost all prophets in the Islamic history confronted with the practice of "hijra" (migration). Generally, the societies or tribes to which they were sent forced them to do so. Just like other prophets, Prophet Muhammad (peace be upon him) also had to migrate from Makkah to Medina in 622 together with those who had faith in him on account of increasing pressure and violence towards them. This was the most

the Regulation on Procedure and Principles to be Applied to Isolated Foreigners taking refugee in Turkey or requesting residence permit from Turkey in order to take refuge in another country, to the Foreigners coming to our borders for collective asylum and to the Possible Population Movements

important migration, which is one of the most significant fact in the Islamic history and which is known as “*Hijra*”¹³.

Upon the Prophet Muhammad’s hijra from Makkah to Medina, a new period started in the Islamic history. That incident was not only a change of place, but also a turning point in the spread of Islam. For this reason, there are many verses in the Quran, which mention about the dignity and honour of hijra and muhajirs¹⁴.

The hijra incident had many consequences. Muslims, who were subjected to torture and persecution due to pressure of polytheists in Makkah, gained strength and formed a state under the leadership of the Prophet Muhammad (peace be upon him). Following the hijra, Prophet Muhammad (peace be upon him) announced the establishment of the Islamic state and commenced diplomatic relations. The first constitution of the state (the Constitution of Medina) was enunciated and treaties were made with the neighbouring tribes. Prophet Muhammad (peace be upon him) tried to complete all formalities for the organization of the state after ‘hijra’. That was indicated by the fact that armed units were sent around in order to ensure the safety of life and property before the first anniversary of hijra. While in the period of Makkah, patience was recommended against mischief of unbelievers and their actual obstructions, however, the situation changed in the period of Medina and the right of retaliation was afforded to the Muslims. These points indicate that the incident of hijra constituted the basis of the Islamic state that would strengthen within a short period and would constitute the reasons of new formations in the history¹⁵.

When mentioning about the incident of hijra, the notions of “*muhajir*” and “*ansar*” must also be pointed out. The word muhajir refers to “*those who migrated*”¹⁶. In the incident of hijra, it was used for the Muslims from Makkah who escaped from oppression and persecution and migrated from Makkah to Medina and Abyssinia¹⁷. The word “*ansar*” was derived from the stem “*nasr*” which means “*helping*”. In the history of Islam, it was used for the Muslims from Medina who provided great

¹³ Görgeç, Gülsüm, *Hijra in the Context of Quran Criteria (Kuran Kıstasları Bağlamında Hicret)*, Unpublishing Master Thesis, Inonu University, Institute of Social Science, Department of Basic Islamic Sciences, Malatya, 2019, p. 52-54.

¹⁴ At-Taubah 9/100: “And the foremost to embrace Islām of the Muhājirūn (those who migrated from Makkah to Al-Medina) and the Ansār (the citizens of Al-Medina who helped and gave aid to the Muhājirūn) and also those who followed them exactly (in Faith). Allāh is well-pleased with them as they are well-pleased with Him. *He has prepared for them Gardens under which rivers flow (Paradise), to dwell therein forever. That is the supreme success*”

¹⁵ Özel, Ahmet, “Hicret”, <https://islamansiklopedisi.org.tr/hicret#2-fikih>, Turkish Religious Foundation Encyclopedia, accessed 16 February 2020

¹⁶ Saydam, Abdullah, “Muhacir”, <https://islamansiklopedisi.org.tr/muhacir--osmanli>, Turkish Religious Foundation Encyclopedia, accessed 17 February 2020

¹⁷ Görgeç, p. 64.

help for the Prophet Muhammad (peace be upon him) and “*muhajirs*” by means of accommodating them in their houses and protecting them¹⁸. In Surat Al-Hashr (59/9), the following is indicated concerning the Muslims from Medina: “*And those who, before them, had homes (in Al-Medina) and had adopted the Faith, love those who emigrate to them, and entertain no desire in their hearts for things given to the (latter), and give them (emigrants) preference over themselves, even though they were in need of that. And those saved from the covetousness in their own souls, they are the ones that achieve prosperity.*” They are directly and indirectly mentioned in 9 different places of the Quran.

1. Constitution of Medina (Mawakhat-e Medina) and Human Rights Development of Migration

Following the hijra, firstly a fellowship agreement was made between the Ansars from Medina and Muhajirs from Makkah. This agreement was made for the establishment of Medina Islamic State on religious, political and economic grounds. Since the relevant agreement was made for the purposes such as ensuring friendship between Muhajirs and Ansars and forming an Islamic community based on a common socio-cultural mentality; it constituted the preliminary preparation of the Constitution of Medina¹⁹.

Following that agreement, a constitution was signed also including the Jews living in Medina together with Muhajirs and Ansars. Apart from ensuring cooperation of Muhajirs coming from Makkah, the Constitution also aimed at ensuring cooperation against the attacks that could come from Makkah²⁰. Moreover, that constitution is the first written Constitution of the Islamic history, which has reached until today²¹.

The Constitution has consisted of 47 articles²². Living conditions of all tribes which signed the constitution and their relations with each other were mentioned in the content of the constitution. In particular, in the first 11 articles, the name of each tribe was mentioned, and it was noted that they would comply with the articles of the constitution. As it is observed, the rights of the Muhajirs who migrated were recognized by

¹⁸ Algül, Hüseyin, “Ensar”, <https://islamansiklopedisi.org.tr/ensar>, Turkish Religious Foundation Encyclopedia, accessed 17 February 2020

¹⁹ Özkan, Mustafa, *Medine Vesikası (Constitution of Madinah)*, Unpublishing Master Thesis, Ankara University, Istitute of Social Science, Ankara, 2002, p. 35-36.

²⁰ Özkan, p. 53.

²¹ Yaman, Ahmet, “İslam Toplumunda Azınlık Olmak (Being a Minority in the Islamic Society)”, *Journal of Presidency of Religious Affairs*, Volume 234, June 2010, p. 5

²² For the Turkish translation of whole text of the Constitution of Medina see Özkan, Mustafa, “*Medine Vesikası*”, <https://islamansiklopedisi.org.tr/medine-vesikasi>, accessed 13 October 2021.

the Medina Constitution, and it was noted that they had to comply with the constitution.

We observe that apart from being an agreement ensuring an order between the tribes living in Medina and Muhajirs coming from Makkah, the Constitution contains many fundamental human rights. In this scope, it is stated under Articles 12 and 15 of the constitution that Muslim tribes living in Medina (Ansars and Muhajirs) should be in cooperation with each other. It is also set out under these articles that the Muhajirs and Ansars were brothers and sisters, and they had to benefit from the same rights and support each other.

According to Article 25 of the constitution: *“And the Jews of Banu ‘Awf shall be considered as one political community (Ummat) along with the believers- for the Jews their religion, and for the Muslims theirs, be one client or patron.”* Under that provision, freedom of religion and conscience was also afforded between the tribes. It was noted that all tribes living in Medina (Muslims and non-Muslims) would be provided with freedom to practice their respective religions.

In accordance with the principle *“Of course, whoever is found guilty of oppression or violation of treaty, shall himself suffer the consequent trouble as also his family, but no one besides”* set out under Article 31 of the Constitution, the principle of *“individual criminal responsibility”* is indicated. That provision was an important step in respect of human rights within a period based on tribes. Article 37 of the constitution stipulated that all tribes living in Medina had equal conditions. Article also set out that all tribes would comply with the decisions taken and they would help each other in case of war. It was also noted that no tribe would commit any crime against the other.

Another important matter is the principle of *“equality before law”* within the context of human rights. It is stipulated under Article 42 of the Constitution that disputes shall be resolved by the same authority²³. According to Article 46 of the Constitution *“Those who acquire unlawful gains shall only harm to their own will”* Under this provision, it was provided that the gain must be legitimate and lawful and the property rights of others must be respected. Accordingly, *“the right to property”*, one of the most important elements of human rights was regulated under that constitution.

Article 47 of the Constitution made references to the issues of personal immunity and prohibition of discrimination. According to the provision *“And this prescript shall not be of any avail to any oppressor or breaker of covenant. And one shall have security whether one goes out to a campaign or remains in Madina, or else it will be an oppression and breach of*

²³ Ayengin, Tevhid, *İslam ve İnsan Hakları (Islam and Human Rights)*, Ravza Publishing, Istanbul, 2017, p. 80.

covenant.”, it was provided that no one shall be subjected to discrimination and also, the guarantee and exception to the right to life were regulated. The last articles of the constitution contained undertakings indicating that the tribes living in Medina would comply with the covenant.

It is observed that the Medina Constitution regulates relations between Muslims (Ansars and Muhajirs) and relations between Muslims and non-Muslims. In this scope, the relations between Muslims, in other words, the relations between Ansars and Muhajirs also became the subject matter of this agreement. Accordingly, the Medina Constitution²⁴ which is considered as the first written constitutional text demonstrates the importance of the rights afforded to and the respect demonstrated to the Muhajirs, who forcibly migrated following the hijra. In this regard, in accordance with the Islamic doctrine and principles, the importance given to the migrants’ rights and respect for human rights are better understood within the provisions of the Constitution of Medina.

2. Some Other Important Migrations in the History

Within the historical process, apart from the incident of Hijra, the migration which left a trace in the world history and which caused re-bordering of the states is the “Migration of Tribes”, the first migration that comes to mind. The Migration of Tribes started from Middle East to Europe, and then to African continent²⁵. On account of various reasons, the Turkish communities migrated to west, east, north and south. The migration of Turkish tribes to the west started the Migration of Tribes, one of the biggest migrations of the world. As a result of the conflicts between tribes and Turkish communities, the tribes started to migrate to the west²⁶. Accordingly, the Migration of Tribes started in Europe. Apart from changing the borders of the countries and falling the empires, the most important consequence of the migration of tribes is that it is ending of the first age and starting of the middle age. As it is observed, the migrations caused opening and closing of an era, apart from their impact on deserted places or residential places.

After Christopher Columbus crossed the Atlantic Ocean and discovered America in 1492, a new migration wave started which would change the political balance of the world. Apart from America, Australia

²⁴ For different views on this matter, see Akarsu, Murat, *Medine Sözleşmesi'nin Anayasallığı*, (The Constitutionality of the Constitution of Medina), *International Journal of Human Studies*, Volume, 1, Issue 2, 2018.

²⁵ Akkaya, Bahadır, *Uluslararası Göç Hukuku ve Türkiye'nin Göç Stratejisi* (International Migration Law and Turkey's Migration Strategy), Unpublishing Master Thesis, University of Gaziantep, Institutes of Social Sciences, Security Strategies and Management Department, Gaziantep 2019, p. 18

²⁶ Akkaya, p. 18.

and New Zealand were discovered by the British and Dutch. These new territories discovered by the Europeans are called “New World” continents. Intensive migrations were experienced from Europe to America, particularly by the British, Portuguese and French people. The number of colonies increased to 13, which laid the foundations of the United States of America²⁷. While the Migration of Tribes caused opening of a new age, the political order of the world took its final form following the discovery of America.

Another important migration movement is that the Ottoman Empire safely accepted the Jews who were exiled from Spain. After Castilla and Leon Queen Isabella I and Aragon King Ferdinand II got married, two great powers were united. Subsequently, Islamic rule in Spain weakened, and Spanish Inquisition established in 1478 ordered the execution of thousands of Jews²⁸. Following the fall of the Emirate of Granada, more difficult days started for both the Jewish community in Granada and other Jews in Spain. On 31 March 1492 Isabella I and Ferdinand II issued Alhambra Decree on the ground that the Jews “*attempted to dissuade good Christians from their own holy belief*”. According to that decree, the Jews were asked to leave Spain within a short period, namely 4 months. It was also noted in the decree that those who did not comply with the decree would be sentenced to death penalty. Upon these developments, Bayezid II took the Jews exiled from Spain by means of Alhambra Decree under his protection. He sent the Ottoman fleet under the commandship of Kemal Reis to Spain and ensured the safe arrival of 150.000 Jews to the Ottoman territories²⁹.

In second half of the 20th century, Europe, from which people migrated to other places between 1800s and 1950s, needed labour force in order to eliminate destructive effects of the Second World War and to establish a new order. To this end, it opened the doors for the migrants. For example, Germany which was gravely defeated in the World War II, received many workers from Italy, Spain Greece and Turkey as migrants³⁰.

²⁷ <https://www.history.com/topics/colonial-america/thirteen-colonies>, accessed 11 September 2020

²⁸ Ledray, Laura, Spanish Persecution of the 15th-17th Centuries: A Study of Discrimination Against Witches at the Local and State Levels, <https://digitalcommons.hamline.edu/cgi/viewcontent.cgi?article=1048&context=dhp>, accessed 28 October 2021, p 54, accessed 11 September 2020

²⁹ <http://www.olaganustukanitlar.com/150-bin-yahudiyi-kurtaran-osmanli-padisahi-ii-beyazid/#:-:text=Bir%C3%A7ok%20ba%C5%9Far%C4%B1ya%20imza%20atan%20II,g%C3%BCvenle%2C%20Osmanl%C4%B1%20topraklar%C4%B1na%20ula%C5%9Fmas%C4%B1nC4%B1%20sa%C4%9Flam%C4%B1%C5%9Ft%C4%B1r.,> accessed 11 September 2020

³⁰ Kaya, Bülent, The Changing Face of Europe – Population Flows in the 20th Century, Council of Europe Publishing, Strasbourg 2002, p. 20, (<https://rm.coe.int/1680494249> accessed 18 September 2020)

Another migration wave which affected the whole world is the “Arab Uprisings” that started in 2010. The crisis starting in Tunisia on 17 December 2010 after a young person who was a peddler burnt himself also spread to Egypt, Libya, Syria, Bahrain, Jordan and Yemen. After internal disturbances in some countries, a new migration wave initiated. The people who left their countries due to internal conflicts were in the search of countries where they could migrate³¹. On account of conflicts which started in April 2011 and still continues in Syria, migratory waves were experienced. More than 10 million Syrian people had to take refuge in the countries such as Turkey, Jordan and Lebanon³².

C- Reasons of Voluntary or Forced Migrations Over the Past Decades

Before dwelling on the reasons of migration, it is firstly useful to focus on the types of migration. Indeed, migration has been classified into many categories³³. Three main categories will be mentioned concerning classification. As the first classification, the concepts of internal and external migration are noted. Internal migration is the incident of migration experienced within the country. External migration is defined as migration from one country to another. Another classification is that migration may be divided into two categories as voluntary and forced migration³⁴. If the migration is on the relevant person’s own will, it is voluntary migration. If the migrant has to go from one place to another due to his/her living conditions, forced migration is at issue. Finally, it is divided into two categories, as regular and irregular migration. Regular migration is made in line with the rules

³¹ Koser, Khalid, *Migration, Displacement and the Arab Spring: Lessons to Learn*, 2012, (<https://www.brookings.edu/opinions/migration-displacement-and-the-arab-spring-lessons-to-learn/>, accessed 18 September 2020)

³² Turkey took approximately 3.5 million asylum seekers under temporary protection. Having established temporary accommodation centers, Turkey provides fundamental human rights needs such as education for all children, including pre-school, medical services in the same manner with Turkish citizens and places of worship for foreigners.

³³ Baggio, Fabio, *Descriptive Classifications of Migration*, <http://www.simiroma.org/Baggio/TS109/Classification%20Baggio%20EN.pdf>, accessed 13 September 2020; <https://emergency.unhcr.org/entry/44937/migrant-definition>, Migrant Definition, accessed 13 September 2020

³⁴ Mani, Semiha M., *Devletler Özel Hukukunda Göçmenlerin Statüsü ve Göçmenlere Ait Düzenlemeler (Status of Migrant in the Private Law of the States and Regulations concerning Migrants)*, Unpublishing Master thesis, Ankara University, Istitute of Social Science, Ankara 2009, p. 26.

and regulations defined within the scope of migration movement, but the irregular migration does not comply with these procedural acts.³⁵

In the light of this information, it is useful to look at the factors which cause migration that is as old as the history of mankind. These factors, which continue to be relevant until today, constitute the basis of international and general principles.

1. Conflicts and Wars

One of the most important reasons of migration around the world, and in particular, Islamic geography, are considered as wars and regional chaos. Indeed, people who were forcibly obliged to migrate from their own hometowns in order to maintain a more appropriate life.

The incident of migration which has many examples in the history on account of war and regional chaos forced the humankind to migrate include serious human rights violations experienced after the Second World War. As a matter of fact, under Article 14 of the Universal Declaration of Human Rights, which was adopted on 10 December 1948, “*right to asylum*” is regulated as a fundamental human right.

Arab Uprising caused collective migrations on account of internal disturbances in Iraq and Syria. This caused the migrants to head off to other countries and become refugees or asylum seekers. Due to internal disturbances in Syria since 2012, many human rights including in particular the right to life, one of the most fundamental rights, became endangered; and collective migrations have taken place, and is still ongoing.

2. Denial of Basic Rights and Fundamental Freedoms Including Growing Intolerance Leading to Religious, Ethnic and Communal Persecution

Another reason of the migration arises from political reasons related with war and regional disturbances. Particular reasons are ethnic and regional pressures, insurrection, occupation and border changes. The migrant who headed off from his own country to another country due to these reasons takes the status of refugee or asylum seeker³⁶. Indeed, this reason of migration falls within the category of obligatory migration.

It is observed that the incident of “*Hijra*” related with religious reasons was experienced by almost all prophets. Although, prophet

³⁵ Bozkurt, Kutluhan, *Avrupa Birliği Politikaları ve Düzenlemeleri Kapsamında Göç Hukuku (Migration Law within the scope of European Union policies and regulations)*, Legal Publishing, Istanbul, 2018, p. 23.

³⁶ Töre, Nazlı, *Uluslararası Göç Hukuku (International Migration Law)*, Turhan Publishing, Ankara 2016, p. 51.

Noah made great efforts for his tribe to have faith in Allah, he migrated by a ship together with those who believed in him. Prophet Shuaib who was sent to the Madyan tribe warned his own people as they were falsifying measurements and weighing (Al-A'raf 7/85), his own people excluded him from his home town³⁷. “Great Migration” or “Hijra” performed by Prophet Muhammad (peace be upon him), explained in detail earlier, was accepted as a reason of the migration on religious purposes in respect of Islamic history.

Today, Muslims who are subjected to occupation and denial of rights migrate in order to live in accordance with their faith. The most important example of this situation are the Muslims living in the Indian Occupied Kashmir³⁸, Rohingyas of Myanmar, Occupied Palestinian Territories³⁹ and Xinjiang region of China⁴⁰.

On the other hand, there have been many mass migrations around the world due to ethnic oppression and political reasons. These mass migrations have increased the interaction between countries even more. In this context, one of the best examples has been the migration waves from Yugoslavia – Macedonia to Turkey. Indeed, these were caused by the policies followed by the governments on these lands (Yugoslavia-Macedonia) and the pressures on people of Turkish origin. This situation has led to mass forced migration⁴¹.

3. Widening of Economic Disparities Within and Among the Nations

Economic grounds are one of the most important reasons of migration. As a matter of fact, the reason leading people to migrate to meet their basic needs including anxiety concerning employment. The person who is employed as a social concept will better ensure his/her prosperity and social peace. Otherwise, his/her productivity will decrease and he/she will suffer from adaptation problem. For this reason, in order to live in better economic conditions and to maintain a better quality of life, the person may migrate to another country⁴².

The best example of this situation was experienced after the Second World War suffering from a great loss after the war, Germany accepted the workers coming from other countries as from 1955 in order

³⁷ www.insanansiklopedisi.org.tr, accessed 13 March 2020

³⁸ See for details <http://www.na.gov.pk/uploads/content/OIC%20Report%20on%20Kashmir.pdf>, accessed 14 September 2020

³⁹ See for details, <https://www.unrwa.org/palestine-refugees>, accessed 18 September 2020

⁴⁰ <https://news.un.org/en/story/2019/12/1054311> accessed 18 September 2020

⁴¹ https://www.goc.gov.tr/kitleesel-akinlar#_ftnref6, accessed 14 October 2021

⁴² Töre, p. 50

to eliminate the deficiency in labour force⁴³. Today, Muslim and Syrian people were forced migration to Turkey⁴⁴ and to other European countries due to internal disturbances in Syria, because of apart from escaping the civil war, the purpose of improving living standards and finding a job.

At this point, it is necessary to touch upon the mass migration recently received by Turkey on account of the internal disturbance experienced in Syria. Indeed, Turkey was faced with a major test concerning migration by opening its doors to the asylum seekers coming from Syria. By “*the Directive no. 62 on admission and accommodation of the citizens of the Syrian Arab Republic coming to Turkey for the purpose of mass asylum and of stateless persons residing in Syrian Arab Republic*” issued by the Prime Ministry in 2012, the Syrian asylum seekers who came to Turkey were granted “temporary protection” and they were allowed to stay in Turkey⁴⁵. Till the present day, Syrian asylum seekers’ basic needs such as accommodation, food, health and education have been and still are met within the scope of temporary protection⁴⁶. In this respect, as it has done in the past, Turkey opens its doors to asylum seekers or refugees who requests its aid and provides them with the necessary assistance in accordance with the Islamic doctrine and values.

4. Natural Disasters, Ecological and Environmental Degradation

Natural disasters which occur out of the human will and desire (earthquake, drought, volcano, flood, landslip, erosion) are another reason for people to migrate in order to survive and maintain a better life⁴⁷. For example, because of the Nyiragongo volcano eruption experienced recently in the Democratic Republic of Congo; 100,000 people in 2002 and 25,000 people in 2021 have migrated to the safe

⁴³ Akkaya, p. 10

⁴⁴ <https://www.unhcr.org/tr/en/refugees-and-asylum-seekers-in-turkey>, accessed 18 September 2020

⁴⁵ Article 91 of the Law on Foreigners and International Protection provides, insofar as relevant, as follows:

“Temporary protection may be provided for foreigners who have been forced to leave their country, cannot return to the country that they have left, and have arrived at or crossed the borders of Turkey in a mass influx situation seeking immediate and temporary protection.”

⁴⁶ Çiçeksoğüt, Adem, “Uluslararası Göç Hukuku Perspektifinde Yerinden Edilmiş Suriyeliler’in Türkiye’deki Statüsü (Status of the Displaced Syrians in Turkey from the Perspective of the International Migration Law),” *Journal of the Kırıkkale University’s Faculty of Economics and Administrative Sciences*, 2017, Volume no. 6, Issue no. 2, page 13

⁴⁷ See for details about linking between enviromental change and migration, World Imigration Report 2020, IOM, Geneve 2020, (https://publications.iom.int/system/files/pdf/wmr_2020.pdf Accessed 19 September 2020)

zones⁴⁸. Similarly, in West Africa (Burkina Faso and Mali, respectively) drought led to both temporary and permanent migration to fertile lands⁴⁹.

Indeed, increase of average temperature of the earth, release of gases affecting ozone layer, air pollution, extension of chemical substances have become global problems. Accordingly, the concept of climate refugees has come into existence⁵⁰. Epidemics may also be involved under this category⁵¹.

II. RIGHTS OF MIGRANTS IN THE LIGHT OF INTERNATIONAL DOCUMENTS AND RELATED ORGANISATIONS

Although the concept of migration dates back to ancient times of history, a solution was sought at international level after two world wars. Indeed, following the collective migrations experienced, the states started to perform studies for understanding the social phenomenon of migration and seeking solutions to manage it. In this scope, by the decision of the League of Nations which was established after the First World War, High Commissioner for Russian Refugees was established. As a result of the studies carried out, the High Commissioner attempted to find solutions for problems of Russian refugees such as their legal status and employment⁵².

Due to increases in the collective migrations, the Convention Relating to the International Status of Refugees was initiated in 1933 with respect to the issue of migration firstly handled by the League of Nations in an exclusive manner. Only 8 countries signed the convention. However, some of the countries which signed the convention made reservation in respect of some articles⁵³. Although this convention did not have an impact at international arena as a small number of countries signed it, it formed a basis for international texts prepared in the coming years. As a matter of fact, it is observed that fundamental rights of

⁴⁸ <https://www.unicef.org/press-releases/children-and-families-risk-following-huge-volcano-eruption-goma-democratic-republic>, accessed 14 October 2021

⁴⁹ Linguère Mously Mbaye, Klaus F. Zimmermann, *Environmental Disasters and Migration*, <https://www.econstor.eu/bitstream/10419/124866/1/dp9349.pdf>, accessed 14 October 2021

⁵⁰ Bozkurt, p. 21

⁵¹ Töre, p. 50

⁵² Büyükçalık, Mürvet E., *Mülteci Hukuku'nun Gelişimi ve Türkiye'de Mültecilerin Sosyal Hakları (Development of Refugee Law and Social Rights of Refugees in Turkey)*, Oniki Levha Publishing, İstanbul 2015, p. 11

⁵³ See the League of Nations' Convention of 28 October, 1933 Relating to the International Status of Refugees (<http://www.refworld.org/docid/3dd8cf374.html> Access date: 13 March 2020)

refugees are indicated in the text of this convention. In particular, the prohibition of removal was indicated in this text for the first time.

In the subsequent period, Jewish refugees escaping from Nazi government in Germany caused a crisis in the international community. In this scope, the League of Nations initiated a Provisional Arrangement concerning the Status of Refugees Coming from Germany in 1936 and the Convention concerning the Status of Refugees Coming from Germany in 1938. These two conventions were not exhaustive when compared with the Convention made in 1933 as regards the rights they afforded. They were only related to situation of the refugees coming from Germany⁵⁴.

The United Nations which was established after the Second World War also has the duty to carry out studies in order to determine the status of the persons who migrated after the war and to solve their problems. In this context, International Refugee Organization was established in 1948. The duties of the International Refugee Organization included carrying out activities concerning all fields of the refugees' lives such as making records concerning them, determining their status, their returning to countries of origin or their placement in a new country⁵⁵. Apart from them, the UN High Commissioners for Refugees were established by the International Organization for Migration which was later incorporated in the UN. Detailed information concerning them will be mentioned in the following paragraphs of the study. In the first place, the 1951 Geneva Convention, which has the characteristics of a constitutional provision at the international arena for the rights of migrants, will be handled.

A- 1951 Geneva Convention on the Determination of the Legal Status of Refugees and 1967 New York Protocol Relating to the Status of Refugees

Since the problem of refugees was not solved following the Second World War, and a new international document was needed for the definition of the notion of refugee; on 28 July 1951 the UN Convention relating to the Status of Refugees was signed under the guidance of the UN High Commissioner for Refugees. The Convention entered into force on 21 April 1954⁵⁶.

⁵⁴ Akkaya, p. 50-51

⁵⁵ <http://www.refworld.org/docid/3ae6b37810.html>, accessed 13 March 2020

⁵⁶ Handbook on Procedures and Criteria for Determining Refugee Status, Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, UNCHR, February 2019, (<https://www.unhcr.org/asia/publications/legal/5ddfdcd47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html> Accessed 13 March 2020) p. 12

The notion of “refugee” is defined in Article 1 of the Geneva Convention, which has a particular importance in the international arena. However, for the purpose of making a distinction between the notions of migrant and refugee, a number of limitations were noted in the definition of refugee. Article 1-a/2 of the Convention is as follows: *“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.”*

According to this article, the notion of refugee is limited to the events occurring before 1 January 1951. It is also considered that he/she must have a well-founded fear of being persecuted. Moreover, it is also noted in the article that the persecution may arise from the reasons of race, religion, nationality, membership of a particular social group or political opinion. It is also maintained in the text of article that the requirement of being outside the country of his nationality and being unable or unwilling to avail himself/herself of the protection of that country is sought.

Moreover, subparagraph B is also explained as follows in addition to these requirements in Article 1 of the Convention:

“B.(1) For the purposes of this Convention, the words “events occurring before 1 January 1951” in article 1, section A, shall be understood to mean either:

- (a) “events occurring in Europe before 1 January 1951”; or*
- (b) “events occurring in Europe or elsewhere before 1 January 1951”, and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.”*

Pursuant to this provision, the States were afforded the right of choice while signing the Convention. Within this scope, the States were provided with the opportunity to grant refugee status either to those who came from Europe or to those who came from Europe or elsewhere⁵⁷.

⁵⁷ In Turkish practise, the descriptions made within the context of the Geneva Convention and the New York Protocol were firstly regulated by *“the Regulation on the principles and procedures applicable to individual foreigners who seek asylum in Turkey or who request a residence permit from Turkey for the purpose of seeking asylum in another country, to foreigners who arrive at the Turkish borders for collective asylum and to possible population movements”* dated 30 November 1994. Furthermore, the Regulation in question was the first domestic instrument governing the status of those who came to Turkey from outside of Europe for the purpose of seeking asylum. Later, the need for a new law arose with the increase in the number of asylum seekers coming to Turkey from

The Convention in question sets out the fundamental rights of refugees and establishes the minimum procedures to be applied in that regard. Within this scope, the fundamental rights of refugees were laid down in this Convention containing provisions on establishment of refugees' legal status, their employment and their right to benefit from welfare services as well as regulations on their identity papers and travel documents, applicability of fiscal charges to them and their right to transfer their assets to another country where they have been admitted. Detailed explanation on the rights in question will be provided under the 3rd Section below⁵⁸.

The most important one of the above-mentioned rights, which still sparks debates at the international level, is the principle of “*non-refoulement*” set out in Article 33 of the Convention. Even though this provision is of a general nature, the exceptions to it were also provided for in the Convention⁵⁹. After 1951, the Office of the United Nations High Commissioner for Refugees (UNHCR) established within the United Nations (hereinafter, “the UN”) has closely monitored treatment of refugees by intervening in several refugee crisis that have taken place. Within this scope, the Hungarian refugees who sought asylum in Western Europe, the Chinese refugees in Hong Kong, the Algerian refugees coming from Morocco and Tunisia in connection with Algeria's fight for independence and lastly, the refugee problems which emerged in Africa due to civil wars in countries for gaining independence revealed that the temporal and geographic limitations set out in the Geneva Convention gave rise to inconsistencies⁶⁰.

Upon the call of the UNHCR, on 4 July 1967 the text of the Additional Protocol to the Geneva Convention of 1951 was drafted. By the text in question, “*events occurring before 1951*” and “*fleeing from Europe*” requirements were lifted. Even though the text in question was drafted as an additional protocol, it was separately opened for the States' signature and its applicability is subject to ratification by the States. Accordingly, the aforementioned two Conventions, which were signed by a high number of States, are of great importance at the international arena for securing refugees' fundamental rights.

outside of Europe and escalation of the instances of mass migration. Within this scope, “the Law on Foreigners and International Protection” was drafted and it was enacted and brought into force on 4 April 2013.

⁵⁸ <https://www.ohchr.org/Documents/Publications/FactSheet20en.pdf>, Factsheet No :20, Human Rights and Refugees, p. 4, accessed 15 March 2020

⁵⁹ For detailed analysis on the subject, see the 3rd Section, pages 24-26

⁶⁰ Büyükçalık, p. 43

B- International Organisation for Migration (IOM)

Following the displacement of approximately 11 million persons from the Western Europe as a result of the destructive impact of the Second World War, the International Organisation for Migration (IOM) was established in 1951 by 132 States with a view to finding a solution for the migration wave which began in the search of another place to live. The objective of the Organisation was established as providing assistance for the increasing operational difficulties in migration management, making migration related matters more comprehensible, encouraging social and economic development by means of migration and promoting migrants' human dignity and welfare⁶¹. In other words, the aim of the Organisation is to ensure that the migration movement takes place in an orderly and humanitarian manner and that the States exchange the necessary information on migration, cooperate with each other and provide an incentive in this regard⁶².

Even though the Organisation was initially established as an independent international organisation, it was incorporated into the UN in 2016 and presently, it functions as a subsidiary institution. Currently, the Organisation has 173 Member States and 8 Observer States including several Muslim States⁶³. For example, the International Migration Organisation (IMO) continues its activities in Turkey. Even though the IMO opened its first office and initiated its activities in Turkey in 1991 in order to deal with the Iraqi refugees who came to Turkey as a result of the First Gulf War, it was considered appropriate for Turkey to join the IMO by the Law no. 5260 dated 25 November 2004 which was brought into force on 19 July 2010 by the Council of Ministers. As seen, Turkey's membership of the IOM became official in 2004 and the joint works of the IOM and Turkey, including the drafting of the Law on Foreigners and International Protection and establishment of the Directorate General for Migration Management attached to the Ministry of Interior, have been carried out as from 2004 until present. In the aftermath of the Van earthquake of 2011, the IOM initiated its emergency intervention programs in Turkey. In the course of the civil war in Syria and the Mediterranean Crisis of 2015, the IOM continued its activities in Turkey. The IOM has its central office in Ankara and sub-offices in Istanbul and Gaziantep⁶⁴.

⁶¹ <https://www.iom.int/mission>, accessed 29 March 2020

⁶² For the 12 objectives where the IOM established its strategies for refugees' rights, see also <https://www.iom.int/mission>, accessed 29 March 2020

⁶³ https://www.iom.int/sites/default/files/about-iom/members_observers_en.pdf, accessed 29 March 2020

⁶⁴ <https://turkey.iom.int/iom-turkey>, accessed 08 April 2020

C- United Nations High Commissioner for Refugees (UNHCR)

Following the establishment of the UN, it was decided to set up the UNHCR by the decision of the UN General Assembly in 1951 due to the fact that the International Refugee Organisation (IRO) established for the purpose of dealing with the migration and refugee problems proved insufficient⁶⁵. The mandate of the UNHCR, which was initially set up for a period of 3 years, was extended and resumed as the world-wide migration problem could not be solved. By its decision of 2003, the UN General Assembly extended the UNHCR's mandate "*until the refugee problem is solved*", namely, until the issue is brought to an end. The UNHCR functions as a subsidiary body established by the UN General Assembly under Article 22 of the UN Convention. Therefore, it is an institution with international legal personality⁶⁶. The Statute of the Office of the United Nations High Commissioner for Refugees, adopted by the UN General Assembly on 14 December 1950, is the main text of the Commissioner's Office. It performs its functions and activities in accordance with the Statute in question. As stated in the introduction part of the Statute, the UNHCR's fundamental aim is to solve refugees' problems throughout the world, to ensure their international legal protection and to either facilitate their voluntary repatriation or settlement in a safe third country. Its second aim is to determine the refugees falling within the scope of its field of activity⁶⁷.

In Article 6 of the Statute, the persons falling under the category of refugee were set out. The Statute further extended the definition of refugee in a manner that it also encompassed its definition in the Geneva Convention of 1951. Within this scope, regardless of any geographic or personal limitations, those who are forced to leave their country for fear of being persecuted for reasons of race, religion, nationality or political opinion also fall under the category of refugee. Therefore, the Statute is of a universal nature.

In Article 8 of the Statute, the duties of the UNHCR were defined. When these definitions are examined, it is seen that the important duties of the UNHCR are as follows⁶⁸;

- Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;

⁶⁵ Report of the United Nations High Commissioner for Refugees, A/2394, 01 January 1954, <https://www.unhcr.org/afr/excom/unhcrannual/3ae68c968/report-united-nations-high-commissioner-refugees.html>, p.10, accessed 15 September 2020

⁶⁶ <https://www.unhcr.org/3b66c39e1.html>, accessed 29 March 2020

⁶⁷ <https://www.unhcr.org/3b66c39e1.html>, accessed 30 March 2020

⁶⁸ For detailed information on the UNHCR's other duties, see <https://www.unhcr.org/3b66c39e1.html> accessed 30 March 2020

- Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;
- Promoting the admission of refugees not excluding those in the most destitute categories, to the territories of States;
- Obtaining from Governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them.

The UNHCR offers three solutions to enable refugees (including stateless persons) to maintain their lives. Within this framework, the solutions offered by the UNHCR are voluntary repatriation, settlement in a third country and local integration. The UNHCR carries out the necessary works in accordance with these options. The most important point that should be emphasised is that the UNHCR handles its works related to refugees' rights within the context of human rights. Indeed, the fact that the UNHCR handles the subject in this manner imposes obligations on the States and contributes to provision of permanent solutions.

D- Conventions, Reports and Commissions Prepared by the Council of Europe and the European Union

Even though the Geneva Convention of 1951 is accepted as a milestone in the European continent, the searches for solution of the refugee problem has continued outside the Convention in question. Within this scope, the Council of Europe and the European Union (hereinafter, "the EU") have introduced several regulations concerning migrants and refugees.

Firstly, the European Convention on Human Rights (hereinafter, the European Convention), which is the fundamental instrument of the Council of Europe, has introduced certain protective arrangements for migrants, asylum seekers and refugees. One of the most important of these protective arrangements is the mechanism of protection against expulsion of an asylum seeker or a refugee. In this connection, the European Court of Human Rights (hereinafter "the Court") rules on the applicants' allegations as to violations of "the prohibition of torture" under Article 3 of the European Convention, "the right to liberty and security of person" under subparagraph (f) of Article 5 thereof, "the right to freedom of movement" under Article 2 of the Additional Protocol No. 4 to the European Convention and the provisions against expulsion orders under Article 1 of the Additional Protocol No. 7 to the European Convention⁶⁹.

⁶⁹ Some of these judgments are as follows:

- In its judgment of *Hirsi Jamaa and Others v. Italy* [GC] (no. 27765/09), the Court found a violation against Italy on the ground that the Coastguard teams patrolling the

The Steering Committee for Human Rights (CDDH) of the Council of Europe has also set up a working group on “Migration and Human Rights” and informed the public opinion about the subject by the detailed reports drawn up by intergovernmental legal professionals⁷⁰.

On the other hand, the Treaty of Rome, namely the foundation act of the EU which was firstly established as the European Economic Community in 1957, included no regulation as to common migration and asylum policies. Similarly, it is observed that the Single European Act of 1987 did not include any regulation in that regard, either. The first steps regarding the asylum and migration policies were taken in the Schengen Agreement signed in 1985. Within the scope of the Agreement in question, the checks in the EU’s internal borders were gradually abolished and the right to freedom of movement was secured. However, this right was conferred on merely the citizens of the EU and efforts were exerted to take steps for merely implementation of a common procedure (entry, exit, asylum, etc.) with respect to the persons coming from outside of the EU. Nevertheless, this issue was left to the discretion of the States⁷¹.

Specific regulations concerning refugees were included in the Dublin Convention which was signed in 1990 and which stated that the Contracting States reaffirmed their obligations under the Refugee Convention of 1951 and the New York Protocol of 1967 with no

open seas had sent the vessels, which had two hundred asylum seekers on board, to Libya without receiving their requests for asylum.

•In its judgment of *Sharifi and Others v. Italy and Greece* (no. 16643/09), the Court found a violation of Article 3 of the Convention in conjunction with Article 4 of the Protocol No. 4 to the European Convention on the ground that the Afghan nationals, who had been arrested at the border of Italy where they had illegally reached via Greece, had been returned to Greece without allowing them to apply for any procedures. *Kebe and Others v. Ukraine* (no. 12552/12) and *MA and Others. Lithuania* (no. 59793/17) judgments are also of a similar vein.

•When the Court receives an application, it may indicate to the respondent Government certain interim measures under Rule 39 of the Rules of Court until the examination of the case. The Court indicated interim measures in a number of cases concerning migration, including placement of minors in detention. The respondent Government’s failure to comply with the interim measure indicated by the Court under Rule 39 of the Rules of Court amounts to a violation of Article 34 of the Convention (*Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99 §§ 99-129; see also *MA v. France*, no. 9373/15).

•In its judgments of *Cruz Varas v. Sweden* and *Vilvarajah v. the United Kingdom* dated 20 March 1991 and 30 October 1991 respectively, the Court held that the persons whose application for asylum had been rejected were under the protection of Article 3 of the Convention.

⁷⁰ For detailed information, see <https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/human-rights-development-cddh/migration>, accessed 30 March 2020

⁷¹ Töre, p. 38

geographic restriction of the scope of these instruments and that they also agreed to cooperate with the UNHCR. The regulations in question concerned which State would be responsible for assessment of an application for asylum made within the EU and it indicated the responsible States by introducing a detailed limitation.

While the EU Member States' initiatives for harmonisation of the asylum policies and practices may be described as political initiatives which were not initially binding, it can be said that this situation changed after the Maastricht Treaty and particularly, as from the year 1999. Thereafter, the States exerted efforts to set up the Common European Asylum System taking as basis the application of the Refugee Convention of 1951 to the fullest extent. The Treaty of Maastricht, which was signed in 1992, included asylum and the policies of asylum as the common field of interest for the Member States. The Treaty of Amsterdam of 1997 made certain amendments to the Treaty of Maastricht. Within this scope, policies related to visas, asylum, migration and persons' freedom of movement were readdressed. By the Treaty of Amsterdam, which entered into force in 1999, the preparations for setting up the Common European Asylum System were initiated. Within this framework, several instruments in the form of regulations and directives were brought into force.

The fundamental structure of the Common European Asylum System began to be established by the adoption of the Dublin II Regulation, which was signed in 2003 and which amended the Dublin Convention of 1999, the Council Directive laying down the minimum standards for reception of asylum seekers, and the regulations concerning the criteria for receiving refugee status, temporary protection, and identity papers and travel documents to be provided to refugees. In addition to these procedural regulations, instruments including provisions on security are also a part of the Common European Asylum System. The regulation on the EURODAC system enabling identification of asylum seekers' fingerprints and several regulations on border security such as FRONTEX have been introduced⁷². Thus, subsequent to the Treaty of Amsterdam, safeguards for freedom of movement were provided and decisions were made as regards asylum and migration related matters in accordance with the EU's principles of freedom, security and justice⁷³. Accordingly, the issue of migration and asylum was removed from the Member States' responsibility and included in the EU's area of responsibility, and a five-year period was envisaged for each Member State to implement the decisions made.

⁷² Büyükçalık, p. 54

⁷³ Bozkurt, p. 107

By the Charter of Fundamental Rights of the EU, which was adopted in 2010, the right to asylum was set out among fundamental rights and principles. Therefore, according to this regulation, citizens of non-EU countries who are in the EU countries will have the rights set out in the Charter (residence, travel and work) even if they are not EU citizens. Lastly, the Dublin III Regulation was adopted in 2013. In accordance with the Regulation in question, more transparent criteria were introduced as regards persons applying for asylum and amendments were made as regards assessment of their applications⁷⁴.

E. Other Important Conventions Regarding Migration

In addition to the above-mentioned protocols, conventions and processes, many conventions of universal and regional nature which provided safeguards for refugees and asylum seekers were signed as a result of increasing focus on issues related to migration.

It is observed that in general, the UN has always been a pioneer in the field of multilateral conventions. Within this scope, the Convention for Prevention and Punishment of the Crime of Genocide dated 1948, the International Convention on the Elimination of All Forms of Racial Discrimination dated 1965, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights both dated 1966, the Convention on the Elimination of All Forms of Discrimination Against Women dated 1979, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment dated 10 December 1984 and the Convention on the Rights of the Child dated 1989 were signed. While these conventions are not entirely migrant-themed, certain fundamental rights and freedoms included in their contents are of a universal nature and therefore, the rights in question are also enjoyed by migrants, refugees and asylum seekers. In this respect, while explaining the fundamental rights and freedoms specific to migrants under the 3rd Section, the conventions in question will also be mentioned where relevant.

Some of the international conventions remained regional in nature. In this scope, on 27 March 1994 the “Arab Convention on Regulating Status of Refugees in the Arab Countries”, which had been prepared with respect to the issues of immigrants and refugees was signed⁷⁵ by the League of Arab States⁷⁶. In the preface of the Convention, the Member States confirmed the provisions of the 1951 Geneva Convention, the 1967 Protocol relating to the Status of Refugees and the 1992 Cairo Declaration on the Protection of Refugees and Displaced

⁷⁴ Töre, p. 40-41

⁷⁵ <https://www.refworld.org/docid/4dd5123f2.html>, accessed 18 September 2020

⁷⁶ <http://www.lasportal.org/ar/Pages/default.aspx>, accessed 28 October 2021
https://en.wikipedia.org/wiki/Arab_League, accessed 19 September 2020

People. The most important feature of this convention is that the definition of refugee is more widely mentioned when compared with the international conventions and protocols⁷⁷. As a matter of fact, the persons persecuted on account of their ethnic origin are mentioned in the first paragraph of the first article. The second paragraph stipulates that any person who unwillingly takes refuge in a country other than his country of origin because of the occurrence of natural disasters or grave events resulting in major disruption of public order shall be considered as a refugee.

Besides, the conventions signed within this scope are the Caracas Convention on Diplomatic Asylum and the Caracas Convention on Territorial Asylum both dated 28 March 1954, the African Union Convention Governing the Specific Aspects of Refugee Problems in Africa dated 10 September 1969 and the Council of Europe Framework Convention for the Protection of National Minorities dated 1995 and the Council of Europe Convention on Action Plan against Trafficking in Human Beings⁷⁸.

In December 2018, and in recognition of the important role of well-managed migration towards sustainable development of nations today, the international community made a significant step forward by adopting the 'Global Compact for Safe, Orderly and Regular Migration' as a starting point for the countries to reassess their national migration policies to combat child and forced labour, human trafficking, exploitation and abuse in the context of migration⁷⁹.

This new Global Compact, which was adopted in an international Intergovernmental Conference held in Marrakesh, Morocco on 10-11 December 2018, and formerly endorsed by the UN General Assembly in the Resolution No: A/RES/73/195, dated on 19 December 2018, clearly

⁷⁷ Article 1

For the purposes of this present Convention, a refugee means:

Any person who is outside the country of his nationality or outside his habitual place of residence in case of not having a nationality and owing to well-grounded fear of being persecuted on account of his race, religion, nationality, membership of a particular social group or political opinion, unable or unwilling to avail himself of the protection of or return to such country.

Any person who unwillingly takes refuge in a country other than his country of origin or his habitual place of residence because of sustained aggression against, occupation and foreign domination of such country or because of the occurrence of natural disasters or grave events resulting in major disruption of public order in the whole country or any part thereof.

⁷⁸ Töre, p. 37-38

⁷⁹ The UNGA Resolution, which includes the full text of the "Global Compact for Safe, Orderly and Regular Migration" is available here: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195 accessed 20 September 2020, p. 17 and 18

reflected a substantial change in the international approach toward the complex issues of migration; from a negative view of migrants and migration in which the security concerns and the logic of national sovereignty overshadow the will of international cooperation, to a positive human rights approach under which migrants are perceived as holders of human rights and agents of developments in the countries of destination.

In line with the spirit of this new Global Compact, it must be highlighted that migration is a source of innovation, diversity, prosperity and sustainable development of societies. In today's globalized world, safe and orderly migration is a beneficial tool to address labor market needs of many industrialized/developed countries⁸⁰, which are confronting problems of either declining/ageing population or shortage of professional expertise⁸¹. In doing so, migrants contribute to the economic growth and socio-cultural diversity of destination countries.

III. GENERAL PRINCIPLES OF THE HUMAN RIGHTS OF MIGRANTS

In line with the international human rights agenda, efforts were exerted to secure a number of rights and freedoms for migrants, asylum seekers and refugees in order to provide them with a better life. Indeed, as human beings, migrants have inalienable, non-assignable, universal and natural rights. In other words, irrespective of where an individual goes, he/she is entitled to these rights under all circumstances and conditions. As a matter of fact, Article 2 of the International Covenant on Civil and Political Rights prescribes that everyone may enjoy the fundamental rights and freedoms recognised in the Covenant irrespective of whether they have any citizenship bond with the country concerned.

In the history of Islam, the concepts of refugees and asylum seekers presented some differences. For this reason, explaining the varying situation before touching upon fundamental rights and freedoms will enable a better understanding of the subject-matter.

Within this framework, if a Muslim person is to migrate to another Muslim country, he/she should enjoy the same rights with the citizens of the country in question. Indeed, as per the verse from the Quran which

⁸⁰ Kül, Yavuz, Opportunities And Challenges Of International Migration For Sending And Receiving Countries, <https://www.mfa.gov.tr/opportunities-and-challenges-of-international-migration-for-sending-and-receiving-countries.tr.mfa>, accessed 28 October 2021

⁸¹ Doudeijns, Marco, Labour Shortages And The Need For Immigrants: A Review Of Recent Studies, OECD, <https://www.oecd.org/els/mig/31857112.pdf>, accessed 28 October 2021

reads “*Verily, this community (Ummah) of yours is a single Ummah, and I am your Lord, so worship me*” (Al-Anbiya, 21/92), the understanding of “*the unity of the Ummah*” was adopted by the Islamic law⁸². For this reason, a Muslim who migrated to another Muslim country could enjoy the same rights and freedoms.

On the other hand, in the Islamic law, non-Muslims residing in Muslim countries were categorised under different groups. Non-Muslims who crossed the borders of a Muslim country without permission were called “*the harbi*”⁸³. The harbi were not entitled to any rights within the Muslim country as they did not obtain any permission or entered into any pledge of security (*aman*). However, non-Muslims who agreed to pay a certain amount (*jizyah*) for their assets and who recognized the sovereignty of Islam were called “*the dhimmi*”⁸⁴. Having fulfilled these conditions, the dhimmi were then regarded as citizens of the Muslim country where they stayed and hence enjoyed all the rights and freedoms.

Lastly, persons who came to a Muslim country temporarily with no intention of becoming a citizen were called “*the musta'min*”. A pledge of security could be entered into with the musta'min. As long as the aman remained in force, the security of lives and assets of the musta'min would be protected. The musta'min were allowed long term stays unless their residence was restricted by the Muslim country where they stayed. The musta'min were subject to the provisions of the Islamic law during their stay despite not being citizens⁸⁵.

Accordingly, a migrant who migrated from one Muslim country to another enjoyed the same rights and freedoms in that country as required by the understanding of the unity of the Ummah. If non-Muslims came to the country without the purpose of citizenship or residence, they could enjoy the provisions of the Islamic law in the Muslim country by entering into a pledge of security.

In the course of the period from past till present, the States' unitarian structure coming into prominence, the effects of the interstate wars and of the nationalistic movements and the development of the positive and international law compelled the States to replace the understanding of the unity of the Ummah with the understanding of sovereignty of the States within their own borders. With respect to

⁸² Yeter, Hasan Serhat, İslam Hukukunda Müste'men (yabancılar) Hukuku (Dört Halife Dönemi)- (The Muste'men in the Islamic Law, Unpublishing Master Thesis, Marmara University, Institute of Social Science, Istanbul 2002, p. 35

⁸³ Özel, Ahmet, “Harbi”, Turkish Religious Foundation Encyclopedia, <https://islamansiklopedisi.org.tr/harbi--gayr-i-muslim>, accessed 15 September 2020

⁸⁴ Yaman, Ahmet, “Zimmi”, Turkish Religious Foundation Encyclopedia, <https://islamansiklopedisi.org.tr/zimmi#3-osmanlilarda>, accessed 15 September 2020

⁸⁵ Yeter, p. 50

individuals, the nationality and citizenship bond came to the forefront. Therefore, at present time, if a person wishes to migrate to a Muslim country, he/she is subject to the status of migrant, asylum seeker or refugee irrespective of whether he/she is a Muslim or a non-Muslim.

Lastly, the right of asylum is worth mentioning before proceeding to the fundamental rights. Indeed, this right, which is recognised by the international law, has been acknowledged as a fundamental human right in accordance with Article 14 of the Universal Declaration of Human Rights which reads, insofar as relevant, as follows: “*Everyone has the right to seek and to enjoy in other countries asylum from persecution.*” However, this right was not mentioned in the Geneva Convention of 1951 or other regional instruments regarding fundamental human rights which were issued subsequent to the Universal Declaration of Human Rights⁸⁶.

Having regards these general considerations, fundamental rights and freedoms of the refugees and migrants may be categorised as follows:

A. Respect for The Right to Life and Physical Integrity of Migrants

The right to life constitutes the foundation of human rights and it is prerequisite to the existence of the other rights. Therefore, the right to life is sacred. Accordingly, it is the first right guaranteed under several international instruments on human rights.

In Islam, the right to life is the most important one among the sacred rights⁸⁷ and it is inviolable. Within this framework, the security of life and assets of everyone, whether Muslim or non-Muslim (the *Musta'min* or the *Dhimmi*), who resides in an Islamic country is guaranteed⁸⁸. Even at time of war, a Muslim State must ensure foreigners' security of life⁸⁹. The importance of the right to life is enshrined in the following verse from the Quran: “*We ordained for the Children of Israel that if any one slew a person - unless it be for murder or for spreading mischief in the land - it would be as if he slew the whole people.*” Furthermore, it is indicated that no human being can be murdered without a justified reason by the following Hadith of our Prophet Muhammad (peace be upon him): “*The one who unjustly kills a non-Muslim*

⁸⁶ Töre, p. 172. Article II(1) of the African Union Convention Governing the Specific Aspects of Refugee Problems in Africa provides that the Member States of the Union must receive asylum seekers to the extent allowed by their respective legislations.

⁸⁷ The Rights of Forced Migrants in Islam, Islamic Relief, 2014 (<https://www.islamic-relief.org/publications/> accessed 16 September 2020), p. 17

⁸⁸ Konan, Belkis, “An Analysis of the Ottoman Empire in Term of Human and Fundamental Rights”, *Journal of the Gazi University's Faculty of Law* Volume 15, Issue 4, p. 259

⁸⁹ Yeter, p. 101

*citizen shall never smell the fragrance of Heaven even though it can be smelled at a distance of forty years.”*⁹⁰ Also, the following verse from the Quran points out to the right to life: “*Do not take life - which Allah has made sacred - except for just cause*”(Al-Isrâ, 17/33).

When the international instruments on human rights are examined, it is seen that they all enshrine the right to life as the first inalienable and inviolable right. Within this scope, the right to life is laid down in Article 3 of the UN Universal Declaration of Human Rights, in Article 6 of the International Covenant on Civil and Political Rights and in Article 2 of the European Convention on Human Rights. Similarly, the International Court of Justice and the European Court of Human Rights, which are international courts, have pointed out in their judgments that the right to life is a core right and that the States have the negative obligation to not take life and the positive obligation to protect the right to life⁹¹.

The right to life is also enshrined in the revised OIC Declaration of Human Rights⁹². Article 2 of the declaration also provides that it is the States’ responsibility to guarantee the right to life. In this context, it is essential for every state to protect the right to life of migrants who move to another country with their own will in order to establish a new life and also of the asylum seekers or refugees who are forced to migrate. While their destination countries have an obligation to protect the right to life of individuals who have the migrant status, they also have an obligation to carry out effective investigation by taking necessary measures in the case of any interference to be made with this right⁹³.

Moreover, torture, inhuman or degrading treatment which constitute a violation of physical integrity are also strictly prohibited. As Islam attaches great importance to rightful due, it prohibits torture which is a treatment against the physical integrity of an individual. Furthermore, it is observed in the Quran that torture and persecution are strictly prohibited with the verses that “*Indeed, those who annoy Allah and His Messenger-Allah has cursed them in this world and in the Hereafter and has prepared for them a humiliating torment. And those who harm believing*

⁹⁰ Hatip, Abdülaziz, “Kur’an ve Sünnette Azınlık Hakları” (Minority Rights in the Quran and the Sunnah), Kur’an ve Sünnette Temel İnsan Hakları (Fundamental Human Rights in the Quran and the Sunnah), İslâmî İlimler Araştırma Vakfı, Tartışmalı İlmî Toplantılar Dizisi: 75, İstanbul 2014, p. 192

⁹¹ Harris, D.j./O Boyle, O/Bates, E.P. Buckley, CM. Law of the European Convention on Human Rights, Oxford University Press 2009, p. 39

⁹² The Cairo Declaration on Human Rights in Islam is a declaration of the member states of the Organisation of Islamic Cooperation adopted on 5 August 1990. The declaration provide an overview on the Islamic perspective on human rights. The declaration was again rewied and updated by the member states in 2020. see for details https://www.oic-oci.org/topic/?t_id=23244&t_ref=13948&lan=en, accessed 29 October 2021.

⁹³ Töre, p. 118

men and believing women undeservedly have certainly born upon themselves a slander and manifest sin.”(Surah Al-Ahzab 57, 58) and that “*O you who have believed, be not like those who abused Moses*” (Surah Al-Ahzab 33/69). Moreover, with the hadith that “*Whoever harms a zimmi (non-Muslim) will be my foe, and whoever is my foe will also be my foe on the Day of Insurrection*”, it is seen that the Prophet Muhammad (peace be upon him) prohibited any torture without making any discrimination between Muslims and non-Muslims.

With Article 7 of the International Covenant on Civil and Political rights indicating that “*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*” and Article 3 of the European Convention of Human Rights indicating that “*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*”, torture and ill-treatment have been prohibited. As in the Islam doctrine, no exceptional circumstance has been given in this regard today.

In the same vein, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was adopted by the United Nations in 1984. In this Convention, the definition of torture, the measures required to be taken by states and the states’ obligations were regulated^{94,95}. Moreover, with the Convention, it was envisaged that a Committee against Torture shall be established and related regulations were included. As a continuation of this Convention, Additional Optional Protocol (OPCAT) was adopted by the UN General Assembly in 2002⁹⁶. With this Optional Protocol, it was envisaged that a sub-committee and a national prevention mechanism shall be established.

On the other hand, European Convention for the Prevention of Torture and Inhuman or Degrading Punishment or Treatment was signed by the Council of Europe in 1987⁹⁷. With this Convention, it was envisaged that an independent and impartial Committee (CPT) shall be established. This Committee draws up reports by means of making scheduled or non-scheduled visits to the hospitals, migrant accommodation centres, migrant camps etc. of the States Parties to the Convention. In line with these reports, the CPT gives advices to the

⁹⁴ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>, accessed 27 April 2020

⁹⁵ Under the UN, as also stated in Article 7 of the Rome Statute adopted in 1998, entitled “crimes against humanity”, it was regulated that where the acts such as murder, extermination, torture, enslavement, deportation, persecution are committed against any civilian population in a widespread and systematic manner, these shall fall into the scope of crimes against humanity. Similarly, under the Rome Statute, crimes against humanity were accepted within the jurisdiction of International Criminal Court. See more details, <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>, accessed 27 April 2020

⁹⁶ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>, accessed 27 April 2020

⁹⁷ <https://rm.coe.int/16806dbaa3>, accessed 27 April 2020

states on the prevention of torture and aims to ensure inter-state cooperation with the Committee in the international arena.

In this regard, both in the Islamic doctrine and in today's human rights documents, torture and ill-treatment have been prohibited without any discrimination. Accordingly, it has been prohibited that migrants, refugees and asylum seekers face such a treatment in their newly arrived countries. As for the right to life, with regard to the prohibition of torture and ill-treatment, states have a positive obligation to take necessary measures to protect migrants. Lastly, torture and ill-treatment have been prohibited –without any exceptions- in the OIC Declaration of Human Rights⁹⁸.

B. Non-Refoulement and Access to Justice

The right to deport an individual who migrated to another country or found asylum in another country to escape persecution was accorded to states by international law. However, this is not always the case and is subject to some exceptions.

On the other hand, with the international human rights documents, refugees were also given certain guarantees. The most prominent one of these rights is non-refoulement. In this scope, Article 33 of the Geneva Convention, which forms the basis of this principle, provides as follows: “*No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*” This right has now become a traditional international rule of law in terms of migrant law, and has been included in many universal and regional international texts⁹⁹.

Article 3(1)¹⁰⁰ of the Convention Against Torture which was signed on 10 December 1984 extended the scope of individuals under the non-refoulement (prohibition of return) laid down in Article 33 of the Geneva Convention. In this context, if a person is to be subjected to

⁹⁸ See Cairo Declaration on Human Rights by OIC, https://www.oic-oci.org/upload/pages/conventions/en/CDHRI_2021_ENG.pdf accessed 28 October 2021.

⁹⁹ Article III(1) of the Asian-African Convention on Refugee Principles dated 1966, Article 3 of the resolution of the UN General Assembly, adopted unanimously on 14 December 1967, Article II(3) of the Organisation of the African Unity Convention dated 1969, Article 22(8) of the American Convention on Human Rights dated 1969.

¹⁰⁰ Article 3(1) of the Convention Against Torture: “*No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*”

torture in case of his/her deportation, she/he is protected under this Convention and his/her return is prohibited¹⁰¹.

This prohibition is not absolute and also has some exceptions. As stated in Article 33(2) of the Geneva Convention, foreigners, who constitute a security threat within a country or who have committed serious crimes, cannot enjoy this right¹⁰².

Articles 2 and 3 of the ECHR strictly prohibits the return of any individual who will face the risk of being subjected to a treatment in violation of the scope of non-refoulement. This is different from the risk of persecution, one of the main reasons set out in the 1951 Geneva Convention.

Article 3 of the ECHR contains one of the fundamental values of a democratic society and prohibits torture or inhuman or degrading treatment or punishment no matter how undesirable and dangerous a victim's behaviour is. According to Article 3, while a sound basis is shown to believe that there is a real risk that the relevant person will be subjected to torture or inhuman or degrading treatment or punishment in the country where she/he is returned, states' responsibility may be evoked for the deportation of this person¹⁰³.

This internationally approved rule is also applicable in the Islamic doctrine. This is because, Ayah 9 of Surat al-Hashr shows that refugees should be welcomed well and not be expelled to the borders. Also, regardless of whether the refugee is poor or rich, their protection and security must be ensured¹⁰⁴. This protection arises from the doctrine of "*a Muslim is a brother of another Muslim, so he should not oppress him, nor should he hand him over to an oppressor*" (Bukhari). It is accepted by the Islamic jurists that this right applies to both Muslims and non-Muslims¹⁰⁵. This is because, according to the non-Muslims pledge of security, this pledge continues to apply until reaching a safe place.

¹⁰¹ Töre, p. 181

¹⁰² Article 18 of the Charter of Fundamental Rights of the European Union guarantees the right to asylum with due respect for the principle of non-refoulement. Article 19 of the Charter envisages that "*No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.*"

¹⁰³ *Salah Sheekh v. the Netherlands*, no. 1948/04, (ECtHR 11 January 2007) & 135; *Soering v. United Kingdom*, no. 14038/88, (ECtHR 7 July 1989); *Vilvarajah and others v. United Kingdom*, no. 13163/87, 13164/87, 13165/87, 13447/87, and 13448/87 (ECtHR 30 October 1991)

¹⁰⁴ Abou-el-Wafa Ahmed, *The Right to Asylum between Islamic Shari'ah and International Refugee Law*, Riyadh 2009, p. 47

¹⁰⁵ *The Rights of Forced Migrants in Islam*, Islamic Relief, 2014 (<https://www.islamic-relief.org/publications/> accessed 16 September 2020), p. 13

Therefore, if a non-Muslim has no consent, his/her return is strictly prohibited¹⁰⁶.

On the other hand, within the framework of the Islamic doctrine, in regards to application to the court, foreigners also have the right to file a case provided that they comply with the legal remedies and conditions¹⁰⁷. In respect of the migrants' freedom to claim rights, according to Article 16 of the Geneva Convention: "1. *A refugee shall have free access to the courts of law on the territory of all Contracting States.* 2. *A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to Access to the Courts, including legal assistance and exemption from cautio judicatum solvi.* 3. *A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.*". It is seen that this regulation is similar to Islamic doctrine and values.

C. Providing Adequate Standard of Living Conditions (Shelter, Medical Care, Education, etc.)

In migration law, one of the most important reflections of the principle of humanness is the provision of humanitarian living conditions. In this context, the needs of migrants, asylum seekers or refugees, such as nutrition, shelter and health services, which maintain the basic living conditions, must be met. This is because, these rights are recognized under the Geneva Convention and the International Covenant on Economic Social and Cultural Rights (ICESCR).

This right has been accorded to everyone according to Article 11 of the International Covenant on Economic, Social and Cultural Rights entitled "*right to living standard*" indicating that "*The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.*" In Article 21 of the Geneva Convention, the right to housing and in Article 23 of the same Convention, the right to benefit from health services are regulated.

Under the ECHR, while the right to health and the right to housing are not clearly stated in the convention, they can be examined within the framework of Article 8 which guarantees the respect for private life. In regards to migration, the issues of health or housing may also be examined within the framework of Article 3 of the ECHR in cases where

¹⁰⁶ Yeter, p. 127

¹⁰⁷ Yeter, p. 117

they come into existence as medical needs, which prevent deportation, and the member states are faulty as they did not provide shelter when they were obliged to do so in accordance with the law¹⁰⁸.

In terms of the Islamic law, the rights to access to basic living standard are highly important. Specifically, it was ordered to protect health and works and, on the contrary behaviours deranging the health were prohibited. Two of the important hadiths concerning the issue are as follows: “*There is no inconvenience to be rich for those who fear Allah. Health is more favourable than richness for those who fear Allah. The comfort of nafs is a blessing of God.*”¹⁰⁹ and “Whoever believes in Allah and the Afterlife should honor to his neighbor. Whoever believes in Allah and the Afterlife should honor to his guest...”¹¹⁰. In this context, in Islamic perspective there is no difference between immigrants’ and citizens’ fundamental rights. Therefore, it is important to protect and improve the living standards and health conditions of immigrants. Similarly, in the Islamic law, the state has the duty to meet the need of a person who is in need. This is because Islam orders assistance and benevolence to those in need¹¹¹.

Accordingly, there is a great burden on states to meet the basic needs of migrants, especially asylum seekers and refugees. This is because, it is very difficult for individuals coming from another country to meet their most basic needs within the new boundaries. For this reason, Islam, which orders to help those in need, also orders to extend a hand to this group in a difficult situation without making any discrimination.

D. Non-Discrimination

One of the rights that forms the basis of human rights is the prohibition of discrimination. Indeed, in accordance with the concept of human rights, it is the use of any vested right arising from the fact of being a human, regardless of sex, skin color, language, religion, race, political and other opinions, national and social origin, wealth, birth or any other difference. Thus, this prohibition has been regulated in most of the fundamental human rights texts.

¹⁰⁸ Handbook on European law relating to asylum, borders and migration, 2020, Publication Office of the European Union, Luxembourg 2020 (https://www.echr.coe.int/documents/handbook_asylum_eng.pdf accessed 28 October 2020) p. 269

¹⁰⁹ Armağan, Servet, *Fundamental Rights and Freedoms in the Islamic Law*, Ankara, 2020, page 192.

¹¹⁰ <https://hadislerleislam.diyinet.gov.tr/sayfa.php?CILT=4&SAYFA=337>, accessed to 15 October 2021

¹¹¹ Yeter, p. 111

When the fundamental human rights texts are taken into account, the prohibition of discrimination is regulated in Article 2 of the Universal Declaration of Human Rights and in Article 14 of the ECHR. Also, it is observed that this prohibition is included in more specifically drafted texts. In this regard, in Article 1 of the UN Declaration on the Elimination of Discrimination Against Women, the issue of equality between women and men is addressed. Similarly, in Article 2 of the UN Declaration on the Elimination of All Forms of Racial Discrimination, a provision concerning the prohibition of discrimination is regulated in an exhaustive manner.

In the Islamic law, equality for all people is one of the most important ground of Islam, there is no distinction between people on the basis of race, power or wealth¹¹². For this reason, discrimination between Muslims and non-Muslims is strictly prohibited. In this scope, the *musta'min* (foreigners having residence permit in an Islamic country) have the same rights and freedoms as the Muslims living in the same country, regardless of any difference. Similarly, in terms of the pledge of security (*aman*), no discrimination is made on the grounds of language, religion, race or skin color. In the Quran, in accordance with the verse that “*And among His signs is the creation of the heavens and the earth, and the diversity of your languages and your colors. Indeed in that are signs for those of knowledge*” (Surah Ar-Rum 30-22), it means that while humans are created in different tribes, languages, colors and so on, these differences do not make anybody superior than another because of these different characteristics¹¹³.

Another issue required to be addressed here is “Islamophobia¹¹⁴”. This is because, unfortunately, the foundations of this phenomenon which has numerically increased in certain parts of the world arise from the fact that people are subjected to discrimination due to their beliefs. When it comes to its generally approved definition, it completely rejects Islamic religion in terms of religion, life style, social society and culture¹¹⁵. In other words, the term of “Islamophobia” contains hostility, hatred, groundless fear of Islam and Muslims, discrimination and violence¹¹⁶.

¹¹² Abou-el-Wafa, p 71-72

¹¹³ The Rights of Forced Migrants in Islam, Islamic Relief, 2014 (<https://www.islamic-relief.org/publications/> accessed 16 September 2020), p. 15

¹¹⁴ See detailed information about Islamofobia, OIC-IPCHR Study On: “Countering Islamophobia: An Unfinished Business”, <https://oic-iphrc.org/en/data/docs/studies/388003.pdf>, accessed 16 September 2020

¹¹⁵ Şeref, Ebru, *Islamofobi Kavramsals ve Sosyolojik Yaklaşım (Islamophobia, Conceptual and Sociological Approach)*, Unpublished Master Thesis, Ankara University, Institute of Social Science, Ankara 2010, p. 23

¹¹⁶ See for details Ergin, Ergül, OIC-IPCHR Study on: “Islamophobia and Counter-Terrorism Strategies”, <https://oic-iphrc.org/en/data/docs/studies/818084.pdf>, page 1, accessed 16 September 2020

Islamophobia has a very close relationship with migration. As a matter of fact, in the places to which refugees migrated for work opportunities, living a more prosperous life or escaping persecution, their way of living their own cultures led concerns about Muslims who started to live in the western societies. Thus, a reaction came into existence against Muslims, especially in the western countries, as migrant Muslim communities reflected their own cultural phenomenon, lived their own faith and a rapid increase was observed in terms of population. Unfortunately, it is observed that this situation has recently amounted to hate speech and threatened social unity. Hence, results of the all issues caused human rights violations¹¹⁷. Thus, migrants, refugees or asylum seekers should not face any discriminatory attitude or behaviour, even if they have different skin colors, languages. Also, states have a positive obligation in this regard.

E. Freedom of Religion and Beliefs

In the Quran, with the verse of “*there shall be no compulsion in the religion*” (Surah Al-Baqarah 2/256), freedom of belief has been granted to non-Muslims. Within this scope, no one can be forced to a religion, or to a certain belief. There are many examples of this in the Islamic societies throughout history. As mentioned in Part I, according to Article 25 of the Constitution of Medina, the religions of all tribes (Muslims and non-Muslims) living in Medina shall be respected as a reflection of freedom of religion and conscience. On the other hand, thousands of Jews fleeing from Spain in the 15th century took refuge in the territories of the Ottoman State and maintained their own beliefs there. Throughout history, Muslims and non-Muslims have tried not to interfere in each other's religious life in the Islamic societies.

Today, the freedom of religion and conscience is also protected by international documents. In this scope, Article 18 of the UN's Universal Declaration of Human Rights provides that: “*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.*” Likewise, this right is also regulated in Article 18 of the International Covenant on Civil and Political Rights. In the light of these regulations, it can be said that the elements of this right include the right to believe or not to believe, the freedom of worship, freedom of manifesting and teaching religious belief and freedom of religious education and training¹¹⁸.

In regards to migrants, unfortunately, freedom of religion and conscience is not explicitly mentioned in today's texts. However, each

¹¹⁷ Ergül, OIC-IPCHR Study on: “Islamophobia and Counter-Terrorism Strategies”, p. 6

¹¹⁸ Töre, p. 144

state is obliged to take the necessary measures to accord this right to an individual within its own boundaries of sovereignty and prevent its violation, in accordance with the international human rights documents above and the principle of equality.

F. Obligation with Respect to Economic, Social and Cultural Rights

Migrants have many rights in the context of economic, social and cultural rights, Particularly, rights to education, travel and work, which are more basic rights of the migrants, will be addressed.

In this scope, with Article 26 of the Universal Declaration of Human Rights indicating that “*everyone has the right to education*”, it is noted that the right to education is a basic human right without any discrimination. On the other hand, the right to education is also regulated in Article 7 of the UN Declaration of the Rights of the Child, in Article 28 of the Convention on the Rights of the Child and in Article 13 of the International Covenant on Economic, Social and Cultural Rights. In the light of these regulations, it is set forth that education is a basic right and everyone has this right. Likewise, in accordance with the provisions of Article, it is stated that in education, no discrimination shall be made to any group on the basis of the principle of equality.

Apart from these Articles, the right to education is also regulated in Article 22 of the Geneva Convention. This Article provision includes some regulations indicating that migrants are provided with the same rights as the citizens with respect to primary education, that the issues such as recognition of university diplomas and accreditation, exemption from duties and charges should be facilitated¹¹⁹.

Moreover, in the Islamic law, the *musta'min* enjoyed the right to education in the same way as the *dhimmi*. This situation stemmed from the fact that a person had the right to improve himself¹²⁰.

As regards the right to work, in accordance with Article 23 of the Universal Declaration of Human Rights noting that; “*Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Everyone, without any discrimination, has the right to equal pay for equal work. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. Everyone has the right to form and to join trade unions for the protection of his interests, the right to work is set forth as a basic human right without any discrimination.*” the right to work is set forth as a basic human right just as the right to education without any

¹¹⁹ Töre, p. 152

¹²⁰ Yeter, p.111

discrimination. Similarly, in the context of this right, Article 6 of the International Covenant on Economic, Social and Cultural Rights includes a similar regulation. Article 17 of the Geneva Convention regulates the right to work in terms of refugees. Under this provision, state accords refugees the right to wage-earning employment. Likewise, Article 18 of the Covenant regulates the issues of self-employment and engaging on one's account in professional occupation.

The right to work was also accorded to the *musta'min* in the Islamic law. They were accorded the right to trade on matters permitted by Islam and to purchase and sell movable and immovable properties. Similarly, the rights of a foreigner with regard to the issues such as transferring money, making investment were guaranteed. Nevertheless, it was forbidden to carry out business with interest in the trade to be carried out by the *musta'min*. Likewise, their transactions were subject to the rules of the Islamic law even if these took place among themselves¹²¹.

In Article 13 of the Universal Declaration of Human Rights, it is regulated that "*everyone has the right to freedom of movement and residence within the borders of each State.*" Likewise, this right is also regulated in Article 2 of the Protocol No. 4 to the ECHR. It is accepted that this right, which is regulated in Article 26 of the Geneva Convention in terms of refugees, shall be applicable to lawful refugees.

Thus, in the light of these regulations, lawful migrants have the right to freedom of movement and residence. In the Islamic law, the same right was accorded to the *musta'min*. In this scope, the *musta'min* had the right to change their places of residence. However, this did not cover Hejaz and Harem districts. Indeed, in accordance with the hadith of the Prophet Muhammad (peace be upon him) that "*Remove polytheists from the Island of Arabs. Two religions cannot coexist in the Island of Arabs.*", it was forbidden for non-Muslims to enter these districts.

Therefore, in the context of the rights explained above, it is concluded that the rights to education, travel and work which are basic human rights, and that they have been recognized for migrants in Islam from throughout its history up to the present, and states should also take necessary measures in case of the violation of these rights.

G. Right to Property

The right to property of migrants is essential and is regulated in Article 13 of Geneva Convention as "*The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in same circumstances, in regards to the acquisition of movable and immovable property and other rights pertaining*

¹²¹ Yeter, p. 109

thereto, and to leases and other contracts relating to movable and immovable property.” Thus, condition of residing in that country is not sought for refugees to enjoy the right to property. Likewise, in Article 14 of the Convention, the right to intellectual and industrial property is regulated. Also, in this scope, every refugee can enjoy the protection accorded in the country where she/he has habitual residence.

Immunity (inviolability) of the right to property is one of the most important immunities in the religion of Islam. Any intervention that may be made in this right has been prohibited. In this scope, with Article 46 of the Constitution of Medina mentioned under Part I indicating that *“Those who acquire unjust profit shall only harm their own selves”*, respect for the right to property of others was required. Similarly, in accordance with the saying of the Prophet Muhammad (peace be upon him) in the Farewell Sermon that *“your properties (...) are sacred and reverend”*, it was underlined that the right to property was inviolable¹²².

In this context, the *musta'min* and the *dhimmi* have the right to protection of their own properties and also in this context, the said right of the *musta'min* or the *dhimmi* is under protection within the scope of the pledge of security¹²³.

In the light of the foregoing, the right to property has also been considered as one of the basic rights for migrants. In this scope, the issues as to how migrants can acquire property in the countries they went to have mostly been left to the internal functioning of states.

H. Respect for Private and Family Life and Family Reunification

In accordance with the Islamic law, the right to respect for private and family life is essential in terms of both Muslims and non-Muslims unless there is a violation of laws. Thus, the *musta'min* could enjoy the secrecy of private life and family rights in the same way as Muslims.

As for the scope of the confidentiality of private life, it is observed that it includes 3 elements. They are assessed within the scope immunity of domicile, freedom and confidentiality of communication and protection of personal belongings. In the Quran, in accordance with the verse that *“O you who have believed, avoid much [negative] assumption. Indeed, some assumption is sin. And do not investigate each other's faults and privacies.”* (Surah Al-Hujurat, 49-12), confidentiality of private life is stated.

Furthermore, family is the foundation of society in the religion of Islam and the importance of founding a family is emphasized. In this scope, in the Quran, with the verse indicating that *“If you fear that you*

¹²² Ayengin, p. 238-239

¹²³ Yeter, p. 105

shall not be able to deal justly with the orphans, then marry (other) women as may be agreeable to you, two or three or four.”(Surah An-Nisa, 4-3), founding a family is encouraged. Likewise, in line with the hadith of the Prophet Muhammad (peace be upon him) noting that *“Marriage is my sunnah and whoever does not follow my sunnah has nothing to do with me. Because I will take pride in your great numbers before the nations.”*, importance of the institution of marriage was emphasized. The right to marry is also applicable to the musta'min and the dhimmi¹²⁴.

In accordance with Article 12 of the Universal Declaration of Human Rights stipulating that *“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to protection of the law against such interference or attacks”* confidentiality of private life has been required without any discrimination. Moreover, Article 16 of the same Declaration states that *“Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.”*, the right to marry is regulated. Furthermore, in Article 8 of the ECHR, the right to respect for family and private life and in Article 12 of the ECHR, the right to marry are regulated.

Moreover, it is also necessary to highlight family reunification. This is because, there is a close relationship between family reunification and the migration phenomenon. As migrants live under more challenging conditions due to their living conditions, states have an obligation to protect and reunite families of migrants¹²⁵.

IV. CONCLUSION AND RECOMMENDATION

The phenomenon of migration, which is as old as the history of humanity, has been encountered nearly by all civilizations in history. Similarly, in terms of the history of Islam, this phenomenon encountered by many Prophets essentially gained importance with the *“Hijra”* of the Prophet Muhammed peace be upon him from Makkah to Medina. Accordingly, it was ensured that a new Islamic State was established, a new written Constitutional text emerged (the Constitution of Medina) and the foundations of the fundamental rights and freedoms for migrants included in the current international fundamental human rights were laid.

Thus, the impact of the Islamic doctrine and values on the rights of migrants listed in the current fundamental texts cannot be undermined. In the Quran, it was ordered to help those in need. In this scope, it is incumbent in the first place on states and then on people to respect and protect the fundamental rights of those who migrate to

¹²⁴ Yeter, p. 103. However, a dhimmi or musta'min man was not allowed to marry a Muslim girl.

¹²⁵ Töre, p. 240

another country and endangering their own lives.

Responsible states have conducted, and are still conducting, many studies in the context of migrant rights, in coordination with the international organisations. Solutions are still being sought for mass migration experienced especially in the Muslim geography. However, it should be stated that the absence of universal and written migrant rights' agreement or document reflecting the principles of Islam is today perceived as a shortcoming. In this regard, it is important to note the major step of including migrant and refugee rights in the revised OIC Declaration of Human Rights.

Furthermore, as we have addressed in Part III, in view of the fact that fundamental rights and freedoms have, in principle, foundations in the Islamic law, it is considered that new policies giving priority to tolerance and humanitarian principles of the Islamic heritage would be an appropriate response to the migrant and refugee crises experienced today.

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