A COMPARISON OF THE UNITED NATIONS AND THE EUROPEAN UNION AS AGENTS OF NORM DIFFUSION: DARFUR CRISIS IN SUDAN AND FREEDOM OF EXPRESSION IN TURKEY

by

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To my beloved family

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ABSTRACT

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Key Words: Human Rights, Darfur Crisis, Article 301, Political Conditionality, the right to life, the right to freedom of expression

International organizations contribute to the diffusion of international norms. Although the impact of domestic conductivity on norm compliance is evident, the level of enforcement mechanism of these organizations does matter as well. Human rights norms as the most influential idea of the recent decades gained prominence in foreign policies of the states as well as in international law with the creation of international organizations. The United Nations (UN) and the European Union (EU) are today the most influential players in human rights promotion. Nevertheless, their impacts on the delinquent states differ significantly. From a rationalist perspective, this thesis will argue that despite the fact that the UN has been the legal guardian of human rights norms, the EU is a better promoter largely due to its political conditionalities on the future member states and it is more successful at sustaining domestic change regarding human rights due to the attractiveness of its reward: full membership. This thesis, therefore, focuses on the role of these organizations in promoting human rights and facilitating norm diffusion specifically by looking at the UN's role in Sudan regarding Darfur crisis, and the EU's impact on Turkey regarding freedom of expression.

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ÖZET

BİRLEŞMİŞ MİLLETLER VE AVRUPA BİRLİĞİNİN NORM YAYICI AKTÖRLER OLARAK KARŞILAŞTIRILMASI: DARFUR KRİZİ VE TÜRKİYE'DE İFADE ÖZGÜRLÜĞÜ

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Uluslararası Organizasyonlar uluslararası normların benimsenmesine katkıda bulunur. Bu normlara uymak icin elverişli ortam saglayan ic dinamikler onemliyse de uluslararası organizasyonların kullandıkları zorlama mekanizmaları ve bunların seviyeleri göz ardı edilemez etkenlerdir. İnsan hakları normları bu organizasyonların kurulmasıyla birlikte hem ülkelerin dış politikalarında hem uluslararasi hukukta son yıllarda giderek daha fazla önem kazanmaktadır. Bugün, Birleşmiş Milletler (BM) ve Avrupa Birliği (AB) devletlerin insan hakları normlarına uyumunun yaygınlaştırılmasında en etkili uluslararası aktorlerdir. Bu iki organizasyonun bu normlara uymayan ülkeler üzerindeki etkileri ise birbirinden farklıdır. Bu tez, BM insan hakları normlarının yasal koruyucusu olsa da, AB'nin normları yaymakta daha başarılı bir aktör olabildigini tartışacaktır. BM'de bulunmayan, AB'de bulunan "üyelik" ödülü karşılığında, aday ülkelerin AB üyelik sürecinin gerektirdiği siyasi koşulları tamamlama zorunluluğu, bu ülkelerin insan haklarına uyumunda önemli bir motivasyondur. Bu nedenledir ki bu tez, BM'nin Sudan/Darfur krizindeki rolünü ve AB'nin Türkiye'de ifade özgürlüğünün gelişimindeki etkisini inceleyecektir.

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INTRODUCTION

A growing literature on international norms in international relations theory identifies the term norm more as "collective expectations for the proper behavior of actors within a given identity"[1], than as regularities of behavior among actors. Thus, regularity of a behavior, which "gives rise to normative expectations as to what ought to be done", is combined with an "internal attitude involving criticism of oneself or others" on the ground that the appropriate behavior is not followed.[2] Nevertheless, increasingly norm-based rhetoric of international authorities today proves us that norm compliance is not automatic and "cannot be reduced to following a static set of clear sharp-edged rules"[3]. As the sources of norm diffusion are intricate, the explanations to the occasional variations of states' attitudes towards norms and the extent to which norms do have an impact on domestic politics are both extensive and controversial in the existing literature.

The countries, which have a close fit between the clauses of international arrangements and agreements and the already established domestic policy norms, are more likely to be successful in promoting necessary policy changes domestically. Yet, for a clear discussion about the international factors of norm diffusion, there must be some degree of incompatibility between international level and domestic level processes. If this is the case, the degree of 'fit' or 'misfit' brings adaptational

[1] Katzenstein's definition; Shannon, Vaughn P; "Norms are What States Make of them: The Political Psychology of Norm Violation", International Studies Quarterly, Vol.44, No.2, June 2000, p.296

[2] Hurrel, Andrew, "Norms and Ethics in International Relations" in "Handbook of International Relations" edited by Carlsnaes, Walter; Risse, Thomas and Simmons, Beth A., Sage Publications, 2002, Chapter 7, p.143

[3] Ibid.

pressures from the outside.[4] The success of these pressures is pertaining typically to the effectiveness of enforcement mechanisms of international organizations on the norm violator states. Hence, this thesis focuses on the level of impact of international organizations as significant agents of norm diffusion.

International organizations enable the diffusion of international norms. Although the impact of domestic conductivity on norm compliance is evident, the level of enforcement mechanism of these organizations does matter as well. Human rights norms as the most influential idea of the recent decades gained prominence in foreign policies of the states as well as in international law with the creation of international organizations. The United Nations and the European Union are today the most influential players in human rights promotion. Nevertheless, their impacts on the delinquent states differ significantly. From a rationalist perspective, this thesis will argue that despite the fact that the United Nations has been the legal guardian of human rights norms, the European Union is a better promoter largely due to its political conditionalities on the future member states and it is more successful at sustaining domestic change regarding human rights due to the attractiveness of its reward: full membership. This thesis, therefore, focuses on the role of the UN and the EU in promoting human rights and facilitating norm diffusion.

Two case studies will be presented in this thesis to support this statement. First case study will be conducted to illustrate the persistent breach of the right to life of Darfuris in Sudan from 2003 onwards and the lack of ability of the UN to deter the violations and enforce human rights standards to region. The second case study will endeavor to understand the exceptionality of the EU norm diffusion process compared to that of the UN due to its membership incentive and investigate the impact of the EU on Turkey through an analysis of improvement of the right to freedom of expression with a reference to the amendment of the Article 301 in 2008 in Turkey.

[4] Cowles, Maria Green; Caporaso, James; Risse, Thommas; "Europeanization and Domestic Change" in "Transforming Europe: Europeanization and Domestic Change" edited by Cowles, Maria Green; Caporaso, James; Risse, Thommas; Cornell University Press, 2001, p.2

The theoretical framework of this thesis will be presented in Chapter I. The first part of this chapter will present a conceptual discussion about international norms which will follow the rationalist and constructivist debate with respect to diffusion of international norms in International Relations Theory. Since the essence of the debate between rationalists –mainly realists and neoliberals- and constructivists over the impact of norms comes from their different perceptions of norm compliance; two different logics will be used to understand the conditions under which states comply with norms; i.e. compliance either out of "logic of expected consequences" or "logic of appropriateness". Since full membership incentive will be presented as a driving force for fulfilling political conditionalities with regards to human rights, the core vantage point of this thesis will be that the states as rational actors apply cost-benefit calculations to meet their own interests in an anarchical international system. Thus, this thesis will argue that "to comply with a norm is a simple matter of whether compliance meets an actor's defined interests" as the Turkish case in the forthcoming chapter will prove and the absence of these interests along with the low enforcement mechanisms of international organizations lacking both reward and punishment for the delinquent state will hinder norm diffusion because it will not affect the cost-benefit analysis of the violator state as the Sudan/Darfur crisis will illustrate. Nevertheless, constructivist logic will also help us to comprehend the importance of international organizations in international system and the concerns for the creation of a European identity guarding human rights at global politics.

The second part of theoretical chapter will dwell upon the definition of human rights in general and within that framework where such rights as right to life and freedom of expression rest. In doing so, the main aim will be to demonstrate the role of international organizations in the creation and promotion of these norms. Later, the chapter will focus on the evolution of human rights norms both at global and regional level and briefly mention why regional organizations and specifically the EU has an advantage in norm promotion compared to the UN. The center of attention will be their instruments for norm enforcement.

The United Nations is an important international organization to analyze the diffusion of norms on human rights as it is the main forum where such norms and

rights are discussed in a universal forum. What is important to note is that the UN neither presents strong monitoring and enforcement mechanisms to the system nor persuades its members to take an action against or irrelevant to their interests. This is a main difference from such international organizations as the Council of Europe (CE) or the European Union. The lack of enforcement capability for the UN undermines its credibility as an international actor. However, one should be careful in this assessment as the UN still acts as a forum for legitimacy which is defined by Ian Hurd as "the normative belief by an actor that a rule or institution ought to be obeyed."[5] Moreover, "a norm have a high degree of political legitimacy especially when it is institutionalized in the global international society"[6] such as the UN-led human rights norms.

On the other hand, the membership incentive for the EU and the carrots and sticks that the EU as well as the Council of Europe carry enable them to become more effective in stimulating the diffusion of norms to less developed countries. Although arbitrary unwillingness has been the case for the EU as well regarding several issues, the concern for human rights especially in prospective member states has been tremendously important. From a rationalist logic, the EU has an interest in fellows who respect to democracy and human rights because of the need for predictable and harmonized policies at national level. Moreover, the promotion of these norms is seen as part of the European identity and to their role in global politics. These norms have become the sine quo non benchmark for the new comers and also gave a kind of authority and prestige to the European Union as a guardian of human rights. The EU did not lack the tools to monitor and enforce human rights within itself and for the prospective members such as European Court of Human Rights (ECtHR) created under the European Convention of Human Rights (ECHR) of the CE which injects hard law into the system and a kind of supranational jurisdiction over the member states with regards to human rights matters and most importantly becomes an implicit

[5] Hurd, Ian; "Legitimacy and Authority in International Politics", International Organization, Vol.53, No.2, Spring 1999, p. 381

[6]Miyaoka, Isao; Working Paper on "State Compliance With International Legitimate Norms: Wildlife Preservationist Pressures On Japanese Fishing"; International Studies Association, 41st Annual Convention, Los Angeles, CA, March 14-18, 2000, p.8

criteria for the EU accession; European Court of Justice (ECJ) as the judicial organ of the EU which transformed itself in the recent years from being a court focusing primarily on economic relations of individuals, corporations and the states to a court considering the well-functioning of human rights regime within the member states, thus urged the prospective members to adjust to this newly emerging judicial structure. In addition, Copenhagen Criteria was adopted in 1993 to evaluate applicants. It is used on the prospective members as a yardstick urging for democracy and respect for human rights. Consequently, membership incentive stands as a distinctive feature for the success of the EU.

Nevertheless, as the EU lacked these instruments beyond its region and the EU within the UN is not such a strong advocate of human rights beyond borders; we can argue that the success of the EU in its region is because the EU member states have an interest in a predictable neighboring country which respects human rights and democracy similar to the prospective member state which has an interest in being a full member with material rewards. This dual sided motivation for norm compliance eases this process. Since the UN cannot provide such global effective instruments, the shortcomings of a universal human rights system are not likely to vanish easily. This is why, to support all these arguments, our case studies will be useful.

Chapter II will analyze a fundamental human rights norm; the right to life, along with an emerging norm obliging '*Responsibility to Protect*' and humanitarian intervention by looking at the historical background and the current situation of the Darfur crisis in order to see the lack of autonomy of the United Nations as an international organization and to understand the lack of deterring impact on Sudanese government.

Later, Chapter III will present the improvement of the right to freedom of expression in Turkey as a story of domestic change driven by EU membership prospect. Here, the main focus will be given to Article 301 which includes punishment for non-violent expression on the basis of denigration of Turkishness. Cases opened based on this Article violated the rights of many individuals and intellectuals with arbitrary interpretations of ambiguous clause. Despite the fact that this Article and its

previous version Article 159 have been numerously disapproved by the international community for years, the changes did not occur till 2008 when the non-compliance has become more costly in the eyes of Turkish political elites. This thesis argues that these changes in Article 301 results from the effective enforcement of political conditionalities of the EU during the negotiation process which started in October, 2005.

In short, the UN and the EU are not primarily human rights organizations and they differ in significant ways including their membership clauses, areas of focus, functions, motives and processes. By the same token, violation of freedom of expression in Turkey is not that grand in scale and not that much in need of urgent response by the international community. On the other hand, the massive violation of basic physical security norms in Darfur given the primacy of the right to life among all other human rights norms, generally requires a kind of military force for humanitarian purposes. Thus, neither two international organizations nor two cases in this thesis are perfectly analogous in all aspects. Nevertheless, this thesis will specifically depict the enforcement mechanisms of norm diffusion of these two organizations and the reaction of the delinquent states to these pressures; which will in turn allow comparison. However, this thesis will not include all mechanisms which can be used for human rights compliance by these international organizations. Although the focus will be a specific mechanism, political conditionality, the center of attention will not be the substance of this mechanism, but will be the difference caused by its presence and absence affecting the success of an organization in a particular issue. Even so, "effective" use of political conditionality, not political conditionality alone, will be tied to the roots of success of the EU in Turkish case.

Therefore, this thesis acknowledges that there may be other cases, beyond the scope of this thesis, where the EU occasionally failed to show its deterring impact on human rights violations such as not only mass murders in distant places but also other various human rights issue areas where political conditionality has been applied ineffectively. By presenting the UN with its failures in Darfur case and calling the EU as a successful norm promoter in Turkish case, this thesis, does not aim to achieve a general theory that applies to every specific case in which the UN or the EU acts

agents of norm diffusion. Yet, the insights from these case studies will attempt to bring some useful explanations to the levels of impact of these organizations.

Given the insoluble situation in Darfur in spite of its vitality and the improvement of freedom of expression and the increasing debate in Turkey, the discrepancy between the deterring impact of these organizations on violations deserves attention in a world where the adherence to international norms started to be perceived inextricable to international cooperation, thereby world peace and global order.

CHAPTER I

THE THEORETICAL FRAMEWORK

The role of international organizations on diffusion of international norms raised a plethora of questions which have been answered in diverse ways in International Relations theory. Before examining their role in real world issues, theoretical chapter will allow us to have a point of reference to understand the complexity of the issue at hand. The first part of this chapter will thus elaborate on the theoretical framework of "norms" in the international politics literature. To do so, it will conceptualize norms, and their prescriptive and parametrical components. Later, different perspectives on norm diffusion from both rationalist and constructivist camps will be explored in order to weigh their explanatory strength on the case studies. These perspectives on norms and the institutions will highlight the context in which human rights norms operates.

The second part of this chapter then scrutinizes human rights norms in general and in its institutional settings. Here, the focus will be on the instruments of norm diffusion that United Nations and the European Union carry as human rights promoters. The political conditionality as one of these instruments will be presented as the architect of the European exceptionality. Since the most important obstacle on the way to norm diffusion is identified as vanishing, but still persistent concept of absolute sovereignty of states, we will briefly mention its transformation to that of 'sovereignty as responsibility'. Lastly, the right to life and the right to freedom of expression will be explored in order to see why their violation as well as their diffusion matter in international system.

I. Norms: Conceptual Overview

There is no denial of the existence of norms in the literature of International Relations theories though there are different conceptualizations. According to Gelpi, there is a distinction between descriptive and prescriptive norms. While the former refers to "a behavioral regularity, the way an actor usually behaves" constituting a pattern of behavior over a considerable time period; the latter defines the way in which an actor ought to behave.[7] The latter does not necessarily refer to a rate of recurrence in the actor's behavior.

One can analyze norms through their components: prescription and parameters. While the prescription part tells the actors 'what to do' or 'what not to do'; the parameters indicate the possible conditions of the application of such prescriptions. For instance, "thou shalt not kill except in self-defense" becomes a prescription with a parameter in which the parameter acts with a legitimizing capacity and the actions other than such specified conditions by these parameters are seen as violation of the norm. After such standard-setting, the steady endorsement of norms brings about a label given by the followers of the norm to the outsiders as the "other". Any deviation from what is seen as normal is "the constitutive of any project of improvement" [8], thus, it is difficult to define a norm without its 'abnormal side' and without 'othering' because what matters for the international system is the states violating the norms rather the ones which follow them. In other words, the violators and their persuasion for compliance constitute the basic motive for the initiatives for the human rights promotion. After finding out the meaning of norm and norm violation, it is now useful to approach them from different theories of IR.

[7] Christopher Gelpi quoted in Miyaoka, Isao; Working Paper on "State Compliance With International Legitimate Norms: Wildlife Preservationist Pressures On Japanese Fishing", 2000, p.5

[8] Makarychev, Andrey S., "Rebranding Russia: Norms, Politics, and Power" in Tocci, Nathalie; Hamilton Daniel S.; Kumar, Radha; "Who is a Normative Foreign Policy Actor", Center for European Policy Studies, 2008, p.157

II. Rationalist and Constructivist Assumptions on Norm Conformity and Violation

There is more or less a general agreement over the definition of norms in international relations theory. In Katzenstein's words, norms are "collective expectations for the proper behavior of actors within a given identity".[9] However, there is a disagreement over the impact of norms on international behavior. The explanations to the sporadic attitudes of states towards norms in the existing literature are immense and contentious.

The spring of the debate between rationalists –mainly realists and neoliberals- and constructivists over the impact of norms comes from their different perceptions of norm compliance as a result of either "logic of expected consequences" or "logic of appropriateness": a distinction proposed by March and Olsen.[10] Whilst consequentialists argue that states comply with a norm "because and when it is useful to do", the ones giving primacy to appropriateness support the view that compliance derives from the states' perception of righteousness and legitimacy of norms.[11]

This distinction also associates with Copeland's summary of three ways of norm diffusion coinciding with three theoretical approaches in IR theory. The first explanation of norm diffusion, which is consistent with neorealism, is *coercion* in which the violator complies due to the threat of punishment by the other actors who are relatively superior to himself. The second approach comes to the forefront to neoliberal view, argues that the actors conform to the normative principles not because they see them as legitimate, but because it serves their *self-interest*. These two

[9] Katzenstein quoted in Shannon, Vaughn P; "Norms are What States Make of them: The Political Psychology of Norm Violation", International Studies Quarterly, Vol.44, No.2, June 2000, p. 294

[10] *Ibid*, p. 296

[11] James Fearon, Alexander Wendt, "Rationalism v. Constructivism: A Skeptical View", in "Handbook of International Relations" edited by Carlsnaes, Walter; Risse, Thomas and Simmons, Beth A., Sage Publications, 2002 Chapter 3, p.61

rationalist approaches present the logic of expected consequences as a result of cost-benefit calculation of the state and they are purely instrumental explanations to norm diffusion. The third way incorporates with sociological approach, and argues that the states internalize norms because they see them as *legitimate* and as part of their *identity*. Let us acknowledge further differences between rationalist and constructivist approaches concerning the motivation behind norm compliance/violation. Only after mentioning these motivations, it would be possible to approach our case studies from a consequential view of the rationalist approach in the forthcoming chapters.

First, rationalist approach accounts for a utilitarian perspective where the rational actors apply cost-benefit calculations to meet their own goals in an anarchical international system. Realism -classical realism and neorealism- assumes that norms themselves have no power to affect state behavior. For neorealists such as Kenneth Waltz and Robert Gilpin, who emphasize the structure of the international system as a system of anarchy, it is the distribution of power, namely distribution of military, economic, and technological capabilities among states, that has an effect on state behavior. Norms can exist only to the extent that they are related to the material capabilities of dominant states rather than to normative motivations. Similarly, Gilpin argues that the creation of norms is in the hands of dominant groups/states in the system and such actors "assert their rights and impose rules on lesser members in order to advance their particular interests." [12] Thus, such a materialist explanation provides a norm definition as state *instruments* of serving their purposes. Likewise, E.H. Carr claims that universal principles are not principles at all, but "unconscious reflections of national policy based on a particular interpretation of national interest at a particular time"[13]

Furthermore, realists view international organizations, which are the main promoters of human rights, epiphenomenal and less significant than they are perceived

[12] Miyaoka, Isao; Working Paper on "State Compliance With International Legitimate Norms: Wildlife Preservationist Pressures On Japanese Fishing", 2000 p.1

[13] E.H Carr, Twenty Years Crisis 1919-1939 (London-Macmillan, 1946, p.87) quoted in Wheeler, Nicholas J.; "The Humanitarian Responsibilities of Sovereignty" in "Humanitarian Intervention and International Relations" edited by Jennifer M. Welsh, Oxford University Press, 2004, p.31

by the most scholars because the standards they brought to the system are ineffective and stand just as "agreements to disagree".[14] Since the international organizations, for realists, cannot have a life autonomous from its members, the absence of self-interest of the states constituting the international organizations makes enforcement impossible. Similarly, the lack of self-interest of the violator state to comply with a norm cannot be deterred by weak enforcement instruments because the international organizations cannot change the calculations of the violator state without the willingness of its members. In other words, the violator does not perceive a threat or coercive action which increases the costs of violation. As a result, norm diffusion becomes unable to be realized when both the enforcer and the violator are short of benefits from norm compliance.

Another theory in the rationalist camp, neoliberalism also takes its departure from similar assumptions of realism; selfish and rational actors in an anarchical system. Nonetheless, they argue that the role of international institutions including norms have a power in shaping/constraining state behavior. Since their focus is on norm compliance of a regime that offers the states long-term economic incentives, they do not directly address global normative issues such as human rights. Neoliberalism still matters for our subject matter with its "logic of consequences" arguing "to comply with a norm is a simple matter of whether compliance meets an actor's defined interests".[15] In accordance with this assumption, then, the violation of a norm is expected whenever norms conflict with states' self interests.

Second, sociological approach of the constructivists typically treats "interest" as it is constituted by normative ideas rather than material interests. Nevertheless, this does not mean that constructivists downplay material interests, quite the contrary, they claim that "material factors matter at the limit, but how they matter depends on

[14] Alwarez, Jose; "International Institutions as Law Makers" (2005), "International Human Rights in Context: Law, Politics, Morals" edited by Steiner, Henry J.; Alston, Philip; Goodman, Ryan; Oxford University Press, Third Edition, 2008, p. 683.

[15] Shannon, Vaughn P; "Norms are What States Make of them: The Political Psychology of Norm Violation", 2000, p.296

ideas."[16] From the vantage point of constructivist logic, because norms shape interests, they cannot be opposed to interests.[17] Such an ideational process both constraints states and construct their identities through learning appropriate behavior from other states, international organizations and NGOs. Constructivist view on international organizations is contradictory to that of realists. Keohane depicts that, for constructivists, "the institutions do not merely reflect the preferences and power of the units constituting them; the institutions themselves shape those preferences and that power"[18] Thus, in Alexander Wendt's terms, "constructivism is a more ideational (or 'less materialist') and more holist (or 'less individualist') approach than neorealism and neoliberalism."[19] Moreover, constructivism offers state perception as a role-player rather than a utility maximizer. As March and Olsen point out, for constructivists, the appropriateness of the action of a state is more important than the consequences of its action. To put it differently, states comply with a norm from "a sense of obligation rather than a cost-benefit calculation."[20]

Nevertheless, as the case studies in the forthcoming chapters will support an opposing position to constructivism, this thesis favors the assumption that "if it is in one's best self-interest to follow a norm, then the appropriateness of "the norm has no independent impact on behavior."[21]

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[16] Fearon, James; Wendt, Alexander; "Rationalism v. Constructivism: A Skeptical View", in "Handbook of International Relations" edited by Carlsnaes, Walter; Risse, Thomas and Simmons, Beth A., Sage Publications, 2002, Chapter 3, p.

[17] Herrmann, Richard K., "Linking Theory to Evidence in International Relations", in "Handbook of International Relations" edited by Carlsnaes, Walter; Risse, Thomas and Simmons, Beth A., 2002, Chapter 7, p.129

[18] Alwarez , Jose, "International Institutions as Law Makers" (2005), "International Human Rights in Context: Law, Politics, Morals" edited by Steiner, Henry J.; Alston, Philip; Goodman, Ryan; 2008, p. 683

[19] Isao Miyaoka, Working Paper on "State Compliance With International Legitimate Norms: Wildlife Preservationist Pressures On Japanese Fishing", 2000, p.2

[20] Ibid.

[21] Gary Goertz, "Context of International Politics", Cambridge University Press, 1994, p.227

For the subject matter of this thesis, rationalist approach is useful not only for understanding the willingness of the EU as an enforcer of human rights norms in Turkish case and unwillingness of the UN to act in Darfur case, but also for comprehending the reasons behind Turkey's decision to comply with normative principles and Sudan's insistence on breaches of human rights norms. Therefore, the reciprocal relation of norm promoters with the state which reacts to the expected adoption of the norm is crucial to understand the two sides of the norm diffusion. Thus, the theoretical assumption of this thesis will be the following: Norm diffusion is possible only when the benefits of enforcement exceed its costs for the enforcers, i.e the international organizations and the states constituting them, and only to the extent the costs of violation exceed the benefits of violation or the benefits of compliance surpass the costs for the delinquent state. In other words, this thesis looks at the change in cost-benefit analysis of violators resulting from the international pressure upon them and points out the direction that norm compliance and diffusion come from rational calculation by the players.

III. International Human Rights Norms

This thesis investigates the diffusion of norms with respect to human rights through the international organizations such as the UN and the EU. This objective, in turn, requires the definition of human rights and specifically what aspect of human rights is being investigated in this thesis. This chapter attempts to provide a basic understanding of human rights in general and within that framework where such rights as right to life and freedom of expression rest. In doing so, the connection between norms and international institutions along with the distinctive features of universal and regional norm promoting institutions will be presented to provide a background to the normative pressures of the institutions on the sovereign states which will be illustrated by using the examples from Sudan and Turkey in the next chapters.

Human rights can be defined as "a set of principled ideas about the treatment to which all individuals are entitled by virtue of being human."[22] Although the roots of these social categories regulating relations between 'individual right holders and states' predate to the struggles for religious freedom, the works of Kant, Locke, Rousseau, and Mill, the American and the French Revolution, the creation of US *Bill of Rights* and the French *Declaration of the Rights of the Man and of the Citizen*,[23] the abolition of slave trade; these rights were under domestic jurisdiction and were not an integral part of international relations and foreign policy and the individuals were not subjects of international law till the Universal Declaration of Human Rights in 1948.[24] Since then, human rights norms have been "the most magnetic political idea of contemporary time."[25]

If one thinks that all states in the world were committed to the shared conception of human rights, there would not be a need for human rights norms and institutions.[26] In other words, there are certain degrees of incompatibilities between international and domestic level processes regarding human rights norms so that there is a concern for human rights in international politics. As we have argued that norm compliance is not self-enforcing process, we will dwell upon the impact of international and regional organizations on domestic human rights policies such as the UN, and the EU associating with the Council of Europe. Before doing so, it is important to mention the connection between norms and institutions and to draw distinctive features of among those institutions.

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[22] Schmitz, Hans Peter and Sikkink, Kathryn, "International Human Rights", in "Handbook of International Relations" edited by Carlsnaes, Walter; Risse, Thomas and Simmons, Beth A, 2002, Chapter 27, p.517

[23] Ibid.

[24] Ibid.

[25] The words of Zbigniew Brzezinski, national security advisor to President Jimmy Carter in Forsythe David P.; "Human rights in International Relations", Cambridge University Press, 2000, p.33

[26] Krasner, Stephen D., "Sovereignty, Regimes and Human Rights" in "Regime theory and International Relations" edited by Rittberger, Volker; Mayer, Peter; 1995, Oxford University Press, Chapter 7, p.140

a) Norms and International Organizations

The desirability of cooperation between states increases with the emerging need for collective 'proper' behavior to handle issues and problems at stake that require international solutions. All norm promoters at the international level need a certain level of institutionalization and an organizational platform through which they promote their norms.[27] Therefore, norms and institutions are intrinsically linked to each other in the sense that the latter provides the means for the former to be internationalized.

Although norms can exist without these organizational structures, these institutions create platforms where the states can exchange their ideas on certain matters and draft conventions to be ratified by the members. Nevertheless, international organizations are not important only because they introduced standard-setting to international law, but also because they accelerate their diffusion, monitor their implementation and enforce the parties, until the full compliance with a norm is sustained. Human rights norms have become one of these tenets of international law after the Second World War where the tremendous achievement began only with the creation of these international institutions. This is paradoxical because human rights issues are in fact embedded in the national/local governments and traditions.[28] Nevertheless, human rights are in need of international organizations more than any other cooperation area such as trade agreements because the violations of these norms affect the everyday life of the citizens of delinquent states, not the interests of the parties to the human rights treaties, and the reactions to these violations cannot be left to arbitrary responses by the other governments or civil society organizations in other

[27] Finnemore, Martha and Sikkink, Kathryn; "International Norm Dynamics and Political Change", International Organization, Vol.52, No. Autumn 1998, *p. 899*

[28] Steiner, Henry, "International Protection of Human Rights" in Malcolm Evans (ed.), International Law (2nd edn. 2006), summarized in "International Human Rights in Context: Law, Politics, Morals" edited by Steiner, Henry J.; Alston, Philip; Goodman, Ryan; 2008, p.753

states. Thus, the enforcement of human rights should be entrusted to the international organs which have some, if not full autonomy from the parties constituting them.

The possession of this autonomy may be limited when states' 'will' matter in decision making such as in the ratification of treaties, but once the norm is operationalized, the organization "takes on a life on its own".[29] If this give-and-take between states' sovereignty reflex and organizations' demand for greater autonomy favors gradual increase in powers of international organizations, this is encouraging for the future of diffusion of human rights not only because international level enforcement is critical for norm compliance compared to domestic drive for change and compared to the individual foreign policies of the states towards the delinquent state, but also because they can be specialized in those norms and monitor them more effectively than any other entity.

This mutual interaction between states and the organizations has gradually transformed the idea of 'unconditional sovereignty' to a 'responsible sovereignty' understanding.[30] Thus, sovereign status is contingent on the fulfillment of certain obligations not only to the international community, but to the individuals in those countries, who are now the subjects of international law.[31] Therefore, today, if a state fails to commit these obligations; international organizations, the United Nations or the regional arrangements taking its source from UN-led International Bill of Rights – which will portrayed in detail in the next sections- have a word to say with their established human rights standards. Nevertheless, whilst both universal and regional organizations differ significantly from each other both in general and with respect to human rights, they have one trait in common: they have been less successful at securing enforcement than at setting standards in international law. Even so, regional organizations claimed to be better at norm promoting than global human rights

[29] Steiner, Henry J.; Alston, Philip; Goodman, Ryan; "International Human Rights in Context: Law, Politics, Morals", 2008, p. 669

[30] Falk, Richard, "Sovereignty and Human Dignity: The Search for Renconciliation" in Francis Deng and Terrence Lyons (eds.), African Reckoning: A quest for Good Governance (1998), at 12, summarized in "International Human Rights in Context: Law, Politics, Morals" edited by Steiner, Henry J.; Alston, Philip; Goodman, Ryan; 2008, p.697

[31] Ibid.p.698

institutions have been so far. Since this thesis investigates this assumption and provides supporting case studies for the shortcomings of the United Nations in Darfur and for the relative success of the European Union in Turkey, it is significant to consider the debate between universalism and regionalism regarding human rights norms diffusion.

b) Universal and Regional Human Rights Promotion:

The effectiveness of an international human rights regime is measured with its ability to "enforce" respect for human rights in a sovereign state. The enforcement is more likely to take place when international cooperation is based on common interests across actors about a specific issue area[32] and when these interests are so vital to be secured by an international authority which brings predictability, information and legitimacy to the system. This section will specifically serve the purpose of understanding the advantages that the EU has as a regional organization in comparison to a global organization. Although this section dwells upon the literature on favorable conditions that an organization is more likely to have when its area of focus regional rather than global, this does not mean that all regional organizations are always good, ,or at least better than global institutions, at cooperation, thereby at diffusing norms as unitary and powerful actors. Europe has a unique success story in regional cooperation today, however, its use of the advantages resulting from its small area of focus deserve attention to acknowledge the UN's constraints and the fitness of political conditionality as an effective enforcement mechanism.

The standardization of human rights norms have been one of these interests of the international community after two devastating World Wars. While the matter of human rights started to be perceived as "universal", there had been a tendency to view regionalism in human rights matters as "the expression of a breakaway movement,

[32] Kapur, Devesh, "Processes of Change in International Organizations", UNU/WIDER Project on "New Roles and Functions for the United Nations and the Bretton Woods Institutions", 1999, p.5 Available at: http://www.wcfia.harvard.edu/sites/default/files/164Helsinki3.wcfia.pdf

calling the universality of human rights into question."[33] The oppositions did not target regional mechanisms for the enforcement of UN-sponsored norms, but disapproved the regionalization of the standard-setting of human rights as there could be a contradiction between the African or the Asian norms and the American or European ones. Nevertheless, the continual postponements of the UN Human Rights Covenants in 1960s highlighted the importance of complementary regional organizations working in accordance with the UN human rights standards. This change in the perception of regional human rights system was due to the gradual increase in the perceived advantages of the regions compared to the world wide solutions to human rights violations.

The advantages of regional organization regarding human rights promotion are manifold. First, regions tend to have more "geographic, historical, cultural bonds" among the states constituting them which in turn results in "similar national problems", similar level of awareness about the common interests.[34] Second, the practice shows that any recommendation by a regional organization confronts less resistance than those of a global body. Third, these limited segments of the globe propose wider and effective publicity about human rights. Fourth, the regions do not refrain from 'general, compromise formulae' reflecting innumerous political considerations. Moreover, "manageable proportions" of the adaptation of international solutions to real problems and commitment by the states to these solutions increase the likelihood of enhancing human rights system within the region.[35] Consequently, the regions offer the UN effective intermediary instruments for human rights promotion. In other words, global human rights promote "the minimum normative standards" reflecting lowest common denominator in bargaining frontier, but regional

[33] Vasak K. and Alston P. (eds.), "The International Dimensions of Human Rights", Vol. 2, 1982, p.451, quoted in "International Human Rights in Context: Law, Politics, Morals" edited by Henry J. Steiner,Philip Alston, Ryan Goodman; p.926

[34] Twenty-Eighth Report of the Commission to Study the Organization of Peace, "Regional Promotion and Protection of Human Rights", 1980, at 15, summarized in "International Human Rights in Context: Law, Politics, Morals" edited by Henry J. Steiner, Philip Alston, Ryan Goodman; 2008, p. 930

[35] Claude, Inis; "Swords into Plowshares", 4th edn, 1984, at 102 in "International Human Rights in Context: Law, Politics, Morals" edited by Henry J. Steiner,Philip Alston, Ryan Goodman; 2008, p.927

human rights instruments "might go further, add further rights, refine some rights," and consider the peculiarities of the region. [36]

When we apply these propositions favoring regional organizations in human rights promotion to Europe, we see that they are already proven in the EU case. Both the UN and the EU had its origins in the desire to eliminate the causes of war and to eradicate the calamities of the first half of the twentieth century. Nevertheless, the EU added a policy of integration in the region which is the chief source of its success. This success has been possible for various reasons favoring regionalism in Europe.

First, the EU's motive has been to reconstruct Europe with Franco-German reconciliation via economic integration which has aimed to end a rehearsing historic crisis. Since the motive was a matter of life or death for the EU, the integration has been uniquely successful. The initial design of the EC reflecting similar national problems in the region along with common interests for the future have always been consistent with human rights norms. However, the EU's emphasis on human rights has become more visible in the Post-Cold era with the desire to reconstruct its role in global politics as a civilian/normative power. The need for promoting human rights norms along with democratic principles has been essential in order to bring predictability to this newly emerging system with full of uncertainties. Besides, although the EU still does not have a bill of rights functioning as a hard law yet -despite its willingness which failed with the rejection of the European Constitution-, "European human rights policies became intertwined with the emerging institutions of the European Community"[37] and with the human rights instruments of the Council of Europe.

As the theoretical chapters on norms and institutions suggested, the interests of the members within the organizations matter. However, the EU member states have

[36] Twenty-Eighth Report of the Commission to Study the Organization of Peace, in "International Human Rights in Context: Law, Politics, Morals" edited by Henry J. Steiner,Philip Alston, Ryan Goodman; 2008, p. 930

[37] Sikkink, Kathryn; "The Power of Principled Ideas: Human Rights Policies in the United States and Western Europe" in "Judith Goldstein, Robert O. Keohane, "Ideas and Foreign Policy: Beliefs, Institutions, and Political Change", Cornell University Press, 1993, Chapter 6, p.169

more common interests in human rights and democracy compared to the UN at global scale. Moreover, although the EU supported both regional and global level institution building, they preferred to "get their own house in order"[38] rather than to mess with the distant parts of the worlds such as Africa due to the fact that the EU member states have more interest in a neighboring country which respects human rights and democracy than the other parts of the world because the security within its geography, and the economic, social and cultural relations within its region matter more for the Union and for any other regional organization. More importantly, if this borderline state is also a prospective EU member state, it has an interest in being a full member to benefit from the union both economically and geopolitically and thus, has a motive to respect human rights and apply democratic principles. This dual sided motivation for norm compliance eases the EU's norm diffusion process.

Therefore, the EU as a regional organization which makes it easy to monitor and respond to any human rights issue immediately because of its small size and relative homogeneity compared to the UN, is able to get significant commitment from its members and prospective members for their adherence to human rights standards. This is essential for assessing the peculiarity of the EU due to the expediency of regionalism to human rights promotion.

c) The Promotion of Human Rights Norms: United Nations as a Global Human Rights Promoter

Human rights, far from being 'timeless and unchanging' social practices, are created as a result of a certain *way of thinking* followed by a certain sequence of historical events that took place in a particular geography. In other words, the notion of human rights emerged with the rise and consolidation of liberalism in the West.[39] Despite the historical particularity and contingency of the rise of the notion of human

[38] *Ibid*,p.157

[39] Donnelly, Jack, "Universal Human Rights in Theory and Practice", Cornell University Press, 2003, 2nd ed.,p.2

rights, these rights can still be claimed as universal; not only because they are 'the inalienable rights one has because one is human', thereby held 'universally' and 'equally' by all human beings; but also they are almost universally *accepted* as ideal norms, at least rhetorically.[40]

Fukuyama argues that human rights norms still proved to be a 'broadly appealing' ideal despite imperfect practices.[41] This argument seems plausible given the prevalent ratification of the International Bill of Human Rights, including the *Universal Declaration of Human Rights* (UDHR*),* the *International Covenant on Economic, Social and Cultural Rights* (ICESR), and the *International Covenant on Civil and Political Rights* (ICCPR) and two optional protocols. Nonetheless, compliance with international human rights accounts for "the actual behavior beyond mere rhetorical commitment"[42]

Kent suggests a five-point continuum to achieve full meaning of compliance to human rights norms: the ratification of human rights treaties and acceptance of the right of the human rights institution to monitor and respond to the conditions of the state (1), the procedural compliance by the fulfillment of reporting and other requests by supervisory bodies (2), substantive compliance with the requests of human rights body (3), *de jure* compliance, or the implementation of norms in domestic legislation (4), and *de facto* compliance, or the rule consistent behavior on domestic level (5) [43]

In practice, despite the approval of existence of human rights norms and the ratification of the Bill of Rights by a considerable number of states; the widespread lack of fulfillment of this 'continuum of compliance' in the globe is partly because the human rights initiatives by the UN did not bring about strong enforcement mechanisms concerning human rights to the international system.

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[40] Ibid p.1-7

[41] Forsythe, David P., "Human Rights in International Relations", 2000, p.11

[42] Schmitz, Hans Peter and Sikkink, Kathryn, "International Human Rights", in "Handbook of International Relations" edited by Walter Carlsnaes, Thomas Risse and Beth A. Simmons, Sage Publications, 2002, Chapter 27, p.529

[43]Kent, Ann E.; "China, the United Nations, and human rights", University of Pennsylvania Press, 1999, p. 236

One of these enforcement mechanisms that UN lacks is the application of "hard law" beyond stated legal principles in the Covenants.[44] Hard law brings higher levels of protection to the individuals vis-à-vis their state because it ensures that any violation of legal principles will be treated individually in a court and these court decisions will be binding as well which will remove the loopholes of the general legal framework. Thus, the hard law created in the courts will clarify the obscurity of legal principles with innumerous amount of specific judgments about individual cases. This is by no means to say that the sole way to have an effective enforcement mechanism is through creating hard law, but it is still an important one as the states will be disinclined to violate the rights if they know that every individual in the society may take legal action against the state in an international platform.

Since the UN did not establish a human rights court where legal principles stated in the UN Covenants could be binding on the parties, the human rights can be diffused primarily through policy actions of the parties, and these actions may even have a greater impact than court decisions on human rights compliance if effectively used.[45] These effective mechanisms include measures such as selective trade barriers, general embargoes or boycotts including financial transactions like bank loans, reduction or cancel of military support or financial aid etc.[46] Although these primarily economic sanctions aim to deter human rights violations committed by the state, they may also deepen these violations by leaving the society in misery, thus such measures should "target regimes rather than people."[47] Moreover, the instruments for norm diffusion that the UN has are primarily the tools of negative enforcement which punishes and sanctions the violator state. In other words, the UN lacks positive enforcement instruments and rewards that the EU has. The UN has nothing concrete to offer to the

[44] Forsythe, David P., "Human Rights in International Relations", 2000, p.12

[45] Ibid p.13

[46] Henry Steiner, International Protection of Human Rights in Malcolm Evans(ed.), International Law, (2nd edn, 2006) at 753, summarized in "International Human Rights in Context: Law, Politics, Morals" edited by Henry J. Steiner,Philip Alston, Ryan Goodman; 2008, p. 674

[47] Marks, Stephen P.; "Economic sanctions as human rights violations: reconciling political and public health imperatives", American Journal of Public Health, Vol.89, No.10, October 1999: 1509–1513

states complying with human rights norms except international prestige and except what can be called as non-punishment. On the contrary, the EU has various carrots for the compliers and sticks for the violators which will be discussed in the next chapter.

Besides, the potential success of policy actions are not realized because the parties to the treaty regime are reluctant to involve in actions against many kinds of human rights issues of the violator state such as "police brutality, press censorship, freedom of expression etc".[48] Although the violator breaches the *erga omnes*[49] vis-à-vis all other states[50], the likelihood of using aforementioned measures is very small. Given the fact that even the serious and systemic violations such as genocide, mass killing, and ethnic cleansing did not lead to strong and rapid reactions by the respondents in all cases and the evolving norm of humanitarian intervention to protect civilians threatened by their own state has been selectively applied, it is difficult to foresee the deterring impact of legal rules in the UN framework on human rights violations such as the violation of freedom of expression. Moreover, realizing humanitarian intervention to stop the violator state is difficult not always due to the unwillingness of the members as a result of cost-benefit analysis of an intervention in the region, but also due to its requirement for huge financial and human resources demanded by the members; while enforcement of freedom of expression does not require such huge resources. However, it is still vital as it is the right to life under threat and the UN is struggling with the unwillingness of its member states to operationalize their resources due its lack of enforcement mechanism and its lack autonomy.

On the other hand, although the violation of freedom of expression does not require such rapid reaction as the right to life does, the EU is still helping Turkey to achieve stability willingly because it is in *the member state's interest* and because *it*

[48] Henry Steiner, International Protection of Human Rights in Malcolm Evans(ed.), International Law, (2nd edn, 2006) at 753, summarized in "International Human Rights in Context: Law, Politics, Morals" edited by Henry J. Steiner,Philip Alston, Ryan Goodman; 2008, p.

[49] *Erga omnes* means 'in relation to everyone' in Latin and it is frequently used in legal terminology and specifically in international law describing obligations or rights toward all parties to the treaty.

[50] Ibid

can do so which contrasts to its position at UN in Darfur case, meaning that the UN is not capable of stopping violations in Darfur due to the lack of financial and human sources and the UN member states are willing to take efficient policy action or supply enough resources for humanitarian purposes in Darfur. In other words, even freedom of expression is strictly on the agenda of the EU when it comes to prospective member states although it could have been overlooked easily by the international community because it reflects deeply rooted national political culture when there is no strict agency scrutinizing the state at close range such as the EU.

In a nutshell, not only the lack of tools of the UN as an autonomous entity, i.e. the lack of hard law and human rights courts; but also the lack of will of the parties to the UN Covenants for policy actions against the delinquent states constituted stumbling blocks on an efficient UN human rights system. However, one should not underestimate the actions of non-governmental organizations such Amnesty International, the action of corporations and even the actions of private individuals because there are numerous cases that they contributed to the human rights compliance – although it is difficult to pinpoint their pure impact- more than the state foreign policy actions and more than the separate human rights institutions. However, neither global intergovernmental initiatives nor non-governmental organizations have been as successful as the European region has been in norm diffusion. Thus, it is crucial to see the evolution of the concern for human rights norms as well as the institution-building in Europe.

d) Regional Organizations and Human Rights Norms: Council of Europe and the European Union

The difficulty of a functioning of global human rights system is mostly due the variety of political cultures and changing degrees of political willingness preventing to converge policies at international level.[51] The issue-specific human rights regimes such as International Labor Organization (ILO), issue-specific regional organizations

[51] Forsythe, David P., "Human Rights in International Relations", 2000, p.110

such as the Organization for Security and Co-operation in Europe (OSCE) and North Atlantic Treaty Organization (NATO) and regional application of human rights such as Council of Europe (CE) have proven to be more successful than the UN Bill of Rights at global scale because of the aforementioned favoring conditions of regionalism. Besides, the EU among them as the most successful example of regional cooperation has been able to incorporate the human rights standards to its structure deriving from both global and regional sources. On the top of that, the EU's political conditionality has been the most effective tool for democratization and respect for human rights given the attractive reward of full membership. Since this thesis focuses on the role of institutions on norm diffusion also in Turkey's policies, I will first introduce the CE, which is mainly responsible for the upholding democratic systems in Europe and which is the main basis for the EU human rights policy. Later, I will present the EU as a separate entity that scrutinizes specific human rights practices not only in member states or in prospective members but also in third countries at the UN level for a better application of the position of the EU in Darfur case. Only then, I will be able to locate the right to life along with sovereignty as responsibility and the right to freedom of expression as human rights norms deriving from these global and regional organizations.

The CE is an international organization established in 1949 and composed of 47 European member states and "concerns itself with all matters except defense" such as human rights, democracy, rule of law and the harmonization in legal standards, creating awareness about Europe's cultural identity and diversity.[52] The most groundbreaking initiative made by the CE has been the European Convention for the Protection Human Rights and Fundamental Freedoms (hereafter the Convention) in 1950. Since then, the ratification of the Convention and commitment to the principles in this Convention has been the compulsory membership qualification for the CE.[53] Although the rights stated in this document is akin to those of Universal Declaration and the two Covenants, its effectiveness comes with the creation of an international

[52] Williams, Shirley, "Human Rights in Europe", in "Realizing Human Rights : Moving from Inspiration to Impact" edited by Power, Samantha and Allison, Graham, New York : St. Martin's Press, 2000, Chapter 6, p.78

[53] Ibid p.83

judicial body under the Convention in 1959 that is able to enforce its decisions: European Court of Human Rights (ECtHR).[54] This court allowed the removal of the loopholes of the legal drafting, in other words, refined the rights and responded to every possible situation which is not stated in legal documents and brought the notion of "evolutive interpretation"[55] to the system, which transforms the legal principles in light with the changing conditions of the time and specifying the rules applied to individual cases. Moreover, European Commission of Human Rights, which is created in 1954, reviews the private petitions coming from "persons, groups of individuals, nongovernmental organizations (NGOs) and other states asserting violation of the Convention"[56] and either dismisses the application or report its opinion to the state which is not legally binding. Although this is the case, the member states usually accept these reports. If not, the Commission can bring the case to the court for a binding decision. If this enforcement mechanism does not work on the state, the ultimate sanction for non-compliance is expulsion from the Council of Europe.[57]

The deterring impact of the ECtHR is not comparable to any kind of human rights institution given the fact that over 800 million citizens living under the jurisdiction of CE member states do have a platform to take an action against any violation their fundamental rights individually. All these enforcement techniques brought by the CE have "raised the bar for human rights standards" and increased the pressure on "the states that lag behind European norms".[58] The strength of the regime is evidently due to voluntary national commitment to the authoritative decisions by the Court, which is precisely lacked in the UN as the previous section depicted.

The appealing nature of the Convention is noticeable in various occasions. First, the number of states adhering to private petitions and the supremacy of the Court's decision has increased even when it was optional in CE's history until 1998. For example, Turkey accepted these restrictions on competences in 1987. Moreover,

[54] Donnelly, Jack; "Universal Human Rights in Theory and Practice",p.138

[55] Ibid.

[56] Ibid.

[57] Ibid.

[58] Ibid.

members have gone beyond simple ratification of the Convention, but also incorporated the treaty to their national law. Besides, Central and Eastern European states sought membership in the CE after the end of the Cold War before they apply to the EU. In other words, it worked as a testimonial presented to the EU. No country has been an EU member so far without CE membership. Thus, "such adherence" to the CE "was a sign of being European, as well as a stepping stone to possible membership in the EU."[59] Lastly, the transformation of optional acceptance of the jurisdiction of the Court and the allowance of private petitions to a compulsory one in 1998 pointed out the success of the Convention and the willingness of the member states to go further in enhancing human rights.

The vitality of the Convention and the ECtHR for the EU is not only because their authoritative rule over domestic law ensured stability in Europe, but also because the EU needed these instruments due to the absence of its own bill of rights though 'respect for human rights and fundamental freedoms' has been perceived as a prerequisite for the applicants to the EU.

At the Union level, the European Union in its initial design were "more concerned with the freedom of market place rather than the rights of the individuals" simply due to the fact that human rights were seen to be "appropriately protected at the national level."[60] European Court of Justice (ECJ), the judicial organ of the EU, primarily focused on the supremacy of EC law over national law regarding economic practices; however, the judges who are generally specialists in economic law showed a great flexibility regarding human rights issues despite the absence of bill of rights in the EU.[61] Thus, this transformation reflected in the Maastricht Treaty (TEU)[62]. Article 6 of the TEU explicitly provided that:

[59] Forsythe, David P., "Human Rights in International Relations", 2000, p.113

[60] Steiner, Henry J., Alston, Philip and Ryan Goodman, "International Human Rights in Context: Law, Politics, Morals", 2008, p.1015

[61] Forsythe, David P., "Human Rights in International Relations", 2000, p.124

[62] Maastricht Treaty, also known as the Treaty on European Union, which was signed in Maastricht on 7 February 1992, entered into force on 1 November 1993, "created the European Union, which consists of three pillars: the European Communities,

> 1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
>
> 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.[63]

Later, with the Amsterdam Treaty, a procedure allowing suspension of membership in case of "a serious and persistent breach of human rights" introduced.[64] The EU in 2000 prepared its own 'Charter of Fundamental Rights' and incorporated it to the draft EU constitution which has been rejected in 2005. However, this document is still cited by the ECJ due to the agreement at ministerial level during its preparation phase. Thus, it has a kind of soft law status within the EU.[65]

While these initiatives at the union level has become successful, the EU also promotes human rights at international level by using certain restrictive measures such as "diplomatic sanctions (expulsion of diplomats, severing of diplomatic ties, suspension of official visits), suspension of cooperation with a third country, boycotts of sport and cultural events, trade sanctions, arms embargoes, financial sanctions, flight bans and restrictions on admissions etc."[66] Beyond these restrictions targeting compliance, the EU accounts for the adherence of third countries to the human rights instruments such as the ECHR, the ICCPR, the ICESCR, and the other conventions and charters ratified under the UN, the CE etc.

Moreover, the catastrophic ethnic cleansing that took place in Bosnia and later in Kosovo made the EU concerned about its regional security and defense measures

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common foreign and security policy and police and judicial cooperation in criminal matters." http://europa.eu/abc/treaties/index_en.htm

[63] Henry J. Steiner,Philip Alston, Ryan Goodman, "International Human Rights in Context: Law, Politics, Morals", 2008, p.1015

[64] Ibid.

[65] Ibid.

[66] Ibid.

for humanitarian purposes because these events showed that such massive violations can happen even in their relatively peaceful continent. Along with this concern, the desire to reconstruct the EU's role in the Post-Cold War system as a civilian and normative power guarding respect for human rights and democratic principles brought about the need to donate financial sources to global human rights institutions. Even so, this transformation of the EU has had several constraints including the difficulty to act as a union, problem of legitimacy in the eyes of citizenry about the transference of domestic financial and human resources to distant places for humanitarian purposes which will be illustrated in Darfur case in detail. It is important to clarify here for supporting of the argument of this thesis that the success of the EU as a regional organization in diffusing human rights norms to candidate countries through its membership offer does not require the success or efficiency of the EU at the UN level as an agent of norm diffusion. This does not necessarily lead us to a conclusion that the EU is ineffective in promoting human rights at global level. Actually, the lack of enforcement ability is pertinent to the UN, not to the EU at UN level. In other words, this thesis does not argue that the EU is more successful at both regional and global level and the UN is not, but rather argues that the EU has a reward for norm diffusion at regional level that is what the UN lacks at global level.

The peculiarity of the membership offer of the EU led to the creation of the most successful human rights promotion instrument which is the political conditionality on the candidate countries. The introduction of accession criteria in the June 1993 Copenhagen Council, also known as Copenhagen criteria requested the fulfillment of "the achievement stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities"[67] to open negotiations along with economic criteria and the requirement of the adoption of the law of the EU, the *acquis communataire*. This requirement since its operationalization has been a significant impediment to the granting EU candidacy to the Central and Eastern European countries, Western Balkans and Turkey as well as a great incentive for them to enhance their human rights records. Therefore, it is important to assess the impact of political conditionality on norm diffusion to portray the EU as an actor of political change. Such a criteria is also absent for the UN, as any state could become a member.

[67] See http://europa.eu.int/comm/enlargement/intro/criteria.htm

e) Positive Political Conditionality as the exceptionality of EU as a Human Rights Promoter

The EU membership as a magnet for the applicant countries has been attached to a strict political conditionality during the accession process and brought "considerable transformative power" not only regarding domestic human rights records, but also in terms of "economic recovery, peace and stability, and democratization."[68]

When we consider Europe as a region, we see that the nation-states have generally assigned norm promotion in Europe to their regional institutions rather than relying on international institutions or individual foreign policies.[69] It is then important to point out this atypical nature of the European experience at regional level in order to acknowledge the lack of similar instruments of the UN at global level.

Schimmelfennig defines political conditionality as "a strategy of reinforcement used by international organizations and other international actors to bring about and stabilize political change at the state level."[70] These strategies can take different forms such as "social influence and persuasion", but the peculiar success of the accession conditionality strategy is owing to its promise on benefits such as "financial assistance, some kind of contractual association, or -ultimately- membership",[71] which is defined as positive conditionality. The negative conditionality, the main instrument in the UN, is not applied through big sticks in the EU case such as extra punishment

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[68] Schimmelfennig, Frank; Scholtz, Hanno; "EU Democracy Promotion in the European Neighborhood:Political Conditionality, Economic Development, and Transnational Exchange", National Centre of Competence in Research (NCCR): Challenges to Democracy in the 21st Century: Working Paper No. 9, 2007, p. 3

[69] *Ibid.*p.14

[70] Schimmelfennig Frank, "European Regional Organizations, Political Conditionality, and Democratic Transformation in Eastern Europe" paper prepared for Club de Madrid - IV General Assembly, Prague, 10-12 November 2005, p.2, can be found at

http://www.eup.ethz.ch/research/promoting/fs-prag.pdf

[71] Schimmelfennig, Frank; Scholtz, Hanno, "EU Democracy Promotion in the European Neighborhood:Political Conditionality, Economic Development, and Transnational Exchange", 2007, p. 5

for non-compliance. The EU rather prefers to menace the potential beneficiaries with withholding carrots such as denial for external assistance, association agreement, partnership or membership. Such rewards-based policies are favorable to norm diffusion compared to sanctions when we consider that the coercive policies by the EU on Bosnia and Kosovo have been useful "to stop violent ethnic cleansing but have not accelerated either democratic consolidation or Western integration."[72] Thus, this thesis, whilst linking the success of the EU as an agent of human rights norm diffusion to the presence of its political conditionality, specifically means the reward-based or positive conditionality; in particular the accession criteria for membership to the EU.

The effectiveness of conditionality depends on three factors: "the size of international rewards, the size of domestic adoption costs, and the credibility of political conditionality."[73] The political conditionality leads norm compliance in the EU case; when the reward is as big as membership to the Union; if this reward is desired by the target state even after a cost-benefit analysis meaning that the benefits of the reward exceeds the cost of the relative loss of autonomy of the state to the individuals, and groups of individuals such as minority groups, interests groups etc. in the name liberal democratic principles and respect for human rights; and when the rhetoric of the EU matches reality, in other words, when the EU's commitment to deliver the reward in case of compliance and suspension of the reward in case of non-compliance is ensured. Nevertheless, one should not underestimate the role of "favorable domestic political conditions"[74] increasing the effectiveness of the EU's political conditionality, but this does not mean that domestic conductivity is enough for norm compliance without international demand.

Although the EU also targeted human rights promotion outside its region, the lack of membership offer in return for the compliance with its political conditionalities

[72] Schimmelfennig, Frank; "European Regional Organizations, Political Conditionality, and Democratic Transformation in Eastern Europe" 2005, p.14

[73] Ibid p.2

[74] Schimmelfennig, Frank; Scholtz, Hanno; "EU Democracy Promotion in the European Neighborhood:Political Conditionality, Economic Development, and Transnational Exchange", 2007, p. 5

hindered the EU's effectiveness at global level. Not only the small size of rewards which can be applicable to outside Europe such as financial assistance, trade concessions etc. but also the excessive costs of compliance for the delinquent states caused ineffectiveness of the EU in the distant parts of the world because the targeted countries at global level are usually authoritarian regimes -not struggling democracies at regional level. This means that the loss of autonomy of the government over individuals via human rights principles is more costly than those who are in the phase of democratic consolidation. Regarding the credibility criterion for naming an organization effective, the EU at global level used its political conditionality "inconsistently and rather unsuccessfully", thus it is not as credible as at global level as it is at regional level.[75]

f) The issue of Sovereignty in Human Rights Context

Human rights debates largely revolve around the concept of sovereignty. Therefore, it is inescapable to define sovereignty and its evolution which gives legitimacy to the enforcement of human rights norms over the world. "The doctrine of state sovereignty implies a double claim of autonomy in foreign affairs" such as political independence and territorial integrity; and "exclusive competence in internal affairs" [76] including the right to defend and govern the nation. The second part of this definition requires absolute domestic jurisdiction of the state over making/implementing laws in its territory. Thus, the concern for independence over domestic jurisdiction, especially when the state behaves as the master of its citizens

[75] Ibid.

[76] Sikkink, Kathryn; "The Power of Principled Ideas: Human Rights Policies in the United States and Western Europe" in "Judith Goldstein, Robert O. Keohane, "Ideas and Foreign Policy: Beliefs, Institutions, and Political Change", 1993, p.141

rather than a servant to them[77], impedes human rights compliance process most of the time.

Hedley Bull counts sovereignty as the constitutive norm of the present international system, which inherently influences the behaviors of actors.[78] This norm as the backbone of international system is legalized by the UN Charter in the aftermath of the Second World War with a statement of non-interference in the Article 2(7): 'Nothing contained in the present Charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any State'. The tension between "the principle of state sovereignty" of the founding pillar of the United Nations (UN) system and "the evolving international norms related to human rights" in international law is not likely to be vanished easily.[79] The changing nature of sovereignty from being a matter of *authority* to that of *responsibility*, and the limitations on exclusivity and absoluteness of state sovereignty by sharing jurisdiction with international organizations over their relations with the individual citizens is perceived mostly as an infringement of the norm of non-intervention.

Furthermore, sovereignty reflex is important especially in the resistance phase when the topic comes to international attention. In other words, sovereignty becomes important claim for the violator state when it is tried to be taken away. Sovereignty, then, stands as a way to escape from the potential sanctions of the international community by claiming the legitimacy of domestic actions, but do not constitute an explanation for violation.

Although the notion of sovereignty is no longer remained intact in an increasingly multilateral world, both the states breaching human rights might still use this notion as armor to possible counter-measures by the international actors and the potential respondents to these violations might still hesitate to interfere with the domestic

[77] Welsh, Jennifer M.; "Humanitarian Intervention and International Relations*"*; Oxford University Press, 2004, p.87

[78] Krasner, Stephen D. ; "International Regimes" , Cornell University Press, 1983, p.17-18

[79] Welsh, Jennifer M.; "Humanitarian Intervention and International Relations"; 2004, p.4

human rights violations elsewhere; especially when the transgressed rights are applied to small groups in scale and when they are ignorable in substance such as freedom of assembly, freedom of expression etc. Even when there are massive breaches to basic physical security rights of the citizens, the UN suffers from the lack of capacity "in terms of finance, personnel, and political commitment"[80], despite it has the necessary legal standards to legitimately intervene in the violator state's sovereignty. Thus, there is a tradeoff between sovereignty in the classical sense and the impact of international organizations on human rights

g) The Right to Life, Responsibility to Protect and Humanitarian Intervention as Human Rights Norms

The issue of humanitarian intervention has stimulated one of the most intense discussions of international relations both theoretically and practically in the Post-Cold War era. Humanitarian intervention is defined as "coercive interference in the internal affairs of a state, involving the use of armed force, with the purposes of addressing massive human rights violations or preventing widespread human suffering."[81] The debate over this newly emerging instrument has largely revolved around the sovereignty concerns due to the changes in the international system "where conflicts arise predominantly at a sub-state level."[82] Moreover, this phenomenon found a new ground for itself with "an expanded definition of what constitutes a 'threat to international peace and security' under chapter VII of the UN Charter"[83] by tying human rights to international responsibility which was previously left to domestic jurisdiction of states.

[80] Ibid p.5

[81] Ibid.p.4

[82] Ibid.p.1

[83] Ibid.p.2

Although there are inherent ethical dilemmas regarding the right to life; such as death penalty as a result of legitimate court judgment, self-defense from unlawful violence, and deaths at times of lawful war with an exception of murdering prisoners of war and civilians;[84] it still stands as the most sacrosanct right among other human rights due to its being a precondition for the exercise of other rights. The Article 3 of UNDHR upholds the right to life, liberty and security of the person. Similarly, the Convention on the Prevention of Punishment of the Crime of Genocide adopted in 1948 prohibits "the killing of members of a national, ethnic, racial or religious group with the intent to destroy the group in whole or in part." The Article 6 of the ICCPR, which is adopted in 1966, protects this right by saying that

> 6(1). Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
>
> 6(3). When deprivation of life constitutes the crime of genocide, it is understood that nothing in this Article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

By the same token, African Union (AU- Formerly Organization of African Unity- OAU) protects the right to life through the Article 4 of the African Charter on Human and Peoples' Rights which was adopted in 1981.

Nonetheless, the foundation of humanitarian norms at the international level does not automatically lead to strong international responses from individual actors in case of their violation. While gross violations to basic physical security of individuals in Northern Iraq or in East Timor had been responded by external military interventions that were justified on largely humanitarian grounds thanks to the permissiveness of the legal structure of the UN; similar mass suffering in Somalia, Rwanda, and Bosnia, although there was a strong case for such an intervention, were the ones where there were either no action or any action taken was "too little and too late".

[84] "Human rights law is silent on other controversial areas concerning the right to life, namely abortion and the right of the unborn child and euthanasia." Human Rights Education Associates Website, The Article on the Right to Life http://www.hrea.org/index.php?base_id=159

The UN has also been self-critical during and after these events, but blamed the Council for their unwillingness and ineffective offers to international community for humanitarian purposes and urged especially the Security Council (UNSC) members- who are given primary responsibility for sustaining peace and security in the world- to act against those violations wherever they might take place because the UN Charter required the Council to be the defender of common interest. Nevertheless, the initial design of the UN which gives veto powers to five permanent members, France, the UK, the US, China, and Russia make difficult to have authorization to the UN itself or to the regional organizations for any deterring action on the violator state. Due to such dependence on its members, the UN as an international organization lacks both credibility and consistency on human rights promotion. Even so, it has been unique in its success to create a legal platform where human rights norms are legitimized. Moreover, it has also been influential actor in spotting the malfunctioning sides of the system along with bringing about new proposals to eliminate them.

The lack of legal basis of an intervention in the Post-Cold War era, and ineffective interventions with ambiguous legitimacies in Somalia, Srebrenica, Rwanda etc. pushed the international community to call for a "Never Again" principle which has been constructed first by the independent International Commission on Intervention and State Sovereignty (ICISS) with a Canadian initiative in December 2001 and later approved by the UN Security Council via a resolution on the Protection of Civilians in Armed Conflict in April 2006 under the heading of "*sovereignty as responsibility*"- or with a popular name in the literature as a norm of "Responsibility to Protect" (Responsibility to Protect).[85] This was a necessary transformation needed because *the right to intervene* into the state sovereignty has been discussed more than the ways to prevent mass killing. Thus, this principle while acknowledging the primacy of state sovereignty, this primacy has been made reliant on the fulfillment of the state's responsibilities.

[85] The website of International Commission on Intervention and State Sovereignty (ICISS) www.iciss.ca/menu-en.asp

The importance of Responsibility to Protect is twofold:[86] first, *states* themselves have the *Responsibility to Protect* its population from violations of human rights; and second, *international community* through the UN has the *Responsibility to Protect* populations from genocide, crimes against humanity if the state fails to do so. In other words, the norm of non-intervention principle has been added a parameter of an exception which is binding both at state level and at international level as 2005 World Summit Outcomes adopted the General Assembly Resolution 60/1 24 October 2005, Articles 138 and 139:

> "Each individual State has the *Responsibility to Protect* its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means"
>
> "The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."

This newly emerging norm has been doubted not only in terms of its being a challenge to state sovereignty and also for other reasons such as the selectivity of humanitarian intervention. If states exercise humanitarian intervention selectively, what could be the explanations for this arbitrariness where constructivism has failed to answer the non-intervention by major respondents in some cases although it would be appropriate both legally and ethically to rescue millions of sufferers in Darfur?

Humanitarian intervention is not purely humanitarian from the realist paradigm, which I will follow throughout the paper, since it accounts for logic of expected consequences of an action for the state itself rather than its appropriateness. Thus, they criticize the norm of humanitarian intervention from a consequentialist approach which will be useful for explaining the motivations behind major respondent's attitudes/inaction towards the crisis in Darfur.

First, I will apply Bull's criticism of humanitarian intervention as an explanation for the African Union (AU)-led intervention rather than the other regional/international organizations contributed by major players in the system. Bull

[86]Retrieved from UN website:
http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN021752.pdf

claims that humanitarian intervention poses a threat to international order- which is more important for the well-beings of individual states in a system- given that states have conflicting claims of justice.[87] Similarly as Brown put it, to permit humanitarian intervention is "to accept that it is always going to be based on the cultural predilections of those with the power to carry it out"[88] This will provide the reasons for the rejection of hostility towards "Western" led intervention due to gross power asymmetry and for the search of African solutions to African problems.

Second, the realist critique of humanitarian intervention and the most important for the claim of this paper is that unless vital interests are at stake, states will not intervene if this risk their soldiers' lives and brings huge economic costs. Humanitarian considerations can play only a subsidiary role only if national interests are endangered. In that sense, an effective humanitarian intervention which immediately stops human suffering in far places, changes the calculations of the internal government by heavy sanctions is only possible by pursuing national interest which coincidentally serves for human rights. Its applicability to the responses by the US and the EU gives important insights for the reasons of the non-interference/ineffective action/rhetorical level sanctions etc. Since I will also question the independence of the UN from their creators and members, it is also important to see its institutional capability with such constraints on its member states about the humanitarian intervention.

Third, it is not only the self-interest that occasionally constraints states to act on humanitarian grounds, but also the normative concerns which can be tied back to material interests. States "have no business risking their soldiers' lives or those of their non-military personnel to save strangers."[89] Then, humanitarian intervention also puts the legitimacy of the state action to risk its own citizens' lives since the citizens of a country should be morally concerned only with their own state. Thus, the possibility of lacking legitimacy in the eyes of the citizenry can be also the hesitation

[87] Wheeler, Nicholas J.; "Saving Strangers: Humanitarian Intervention in International Society", Oxford University Press, 2000, p. 29

[88] *Ibid.p.*29

[89] Ibid p. 31

of the major respondents if one remembers the critiques towards the US failure in Somalia – perceived as the death of US soldiers "to prevent Somalis killing from one another."[90]

In a nutshell, in order to analyze the failure of the international community to respond Sudanese government effectively from a rationalist approach, this thesis will tie inefficiency of humanitarian intervention to three assumptions. First, its being a *threat* to order and *instruments* of major powers will draw upon Sudanese/African hesitation over intervention. Second, non/lack of-operationalization of military and economic capabilities will be due to *lack of national interest* over the region both on the US, the EU side, which automatically affect the UN's range of action. Third, though there is an emerging norm of Responsibility to Protect, which is tried to be legitimized at international level, there is still a lack of legitimacy at state/societal level of risking population resources of a country for the sake of humanity.

These debates are important to understand the constraints that the UN faces and to point out the difficulty to act as autonomous entity at global level in such norm applications. Furthermore, the nature and the urgency of humanitarian intervention require negative conditionality which does not directly target norm diffusion, rather an immediate stop to norm violation. However, the UN lacks positive conditionality in other human rights issues as well such as freedom of expression. It is obvious that the UN lacks an offer of membership since it is a universal organization where the qualification of membership is not tied to any criteria other than holding the characteristics of statehood. Nevertheless, the other types of positive political conditionalities that the UN can make use of are not effective either because of its lack of ability to change the cost-benefit calculations of individual states, whether violator or responder, which are also mentioned in the previous chapters.

[90] Kyle Bristow's Article called "The Immorality of Interventionism", Global Politician Magazine, 4/7/2008 http://www.globalpolitician.com/24447-foreign-policy

h)Freedom of Expression as a Human Rights Norm

Although the right to freedom of expression in international law has been secured in legal documents by other clauses of human rights norms, direct references to freedom of expression in both in international bill of rights and in regional and documents should be drawn in order to see the differences among them in terms of the elaborateness of the content. Article 19 of the UNDHR; adopted and proclaimed by the UN General Assembly, 10 December 1948; prefers to define freedom of expression without determining the cases where it can be restricted. [91]

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 19 of the ICCPR, which is adopted in 1966, on the other hand, has a more specific clause on freedom of expression compared to that of UDHR. While the means through which freedom of expression can be exercised are clarified, the restrictions are allowed under some ambiguous headings.

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> a) For respect of the rights or reputations of others;

[91] See International Treaties in UN website www.un.org

b) For the protection of national security or of public order (ordre public), or of public health or morals.[92]

Nevertheless, the Article 10 of the ECHR is clear both about the means and the cases of restrictions due to the overall success of CE in going further in legal and practical terms in human rights norms.

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. [93]

The right to freedom of expression, as the Article 10 (1) of ECHR and the Article 19 of UNDHR ensure, is a fundamental right allowing individuals to communicate alternative opinions without government censorship. Article 19 of the ICCPR, on the other hand, draws a distinction between freedom of opinion and freedom of expression, while the former is an absolute right, the latter can be restricted under certain circumstances. Freedom of expression can be exercised by every individual and every juridical persons such as media organizations through any medium of expression; verbally, visually, in a written format or in any forms of art.

[92] İbid.

[93] European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 Rome, 4.XI.1950 http://conventions.coe.int/treaty/EN/Treaties/html/005.htm#FN1

However, there will always be cases where restrictions can be justified as necessary by using the Article 10(2) and the other related Articles in international and regional treaties; since "all human rights are universal, indivisible and interdependent and interrelated."[94] Thus, the right-holders should acknowledge that the freedom of expression is not the only recognized value and the value of each right depends on the presence of others.[95]

Nonetheless, there are limitations on those limitations regarding freedom of expression, which are clearly defined by the Article 10(2) of ECHR where a very high-level justification required for the interference. In other words, Article 10 of the Convention and the case law of the Court consider at least five criteria in order to justify an interference of a state to the right to freedom of expression. First, the restrictions should be 'prescribed' by domestic or international law, which is accessible to the right holders. Second, these restrictions should be limited to those mentioned in Article 10(2) such as national security, territorial integrity, or public safety. Third, these restrictions should be "necessary in a democratic society". In other words, if there is a pressing social need to restrict this freedom, this need should also be violating the principles of 'pluralism, tolerance and broadmindedness' of the democratic society. In doing so, the balance between 'the interests of the society over those of individuals' and 'the fair treatment of minorities' should be taken into account. The fourth criterion, which is the proportionality to have a lawful restriction, is not mentioned on the Covenant, but a part of case law of the Court. The Court is carefully observant on the proportionality of the restriction to the action of the right-holder. Here, even if the restriction is justified with the previous criteria, disproportionality will still hinder lawfulness of the State's initiative. Lastly, the non-discrimination principle applies to the right to freedom of expression as well as it does so to any right in the Convention. In a nutshell, unless the necessity and the proportionality of the restriction is justified on the ground that the right holder violates

[94] Article 5 of the 1993 Vienna Declaration stated in Donnelly, Jack; "Universal Human Rights in Theory and Practice", p.27

[95] Merills, J. G.; "The Development of International Law by the European Court of Human Rights", Manchester University Press, 1989, p.122

specific interests of democratic society prescribed by law, the right to freedom of expression cannot be ceased by the state.

Nevertheless, in democratic societies, state does not take an active role only in lawful restrictions on freedoms, but also in the creation and the protection of substantial engagement of the citizens with those rights. For instance, in those countries, the state has the responsibility to exercise positive protection of its citizens' right to freedom of expression from third parties and from itself. In other words, the full achievement of freedom of expression is possible when the right-holder knows that the state and the law will protect its freedom and when the need for self-censorship is minimal. Thus, full compliance with the norm of freedom of expression cannot be measured only with the number of persons whose rights are attacked by the state, but discerning the level of self-censorship in the society is equally important. Furthermore, the level of compliance to the right to freedom of expression can be determined by observing the state's respect not only to the 'information' and 'ideas', "that are favorably received or regarded as inoffensive or as a matter of indifference", but also to "those that offend, shock or disturb the State or any sector of the population."[96]

It is significant to have every aforementioned components of freedom of expression in democratic societies. Turkey, on the other hand, generally disregards these criteria individually and collectively to be able to restrict freedom of expression. The only criterion Turkey used has been to look at the "content" of expression regardless of its nature and target.[97] Nevertheless, this seems to be changing in Turkey thanks to its relations with the EU.

The increasing rate and the level of compliance to the norm of freedom of expression in today's world and especially in Europe have various reasons; the precise

[96] The decision of the ECHR on Handyside v. United Kingdom, 7 December 1976, 1 EHRR 737, Para. 49. in Commonwealth Secretariat, "Freedom of Expression, Assembly and Association Best Practice", 2002, p.16 http://publications.thecommonwealth.org/,

[97] Oran, Baskın; "The Minority Concept and Rights in Turkey: The Lausanne Peace Treaty and Current Issues", in Arat, Zehra Kabasakal; "Human Rights in Turkey", University of Pennsylvania Press, 2007

legal documents at global but most importantly regional level; their increasing legitimacy in the eyes of many countries; the inclusion of human rights to the foreign policies of the role-model liberal democracies. However, none of them is sufficient to account for the high level compliance in Europe alone because neither legal base, nor the endorsement of legitimacy of the norm or the inclusion of human rights in foreign relations is unique to Europe, but exist at global level as well. The impact of EU level human rights policies is influential in an unexpected way for a model of international cooperation. This lies in its small size of focus, its cooperation with successful regional organizations such as CE, OSCE; its emphasis on positive conditionality thanks to variety of offers such as association, partnership etc.; and many other sui generis features that it has, but the most important variable has been its membership offer to the countries in its region changing the calculations of the violator state in favor compliance and its willingness to deliver this reward in case of compliance because it is the common interest of all members in the EU, and also for the EU as an autonomous organization.

Chapter II:

United Nations and Darfur Case: Humanitarian Intervention and Massive Violation of Basic Physical Security Rights

This chapter aims to have a clear discussion about the role of the UN on norm diffusion. In doing so, Darfur case will be illustrated as a massive violation of basic physical security rights allowing the norm of humanitarian intervention and Responsibility to Protect. Throughout the chapter, while mentioning the historical background and the magnitude of the Darfur conflict, the priority will be given to the international response where recurrent condemnations have largely failed to translate into concrete political action to protect vulnerable civilians.[98] Thus, the attitudes of major respondents to the conflict are crucial compared to the rest of the international actors due to their ability to change the nature and the scope of the conflict and their liability to become potential interveners due to their incentives/resources/capacity to act. The reasons of the ineffectiveness in changing the calculations of the Sudanese government over its own territory will be approached from the rationalist camp with its "logic of expected consequences" in norm compliance.

According to Spokespersons for the UN, the present situation in Darfur represents "the world's worst humanitarian crisis".[99] This statement remains valid from 2003 onwards where the violence against civilians in Darfur has continuously escalated. The conflict in the Darfur region of western Sudan is mainly between the Janjaweed, a militia group recruited from local Arab tribes, and the non-Arab peoples

[98] http://www.hrw.org/englishwr2k8/docs/2008/01/31/sudan17759.htm

[99] Reuters, 30 June 2004

of the region[100]. Although the Sudanese government denies publicly that it supports the Janjaweed, it is an arm-provider to this militia group. Being a participant in the joint attacks to Darfuris, the Sudanese government's active involvement has later become apparent with the efforts of non-governmental organizations.[101]

This chapter prefers to focus on the positions of three actors on the violation of norms of Sudanese government: the United Nations (UN), the United States (US) and the European Union (EU). First, United Nations, which has the priority in the creation of the general norm setting agenda, will be portrayed as an actor that experiences the dilemmas in its transformation from being an institution that prefers *non-use of force* to an institution that is *for the use of force*. Together with its decision-making mechanism in the Security Council on such crucial matters, its autonomy from the individual states in terms of capacity to act will be questioned. Second, the US response to the conflict will illustrate the imbalance between the existing capabilities of the US to handle the conflict and the degree of the realization of its ability. Lastly, I will mention the EU as an actor that tries to substitute lofty humanitarian rhetoric or condemnations with resolute action when it comes to global level due to the lack of appeal of this intervention to its interests, and argue that the unity among the EU members regarding regional issues is higher compared to international level while keeping in mind that this regional applies

[100] www.international.ucla.edu/africa/events/showevent.asp?eventid=4901

[101] "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General" available at UN Website http://www.un.org/News/dh/sudan/com_inq_darfur.pdf

I. Historical Background:

The Genesis, the Peak point and the Magnitude of Sudan/Darfur conflict

Sudanese conflict is the product of a number of ethnic, religious, economic and political tensions which date back to ancient history. As a former Condominium of Great Britain and Egypt from 1899 through Independence in 1956, Sudan has always experienced distrust between Northerners and Southerners which had also been provoked by the isolationist and discriminatory policies of Britain over the Southern part in favor of the Northerners for the sake of stability in Egypt, Sudan and thereby in the Suez Canal.[102] At the time of independence, Sudan was to be unified, but immediately after the removal of British administrators in Southern region, Northern Arabs left English speaking Southern elites without political power. Tension will only then move to a different stage: an armed resistance movement. [103]

The conflict between Sudan and Darfur is not only a historical/external construction of an imperial power, but also a result of differences between their ethnicities reflecting upon their economic and political positions. While Arab Northerners holds the central political authority in its hands, being represented in the capital, Khartoum, have an access to the countrywide resources; the African population – around 40% of the total Sudanese population- is intentionally marginalized in their remote and impoverished region, and mostly tried to be Arabized.[104] The allocation of resources by the Sudanese government on the Arab population gathered along the Nile up north has added economic and social inequality

[102] Neil Mantha, "Harvard World Model United Nations, Study Guide for Security Council", Edinburgh, Scotland, March 2005, p.3

[103]Ibid

[104] Ibid. p.5

to already existing political inequality- poor health services, poor infrastructure, breakdown in education, poor economic development, etc- and this led to continuous escalation of the tension between the Arabs and Africans since 1980s.[105]

Even though the overall situation worsened from 1990's to 2002, the peak point of the conflict culminated in February 2003 with Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) accusing the government of neglecting Darfur.[106] This initially successful rebellion against the central government was responded by the Sudanese Government's arming Arab militias known as "Janjaweed" -devils on horseback. These *Janjaweed* militias empowered and supported by the Sudanese Government exercised violence, committed murders, raped and tortured countless civilians. Together with the Sudanese army's aerial bombardment of the Darfur region, "entire villages have wiped out, food and water supplies have been destroyed" with a refugee's words."[107]

The statistics of the conflict make the severity of the situation obvious. From 2003 onwards; approximately 300,000 people have been killed and the mass displacement of an estimated 4.2 million people including more than 2.4 million internally displaced persons -who are dependent on humanitarian aid due to severe food shortages- took place.[108] Thus, the conflict has not only affected the stability of Sudanese territory, but caused border problems with its neighboring countries, especially with the Chad government.

[105] Ibid. p.6

[106] http://news.bbc.co.uk/2/hi/africa/4211595.stm

[107] http://www.mlive.com/news/kzgazette/index.ssf?/base/news-28/1205938240125430.xml&coll=7

[108] http://www.usaid.gov/locations/sub-saharan_africa/sudan/

II. The Situation in Darfur and International Responses:

International Awareness, International Initiatives and Actors' Responses

Although Khartoum has the primary *Responsibility to Protect* its own citizens against atrocities, it has deliberately ignored this responsibility. It is also clear that the government of Sudan has consistently failed to fulfill its obligations under international law; including those imposed by various Security Council resolutions and human rights treaty bodies and violated numerous international norms since the starting point of the conflict in 2003. Nonetheless, international awareness of the crisis was very slow to create an adequate attention that year. It was mostly because of sustained and systematic obstruction by the government of Sudan, which prevented both working/lobbying humanitarian organizations, notably *Amnesty International*, *Médecins Sans Frontiers* and physically prevented the world media[109] from entering Darfur by Khartoum's news blackout. [110] The immediate response in the form of persistent mediation efforts first came naturally from Chad as the side-effects of the Sudanese internal conflict had already brought aforementioned consequences across border. Increasing number of displaced people, refugees in Chad and in Central African Republic, combined with the collection of data about the scope of the conflict –such as US government satellite photography- made systematic atrocities visible to the international community from 2004 onwards despite Khartoum's hindrance of the

[109] For some scholars, international media is important to create awareness. "The CNN effect"is believed by some -Gow, Holbrooke- to have directed the political agenda in Western Europe and North America toward peacekeeping operations in Iraq, Bosnia, Haiti, Rwanda, and Somalia.

http://www.mtholyoke.edu/acad/intrel/fixdal.html

[110] International media and also community in general was already diverted by American Invasion of Iraq in 2003; Slim, Hugo; "Dithering over Darfur? A Preliminary Review of International Responses", International Affairs, Vol.80, No.5, May 2007: p.813

situation. Then, in March, Chad as official mediator hosted *N'djamena talks* with the group of international facilitators such as the US, the EU (represented by France), the African Union (AU), and the UN. These talks resulted in a humanitarian ceasefire agreement between the Sudanese government and the two rebel movements with the support of the African Union.[111] This led to the establishment of an AU peacekeeping mission, the African Union Mission in Sudan (AMIS), which was at first mandated to provide military observers to monitor and report on the ceasefire; an armed force to protect civilians and humanitarian aid workers; and an unarmed civilian police force and support teams were added later.[112] This force neither has the means, expertise and resources for a complex and modern intervention nor has "the peace" to keep in the region where the mission was supposedly deployed with a veiled 'Chapter VI' peacekeeping mandate.

Choosing African Union as a first resort has different explanations. Western-led humanitarian intervention perceived both as a threat to order and as an instrument of major players for achieving their goals over and across the region. First, Arab League, and most of its member states, "is xenophobically opposed to a Western-led intervention in North Africa, and strongly protective of one of its own."[113] Given the fact that AU operates with the consent of Khartoum, its actions are extremely bound with the reactions from the Sudanese government. So-called desire of "African solutions for African problems"[114] failed despite desperate attempts on the part of the African Union. Moreover, African Union also had to try so hard because of the delay and inaction from the major respondents' of the issue. From the Western perspective, it can be seen as the hesitation to be present in a region where both the norm violator government feels hatred due to the violation of non-interference from external actors and where the other countries in the continent is tired of any kind of domination of Western powers historically.

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[111] Ibid. p.816

[112] See the website of Human Rights Watch, http://hrw.org/reports/2007/sudan0907/4.htm#_Toc177544433

[113] Grono, Nick; "Briefing Darfur: The International Community's failure to protect" African Affairs, Vol.105, No.421, 2006: p.629

[114] Ibid.

a) The Role of the United Nations

During the AU intervention, the UN's role predominantly has been the endorsement of the intervention through a number of Security Council Resolutions and actions. These attempts include slow and ineffective actions such as a push for "increasing diplomatic pressure"[115], "encouragement of international community to support the AU"[116], "acceptance to refer war crime suspects in Darfur to the International Criminal Court"[117] as an instrument to identify individuals obstructing the peace. Moreover, seemingly effective actions by the UN suffered from the lack of monitoring of its implementation such as "the extension of responsibility of Sudanese government to 'neutralize armed militia' to 'disarmament of militia'. A solution to avoid the hostility towards a complete AMIS handover to the UN mission, the UN has taken "the initial attempt towards an UNMIS hybrid deployment to Darfur"[118]

On May 5, 2006, the Sudanese government and one rebel (SLM/A) faction signed the Darfur Peace Agreement (DPA) in Abuja, Nigeria. Nonetheless, other rebel groups, namely JEM and a rival faction of SLM, perceived the DPA inadequate to meet the needs of Darfurian sufferers and did not sign the treaty which then had been responded offensively by the Sudanese government. The violence in Darfur has in fact worsened in the year since the DPA was signed.[119]

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[115] UN Security Council Resoultion 1556 (2004)

[116] UN Security Council Resoultion 1590 (2004)

[117] International commission of enquiry relating to ICC jurisdiction for trial of persons accused of war crimes in Darfur, as well as the classified list of 51 names to UNSC - UN Security Council Resoultion 1593 (2004)

[118] Aboagye, Festus; "The AU/UN Hybrid Operation In Darfur: Challenges, Lessons And Implications For Regional Peacekeeping Training" presented At The SADC Workshop On Peace Support Operations, Zimbabwe, 3-5 November 2007, available at

http://www.apsta-africa.org/pdf/darfurfestus.pdf

[119] http://www.savedarfur.org/pages/background

UNSC Resolution 1706 adopted in 2006, which invited Sudan's consent to a UN force, was rejected by Khartoum and the new-way out was the proposal of a hybrid force of UN-AU peacekeeping (UNAMID) which was duly mandated on July 31, 2007 also with the consent of Khartoum government.[120] This force had the mandate to take necessary action to support the implementation of the DPA, as well as to protect its personnel and civilians, without "prejudice to the responsibility of the Government of Sudan".[121] Then, the UNSC unanimously voted to send 20,000 troops, 6,000 police and 5,000 civilian personnel to Darfur to supplement the existing AMIS (African Union) mission in January 2008. "But only about 9,000 soldiers and police officers of the authorized 26,000 have deployed."[122] Thus, they are desperately short of personnel as well as essential equipment related to logistics, helicopters etc., which would make access to remote parts of the region far easier. Reports show us the increasing complexity of the conflict compared to what it was in 2003 due to the multiplicity of rebellious groups.

It was not the lack of current operational capacity causing the deadlock of the conflict so far. No earlier UN effort had contributed to the deterrence in Khartoum's actions either because of the inability to decide upon the matters on time – debating/dithering over Darfur-or because the implementation of legalized decisions. [123]

Leaving the reasons of the creation of International Organizations (IO) aside – on which there exists a huge amount of literature, the United Nations gives a clue how the IOs function after its creation. Is it a creature of its member states? Although there is an expanded definition of what constitutes threat to "international peace and security" which legalize and authorizes the international force to stop the conflict

[120] Waal, Alex de; "Darfur and the failure of the Responsibility to Protect" International Aff airs 83: 6, 2007, p. 1042

[121] http://www.un.org/Depts/dpko/missions/unamid/mandate.html

[122] http://www.sudantribune.com/spip.php?Article26883

[123] Lederer, Edith M "UN Warns Darfur War Worsening, with Perhaps 300,000 Dead" published on Wednesday, April 23, 2008 by Associated Press, available at

http://www.commondreams.org/archive/2008/04/23/8469

under the UN Charter and the resolutions passed by UNSC has allowed international community, more than ever, to do something for human rights violations; that did not automatically lead Security Council to show willingness for such an intervention. China, given the fact that it is the largest importer of oil from Sudan, has been ready to block/veto any over effective UN measures from the beginning of the conflict which explains much of UN inabilities. Moreover both Russia and China are doubtful about any UN intervention on a humanitarian basis, "fearing it may lead one day to intervention in Chechnya or Tibet or Xinjiang."[124] This shows that UN has so many constraints upon itself rather than functioning as a constraint on state behavior in an anarchical order where there are interest seeking members. Even before considering the agreement over intervention, UN's lack of constraining function on the states is already apparent in the actions of Khartoum. UN officials' acknowledgment of the magnitude of the issue rhetorically did not matter for Khartoum as to reconsider its calculations since the response was already two years late since the beginning of the conflict. This is too late for dissuasion of a norm violator.

More importantly, beyond the institutional/political burdens on the way to a multilateral solution, it was also the result of ineffective unilateral positions to Sudanese government. As Ms. Jody Williams, head of the UN high-level mission to Darfur, spoke about the basis of the problem in March, 2007: "There are so many hollow threats towards Khartoum, that if I were Khartoum I wouldn't pay any attention either."[125] Therefore, it is also important to mention the responses of individual actors such as the US.

[124] Grono, Nick; "Briefing –Darfur: The International Community's failure to protect", 2006, p.629

[125] http://www.atlanticcommunity.org/index/Open_Think_Tank_Article/Darfur:_Conflict_History_and_Options_for_Resolution

b)The Position of the US

Traditional international reluctance to use the word "genocide" has been a persistent feature of the Darfur crisis as it was in Rwanda. Nonetheless, this time US Secretary of State Colin Powell, in 2004, announced that "genocide has been committed in Darfur… and may still be occurring."[126] This decision was responded by UNSC members and advocacy organizations that "naming the situation in Darfur genocide would commit the US to action, specifically intervention". US State Department then launched an investigation team which later approved the situation as being an act of genocide which then pronounced by President George W. Bush in the US Congress which was the first time in the US history that a conflict has been labeled as such while it was still going on.[127] However, this finding was announced "to have no impact upon US Policy" and the US passed the issue to UNSC. In this way, neither the US had closed the ways to emerging norm of Responsibility to Protect, and thereby humanitarian intervention, in case it can be necessary in occasions where the US interests are at stake nor had the responsibility to act in accordance with its rhetoric of genocide by submitting the issue to the UN knowing that ineffectiveness of the institution will not danger the material and populational resources of the country.

A key factor which affected the process on Darfur on the part of the US was an international reluctance to see a strong military intervention in the wake of invasion of Iraq. Moreover, not only the international attitude might make the US hesitate, but also the suspicious attitude/hostility towards the presence of the US in the region, the fear of interest-seeking exercises of the US in case of a possible unilateral intervention would cause the possible peacekeeping force to dysfunction.

[126] Slim, Hugo; "Dithering over Darfur? A Preliminary Review of International Responses" International Affairs 80, May 2007, p.813

[127] http://www.savedarfur.org/pages/background

Concerning the handover of AMIS to the UN forces, US' attempt to convince both Sudan, and AU to the effectiveness of one organization's actions instead of two failed.[128] UNAMID, which currently has the lead in the conflict, suffers both from this duality and lack of resources and manpower.

While the US has been a major funding country for both AU peacekeeping and humanitarian aid efforts in Darfur, the actual costs related to Darfur have exceeded the calculations due to the changing nature and scope of the crisis. The discrepancy between funding and the need for frequent emergency measures cannot be effectively responded by the US because "within the President's proposed budget for Fiscal Year 2008, there is a projected $186 million shortfall for Darfur peacekeeping, and a $6 billion shortfall for America's core humanitarian assistance."[129] These numbers show the lack of real commitment of the US to solve this crisis which seems to affect millions of Darfuris.

Action with a dedication to a real solution is what really matters. Without the possibility of solving the crisis entirely, acting may mean at best "crisis in slow motion". Despite the so-called efforts of the US, the visible failures of the possible solutions both at the level of decision making and at practical level stimulate the question of how "humanitarian" is the intervention: as one former senior UN official commented that the international community is "keeping people alive with our humanitarian assistance until they are massacred" as this can be the case for Darfur.[130]

[128] "Bosnia's 'dual key' approach in which both NATO and the UN were required to sign off on strategic and tactical level decisions demonstrated some of the difficulties of conducting an intervention by means of two multilateral security organizations" Kreps, Sarah E.; "The United Nations-African Union Mission in Darfur: Implications and prospects for success", African Security Review, Vol 16, No 4, 2007, p.7

[129] http://www.savedarfur.org/pages/background

[130] Grono, Nick; "Briefing –Darfur: The International Community's failure to protect", 2006, p.629

c) The Position of the European Union

The EU, today -with its 27 member states, at the time of the start of the conflict with its 25 member states, and with a quarter of the world gross national product- neither lacks resources nor the man power, nor is it because such an intervention clashes with the EU's stated ideals such as humanitarianism and morally balanced foreign policy. Even though there has been no shortage of condemnation of Khartoum's action from Europe's leaders, [131] the rhetoric hasn't been matched by action. While Europe's leaders are genuinely concerned about what is going on in Darfur, they prefer to approach the conflict resolution in favor of "African solutions to African problems" from the beginning. This derived from their success to have regional solutions to their regional problems and lack of interests to operationalize financial and human resources in far places.

Even after witnessing the inadequacy of AMIS, the EU did not go beyond continuous condemnations and has provided just around 100 police and military advisers to AMIS -out of AMIS' total 7000. It has also provided very generous financial support of 400 million euros provided by the Commission and member states.[132] However, the failure of the AU did not push the EU to show the willingness to send the NATO forces to the region. Although, the former NATO Secretary General, now EU High Representative for the Common Foreign and Security Policy Javier Solana said that it was "NATO's objective…to halt the violence and bring an end to the humanitarian catastrophe" through "military action", this principle does not apply to protect Africans in Darfur.

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[131] Javier Solana : "This humanitarian and political crisis is unacceptable, an affront to our conscience. Standing by is not an option.", José Manuel Barroso: "Darfur is suffering one of the worst humanitarian crises in the world." quoted in a Speech "Darfur: What Should the EU Do?" by Grono, Nick; at the Conference on Darfur, Landstingssalen, Copenhagen 28 February 2007; available at http://www.crisisgroup.org/home/index.cfm?id=4683&l=1

[132] Miller, Leland Rhett and Bock, Christian W.D., "Again, Never: The EU's Failure to Act in Darfur. Journal of European Affairs", Vol. 2, No. 4, December 2004. Available at SSRN: http://ssrn.com/abstract=633483

Moreover, the EU has not enacted any sanctions against the regime, nor discouraged European companies from doing business in the country. The EU chose to hide behind a "requirement" that the UN should enact mandatory global sanctions first, but then did not show the willingness to realize this global sanction under the umbrella of the UN.[133] Moreover, both the EU and the UN focused on the exercise of sanctions at the individual level –war criminals- instead of a state level sanction to the Sudanese government which would change the calculations of Khartoum. Even individual level is problematic due to selection of low-level individuals, none of whom are senior government policymakers. [134]

Despite the inefficient responses of the EU during the 4 years of conflict, on 28 January 2008, the EU has decided to launch a bridging military operation in Eastern Chad and North Eastern Central African Republic (EUFOR TCHAD/RCA) in the framework of the European Security and Defense Policy (ESDP).[135] It was mostly because Chad's threat to expel refugees from Sudan's Darfur region, saying their presence is triggering insecurity, and called on the international community to take them away. The contribution to the force is imbalanced: more than half of the troops are deployed by France and other EU countries have so far been hesitant to commit their own military or specialized technical personnel. This shows the difficulty of united "action" compared to "speaking" with one voice.

Both the US' and the EU's ineffectiveness can be approached from the UN's inability to change the actors' cost-benefit analysis in which operationalization of military and economic capabilities is too costly for a region where these actors *lacks national interest*. Besides, though there is an emerging norm of Responsibility to Protect which is tried to be legitimized at the international level, there is still a lack of legitimacy at state/societal level of risking populational resources of a country for the sake of people in distant places. Logic of appropriateness is thus difficult apply to this

[133] Miller, Leland Rhett and Bock, Christian W.D., "Again, Never: The EU's Failure to Act in Darfur. Journal of European Affairs", Vol. 2, No. 4, December 2004. Available at SSRN: http://ssrn.com/abstract=633483

[134] Human Rights Watch, World Report, 2008, http://www.hrw.org/englishwr2k8/docs/2008/01/31/sudan17759.htm

[135] European Union at United Nations website: http://www.europa-eu-un.org/Articles/en/Article_7689_en.htm

case because neither Sudanese government accept the behavior as a norm which is appropriate to comply with, nor the respondents are willing to give resources without any interest in the region's peace although they repeatedly acknowledge dreadfulness of the events.

Nevertheless, the EU's approach to human rights violations in its region and its level of impact on norm compliance is completely different due to diversity of willingly rewarded political conditionalities and their appealing nature for the violator states. Let us see the reasons of the success of the EU as an agent of norm diffusion by looking at the Turkish case where the improvement of human rights records coincided with the increase in credibility of its membership prospect.

Chapter III:

The European Union and Turkey: Freedom of Expression

The theoretical chapter provided that the existence or imposition of international norms, and even their endorsement are not sufficient to dwell upon the conditions under which they would be complied with. Turkey is not an exception to that common view. The desire of Turkey to be a part of Western world coming from its Ottoman legacy has been an important driving force behind its rapprochement with the West and its membership to the Western organizations and institutions. However, the conflict between Turkey's authoritarian heritage and democratization process has been the source of the vicissitudes in the commitment to the human rights norms in its history.

One of these human rights violations committed in Turkey has been notorious Article 301 in Turkish Penal Code. This article criminalizes the denigration of Turkishness, the Turkish Republic, and the foundation and institutions of the State. Not only the ethnic connotation of the article, but also its frequent use and arbitrary interpretations have been subject to extensive criticism by the international community, specifically by the European Union with the start of Turkish accession negotiations on October 3, 2005.

Given the "strong promotional", albeit "weak monitoring" procedures of the UN-led global human rights norms, the most important steps of Turkey on the way to respect for human rights have been through its relation with European-led organizations, and specifically with the EU. Several positive conditionalities have been applied by the EU such as external assistance, association agreement so on and so forth, but none of their success has become as visible as full membership offer.

Since this thesis compares the level of impact of international organizations on norm diffusion Therefore, it is important to see the efficiency of membership bid of the EU as a carrot for democratization and respect for human rights because the UN does not and will not have such a great reward for the violators and relative inadequacy of other conditionalities will hinder its deterring impact on the violator state.

The Association Agreement (Ankara Agreement) between Turkey and the EC was signed in September, 1963 to show the commitment of both sides to "the step-by-step establishment of a customs union."[136] Although associate membership status gave Turkey a hope for community membership in the future, Turkey had to wait for decades to get credible promises from the EU. Moreover, at that time, both sides of the agreement emphasized economic benefits of integration. Nevertheless, whilst the European integration had been transforming itself from being solely an economic union to a political one, Turkey's mindset could not be altered easily to keep up with this change in EU integration in the 80s and 90s in which the membership status started to be highly rest upon "the performance relating to the democratization and human rights."

Although Turkey took initiatives to adapt to those diversifying paths of integration, they did not really bring about substantial improvements to its democracy unless Turkey had the prospect of full membership. Thus, the European impact on Turkey has been tremendously important especially with Turkey's application to the EC for full membership 1987 onwards. The application has been responded with a prioritization of the finalization of association and achieving a customs union because Turkey, at that time, as an associate member had not yet fulfilled the requirements during transitory stages to a customs union which were foreseen by Association Agreement and specified by the 1970 Additional Protocol. This was first because Turkey's freezing the association in 1978 due to perceived economic burdens. Later, the EU also suspended it relations with Turkey in 1982 as a reaction to the undemocratic atmosphere caused by 1980 coup d'état in Turkey. The EU also blocked the Fourth Financial Protocol which was about a financial aid package to Turkey.

[136] Müftüler-Baç, Meltem; "Turkey's Political Reforms and the Impact of the European Union", South European Society and Politics Vol.10 No.1 April 2005, p.19

Given the absence of a significant popular demand domestically, negative conditionality in the form of withdrawal of external assistance and suspension of association might have caused a considerable pressure on the military to leave the authority for a civilian rule, but not enough to alter the calculations of the military immediately.

Even when the reward is limited to association, the impact of the EU on Turkey has been significant. Positive conditionality imposed especially by the EU Parliament before its vote on Customs Union in December, 1995 made Turkey to pass a package of constitutional change [137] which also touched upon non-violent expression of political views in Anti-Terrorism Law. Nevertheless, these changes have been perceived by the EU as 'cosmetic' because these superficial legal changes does not bring any substantial improvement to solve deeply rooted problems of Turkey and its democracy. Furthermore, the rejection of Turkey for EU candidacy in Luxembourg Summit of the European Council in 1997 had proved the importance of 'reinforcement by reward' because without the membership incentive there was no a fundamental change on the way to democratization or a major improvement in human rights records. Later, the EU reconsidered the implicit promise of full membership in Ankara Treaty and the awkward situation of Customs Union with a country which cannot be even a candidate. Finally, Helsinki European Council held in December 1999, granted a candidate status to Turkey. This has been the first time in Turkey that but gained momentum with Turkey's EU candidacy since 1999. With the start of accession negotiations, Turkey began to consider major reforms to remove traditional stumbling blocks on its democracy. The right to freedom of expression has been one of these issues.

Negotiations with the EU are opened on the basis that "Turkey sufficiently meets the political criteria" set by the Copenhagen European Council in 1993, and later proclaimed by Article 6(1) of the Treaty on European Union and in the Charter of Fundamental Rights.[138] As we have mentioned in the previous chapter, "the

[137] Ibid. p.20

[138] See "EU-Turkey Negotiating Framework-Luxembourg, 3 October 2005". Available at European Commission's website: http://ec.europa.eu/enlargement/pdf/st20002_05_TR_framedoc_en.pdf

stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities"[139] are sine qua nons for EU membership. Nevertheless, respect for these principles is by no means irreversible, thus cannot be guaranteed just because they were once adopted in a given country. Thus, the EU needed to include a threat of "suspension of negotiations" in case of serious breaches of these principles which is asserted in the Negotiating Framework with Turkey in order to sustain compliance. This threat did not only mean a delay in the completion of negotiations but also meant a loss of reward if Turkey halts the reform process or reverses the progress achieved. The cost of the absence of the reward has a deterring impact on violation due to the benefits of the full membership.

Although Turkey's relations with the EC/EU have been a strong motivation on the way to the adaptation with international norms, and with the political conditionalities in general, the aspiration for modernization has not been limited to the European integration. Turkey has been among the founding members of the United Nations in 1945 not to be marginalized by the international community due to its neutral stance in the Second World War.[140] Turkey has been granted a founder member status to the Council of Europe in 1950. It has become a member of NATO in 1952, a founding member of OSCE in 1961 and an associate member of EEC in 1963. It has signed ECHR in 1954 just a few years after its adoption by the CE.

These memberships have given "some recognition to Turkey's European identity"[141] which has always been "an implicit objective of Turkish foreign policy."[142] Since the European identity has not only been attached to geographical

[139] The fulfillment of Copenhagen Criteria or specifically political criteria is not enough to conclude negotiations as the Negotiation Framework with the EU suggests. Although it is a vital one, there are still other considerations such as the commitment to good neighborly relations

[140] Türkmen, Füsun; "Turkey's Participation in Global and Regional Human Rights Regimes" in "Human Rights in Turkey" edited by Arat, Zehra Kabasakal; University of Pennsylvania Press, 2007, Chapter 16, p.253

[141] Müftüler-Baç, Meltem; "Turkey's Relations with a Changing Europe", 1997, Manchester University Press, p.6

[142] Ibid. p.3

considerations, Turkey's aspiration for Europeanization gradually revolved around democratic principles, norms, and rules through various organizations.

On the whole, this chapter will thus linger over the European impact on Turkey's democracy and its human rights dynamics historically. In doing so, I will first illustrate the impeding domestic factors to Turkey's aspiration for Westernization. Only then, it will possible to refer to the Article 301 debate as a violation of the right to freedom of expression in the light of the concern of loss of autonomy of the state over individuals.

I. Historical Legacies Leading to Human Rights Violations

Although the international and regional organizations increasingly do matter in international relations, their impact on human rights is still dependent on the degree of permeability of the states. Hence, this section focuses on the domestic factors leading to human rights violations because it is important to see why these factors are compensated by the EU's reward of full membership. It will also allow us to see the magnitude of the EU's achievement on altering sacrosanct policies of Turkish Republic.

Turkey has been reluctant to remove the pressure on the right to freedom of expression mostly because of two intermingling factors shaping the state's political atmosphere since the foundation of the Republic in 1929. First one is caused by the narrow definition of minority concept and the correlated problems with the definition of "Turkish" identity and the second one is related to the fear about territorial disintegration caused by a collective psychology in Turkey which is called Sevres syndrome.[143] Dwelling upon these two factors will be useful to understand how much the EU has been successful as a catalyst for domestic change targeting these traditional and persistent factors leading violations of human rights.

[143] Oran, Baskın; "The Minority Concept and Rights in Turkey: The Lausanne Peace Treaty and Current Issues" in "Human Rights in Turkey" edited by Arat, Zehra Kabasakal, 2007, p.50

The concept of minority is closely associated with the definition of "Turkishness" which is also the main component of Article 301. Thus, the meaning of Turkishness is essential to understand the basis of the punishment of "the denigration of Turkishness". This definition has been problematic ever since the foundation of the Republic because Turkishness as a *supra-identity* of the state has been the same with "*one*" of the *sub-identities* in its territory, i.e. Turks. This was not historical heritage of Turkey's Ottoman past; quite the contrary the supra-identity of Ottoman Empire embraced and recognized all sub-identities, but did not coincide with any of them. Nevertheless, Turkey, by limiting minority status to "non-Muslims" in the Lausanne Peace Treaty signed in 1923 following Turkey's victory in the War of Independence, forced all other sub-identities except Jews, Greeks and Armenians to accept the supra-identity of Turkishness as their identity which at the end "created an imbalance in favor of Turks."[144] For instance, Turkey refused to grant minority status to the Kurds, who are the second largest group in Turkey after Turks. This was due to a perceived threat for "the unity of nation" because giving those equal rights with the majority and further minority rights which are internationally recognized such as building their own schools, using their mother-tongue meant that the nation is not united anymore[145] Besides, even the non-Muslim minorities included in the Lausanne Treaty did not enjoy their rights fully, they have been perceived as foreign nationals rather than loyal citizens of the state. Thus, Turkish supra-identity with its ethnic connotation estranged both non-Muslim minorities and also other sub-identities. The Sèvres Treaty which was signed after the First World War, though replaced with the Lausanne Treaty of favorable conditions, left a fear for the new Republic which is called Sèvres syndrome: a fear of partitioning of the country as a result of "collaboration between its minorities and their foreign allies." Any idea against traditional conceptualization of minority, the demands for redefinition of state identity has been oppressed from the beginning of the Republic and intensified with the military coups which have been stumbling blocks on the way to democratic consolidation in Turkey. The peak point of the impact of those fears in Turkish society has been its manifestation in 1982 Turkish Constitution restricting especially freedom of expression and criminalizing any

[144] Ibid. p.50

[145] Ibid. p.35

dissident opinion.[146] Since then, important steps have been taken on the way to remove discriminatory, fear-related clauses and their undemocratic exercises in Turkish legal system. The EU has been the major catalyst for domestic change in Turkey especially with the increase in the credibility of Turkey's membership to the EU.

Turkey has tried to justify this perception and the related violations of human rights based on "territorial integrity" principle of international law. While such principle is universal and inalienable in international system, Turkish Constitution has another clause accompanying this principle: "the integrity of nation"[147] This phrase is unique when we compare it to the constitutions of liberal democracies because there is no such monolithic concept of the nation in those states which disregard the differences and causes assimilation of those differences by imposing a dominant ethnic supra-identity. Moreover, a well-known defense by Turkish political elites on the existence and the use of Article 301 claims that there are compatible articles on public denigration in European legal systems as well and it is necessary for public peace. Nevertheless, as Joost Lagendijk, the chair of the Joint Parliamentary Committee with Turkey, commented on this claim, in those countries, especially in Germany and Austria, there are clauses for criminalizing denigration of the state, but none of them includes an ethnic definition such as "Germanness" or "Austrianness"[148] Moreover, none of those liberal democracies ignore the supremacy of individual over the state/society unless the individual threaten them. Thus, in a world where individuals have been the subject of international law, it is more difficult sustain human rights violations by claiming the unity of the nation.[149] Nevertheless, without a

[146] Müftüler-Baç, Meltem, "The Impact of the European Union on Turkish Politics" ; East European Quarterly, Vol. 34, 2000, p.166

[147] The Constitution of Republic of Turkey is available at http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf

[148] An interview with Lagendijk can be found at NTVMSNBC news channel http://arsiv.ntvmsnbc.com/news/398862.asp

[149] Oran, Baskın; "The Minority Concept and Rights in Turkey: The Lausanne Peace Treaty and Current Issues", in "Human Rights in Turkey" edited by Arat, Zehra Kabasakal, 2007, p

strong enforcement mechanism, deeply rooted legacies of the state have been difficult to vanish.

There are also theoretical explanations which are useful to discern the extent to which compliance with the right to freedom of expression has been persistent on specific issues, such as Kurdish and Armenian issues. First, there are *political explanations*; non-democratic regimes, and the states in transition to democracy compared to democratic regimes, the countries facing real or perceived threats such as civil or international war, separatist movements and terrorism compared to the ones that do not have such threats, are more likely to violate human rights. For instance, the demands of Kurdish minority to have a greater autonomy in Turkish politics have long been responded in a repressive way. Interestingly, Turkish state seems to react similarly, both to terrorist activities committed by PKK and its offshoots, and also to the Kurdish political movements which stem from the same vein, the repressed status of the Kurdish minority in a period starting from as early as the foundation of the Turkish Republic. Demanding more autonomy that is political is equated with terrorism, and the state's threat perception led to human rights violations, thereby became an obstacle on the way to democratization.

Secondly, *economic explanations* dwell upon the correlation between the countries with fewer resources/poor countries tend to repress its citizens more due to the distributional domestic conflicts. Turkey, again, stands as a relevant example for the economic aspects of human rights violations backing up by its political and ideological reasons for violations. The resistance to recognize Kurds as a separate minority brought an economic marginalization of the Kurdish people and serious problems of economic under-development of the eastern and south-eastern region where Kurds are mostly populated.[150] This inequality is not specific to the region but to an ethnic minority because the Kurdish people in western Turkey also suffer from

[150] White, Paul J.; "Economic Marginalization of Turkey's Kurds: the Failed Promise of Modernization and Reform", Journal of Muslim Minority Affairs, Vol. 18:1, 1998, p.139-158

social and political problems, lack of education, and massive unemployment."[151] This discrepancy between Turkey's east and west, adding to manifold aspects the Kurdish question, "seems to be a major challenge for Turkey in its process of democratization"[152] and a major cause of repression.

There are also other arguments based on economy relating to the impact of globalization, and specifically free trade on the condition of human rights in domestic environment. Nonetheless, the result of this correlation is ambiguous due to lack of research and the recency of the globalization process to see its end result on domestic human rights conditions. Thus, neither the ones who claims that expansion of free trade leads compliance to human rights nor the supporters of the view that free trade increases human rights violations had handful results regarding the impact on political, civil, economic rights of the citizens. However, we can still claim that in Turkish case, the timing of economic liberalization and especially increasing economic relations with the EC coincided with political liberalization, yet whether it is a correlation or causation needs further research.

Thirdly; *cultural/ideological* explanations concentrating on the ideologies deeply embedded in inter-communal hatred or revenge for past abuses. Such ideologies justify all the means including repression and show them as vital necessities to achieve a greater end. This explanation is very much in line with the discussions of Armenian genocide. Turkey in order to prevent the recognition of Armenian genocide argued that Armenians who died in 1915 events are the victims of the warfare rather than a massacre. There are other arguments blaming the victims as the initiators of aggression thus suggesting that they got what they deserved. Some also claimed that murderers did not really murder; victims were not really killed, but

[151] Gordon, Philip and Taspinar, Omer; "Turkey on the Brink", The Center for Strategic and International Studies and the Massachusetts Institute of Technology, The Washington Quarterly, 2006, 29:3,

[152] Müftüler-Baç, Meltem, "The never-ending story: Turkey and the European Union", Middle Eastern Studies, Vol. 34, No.4, 1998, p.252

died due to "famine, war, and disease".[153] This debate is closely associated with the freedom of expression because any attempt by the intellectuals to elucidate the Armenian question has found repressive reactions as if they attacked the state's honor with words.

After presenting primarily domestic explanations to human rights violation such as political regime, threat perception, economic well-being, state's ideology- except international war and globalization- on human rights conditions; it becomes apparent that human rights violations reflect deep aspects of a state's political structure as well as its historical legacy. The restrictions on freedom of expression in a state also reflect these roots of violation. Therefore, it is difficult to see for foreign states and international organizations without efficient monitoring mechanisms and effective political conditionalities aiming to remove these deeply embedded factors of violations. The EU having these instruments has been able to attack these factors.

II. Historical and Empirical Analysis of Turkey's Human Rights Record

The political conditionality of the EU has attracted its neighboring countries with the size and credibility of its reward which changes the actors' calculation on compliance. Thus, the EU has been leading the Europeanization process in Turkey as well. After mentioning the historical background of Turkey-EU relations and the reasons for persistency in human rights violations, it is now necessary to see Turkey's human rights records regarding freedom of expression and to what extent the EU has been influential in changing the delinquent state's calculations.

[153] Smith, Roger W.; Markusen, Eric; Lifton, Robert Jay; "Professional Ethics and the Denial of Armenian Genocide", Holocaust and Genocide Studies, Vol.9 No l, Spring 1995, p.15

In doing so, this thesis preferred to focus on the Article 301 of Turkish Penal Code as a valid illustration of domestic change among other human rights issues in Turkey in general and among other restrictions on expression of opinions because there has been a concrete policy action for a domestic change in 2008. Moreover, both the original Article 301 which replaced the Article 159 carrying heavier penal provisions and the amended version of the article entered into force as part of penal-law reform demanded by the EU on the way and during Turkey's accession negotiations. Not only the negotiation phase but also the popularity of the violation due to the involvement of public in general, civil society organizations and media to the cases against Orhan Pamuk, Turkish Nobel Laureate in Literature; Hrant Dink, a Turkish-Armenian journalist who was murdered in 2007, and many other journalists and writers, or to the strong criticism made by the EU officials and by the individual member states. After a strong insistence on non-compliance, this legislative amendment to the Article 301 will allow us to see both resistance and compliance phases of norm diffusion and to evaluate the impact of membership incentive on the change in cost-benefit analysis of Turkish government.

Consequently, this section will first problematize the article as a violation of the right to freedom of expression based on our theoretical discussion and Turkey's legal responsibilities to international law. Second, in order to see domestic dynamics attracting the EU's attention, a historical/empirical analysis of the Article 301 will be portrayed along with EU's pressure for domestic change.

III. Freedom of Expression and the Debate over Article 301 in Turkey

Freedom of Expression is an inalienable right for individuals, but international human rights regimes also account for legitimate limitation of its exercise to protect the fundamentals of a state such as national security, territorial integrity, or public safety. Article 301 of Turkish Penal Code is an article by which such a restriction is applied to freedom of expression. Nevertheless, as Turkey did not always fulfill the criteria of legitimate restriction prescribed by international law or disregarded at least one criterion mostly the necessity and the proportionality of the restriction, "much of the ECtHR's case load on the freedom of expression has come from Turkey."[154] Turkey has been persistent to change this law although it has been sued frequently owing to the right to individual petition to ECtHR of Turkish citizens which was ratified by Turkish Parliament in 1987.

Turkey as a part to various human rights treaties and institutions did not really consider changing the article before it felt the EU pressure. In June 2005; Turkish Grand National Assembly introduced Article 301 as a legislative reform prior to the start of accession negotiations and initially meant to remove the threat to the freedom of expression caused by Article 159 of the old penal code. Article 159 had already changed twice in 2002 and in 2003 through the third and the seventh Harmonization Packages with the EU. Preceding the negotiations with the EU, the hope for an abolition or amendment of Article 159 ended in nothing. The arbitrary interpretation of vague terms of this article remained intact in essence in Article 301 as well. In other words, replacing the previous article by adding a distinction between *criticism* and *denigration*, of which the former will not constitute a crime; did not eliminate the controversies of the Article and the reduction of the years of imprisonment did not alter the problem of proportionality. Although the changes to protect freedom of

[154] Smith, Thomas W.; "Leveraging Norms: The ECHR and Turkey's Human Rights Reforms" in "Human Rights in Turkey" edited by Arat, Zehra Kabasakal, p.272

expression have been superficial; the existence of a change in legal wording, the discussion among the political elites and its entrance to public discourse, and the EU's pinpointing the article amendment as a must are pertinent to the demands by the EU.

Before depicting the impact of the EU on the amendment of the article, it is essential to have a look at the exact wording of the original Article 301. The article states that[155]

> 1. Public denigration of Turkishness, the Republic or the Grand National Assembly of Turkey shall be punishable by imprisonment of between six months and three years.
>
> 2. Public denigration of the Government of the Republic of Turkey, the judicial institutions of the State, the military or security structures shall be punishable by imprisonment of between six months and two years.
>
> 3. In cases where denigration of Turkishness is committed by a Turkish citizen in another country the punishment shall be increased by one third.
>
> 4. Expressions of thought intended to criticize shall not constitute a crime.

We suggested in theoretical chapter that freedom of expression can be curbed if it attacks the interests of the society. It is problematic in practice whether this article in the range of those interests. Article 26 of Turkish constitution protects freedom of expression and dissemination of thought within the limits identified by the Article 10(2) of ECHR.

> **Article 26 of Turkish Constitution**
>
> **Freedom of Expression and Dissemination of Thought (As amended on October 17, 2001)[156]**
>
> Everyone has the right to express and disseminate his thoughts and opinion by speech, in writing or in pictures or through other media, individually or collectively. This right includes the freedom to receive and impart information and ideas without interference from official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, and similar means to a system of licensing.

[155] http://www.amnestyusa.org/document.php?lang=e&id=ENGEUR440352005

[156] The Constitution of the Republic of Turkey, http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf

> The exercise of these freedoms may be restricted for the purposes of protecting national security, public order and public safety, the basic characteristics of the Republic and safeguarding the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation and rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.
>
> The formalities, conditions and procedures to be applied in exercising the right to expression and dissemination of thought shall be prescribed by law.

Thus, as the article points out that there are certain benchmarks to call for these restrictions in domestic law which has already been harmonized with the ECHR. Article 301 with its vague terms such as "public denigration", with its ethnic reference to "Turkishness" and more importantly, with its openness to interpretation allowing all individual prosecutors to open a case based on their personal interpretation and political view, did not meet the requirements for permissible and legitimate restrictions on freedom of expression because this article has not been just legal statement but a political one as well.

Along with small differences in wording of the clause regarding the right to freedom of expression, Turkey is in fact perfectly compatible with the international treaties it signed because the constitution gives supremacy to international agreement over domestic law as the Article 90 of Turkish Constitution suggests:

> **Article 90 of Turkish Constitution:**
>
> **Ratification of International Treaties (As amended on May, 22, 2004)** [157]
>
> International agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.

[157] The Constitution of the Republic of Turkey, http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf

Nevertheless, as the previous chapter dwelling upon the domestic factors for violation of this right suggested that since Turkish political system occasionally prioritized "national interest" with its own definition regardless of the right of individuals. Therefore, this article allows the prevailing political definition of "interest" to violate a fundamental human right to hold opinion and express it freely through any means of communication. Most notably, the subject of litigation has revolved around the same issues all over. "The dominant cleavage in the society between nationalism and the recognition of other ethnic groups in Turkey, in particular the Kurds"[158] and "Armenian issue" have been an obstruction for Turkey to become a state that welcomes any non-violent expression. Nevertheless, in the recent years, the impact of the EU increased the costs for stifling policies on freedom of expression and also increased the benefits of compliance with the start of accession negotiations. Although there are still undemocratic practices both in the Article 301 and other related articles of freedom of expression, there is also an attempt on Turkish side to deal with buried issues regarding both Kurdish question and Armenian issue.

Let us apply the criteria for permissible restrictions to Article 301 case so that we can then claim that the practice of Article 301 has been a human rights violation and the amendment to the article has lessened the side effects of this article on individuals.

These restrictions should be made known to the citizens and prescribed by law; must be perceived *necessary* for a democratic society. Even if a restriction is necessary, the punishment should be proportionate. Although Turkey includes these limitations in its domestic law in line with those of ECHR, the interpretation of the clauses such as national interest, public order etc differs significantly. Thus, ambiguous terms of the article may or may not threaten the rights of individuals who expressed a dissenting opinion peacefully depending on the will and interpretation of the prosecutors. Moreover, Turkey has long understood the necessity principle in line with the continuation of its omnipotent power over the individuals and state ideology function. Nevertheless, this restriction should consider whether the expression fall into

[158] Müftüler-Baç, Meltem; "Turkey's Political Reforms and the Impact of the European Union", South European Society and Politics Vol.10 No.1 April 2005, p.20

the range of 'pluralism, tolerance and broadmindedness' of the democratic society, not into the range of state ideology. If the expression is not tolerable, the state has the right to decide to take punitive action. This action includes imprisonment in Turkey contrary to liberal democratic states that have comparable articles even though imprisonments are commuted to a fine. Besides, according to ECHR legislation, the balance between individuals, minority groups and society should be taken into account. In other words, neither the individuals/minority groups can threaten public peace nor society/majority can push the individual/minority groups to use self-censorship or punish for their non-violent expression. However, the article both threaten the rights of individuals who talk about Turkey's untouchable issues with fear of imprisonment and multiplies the scale of violation of free expression because of self-censorship. Furthermore, the state by accusing the person for "insulting Turkishness" threaten the physical security and affect psychology of the person in his/her social life because identity issues are sensitive especially for ultranationalists and anybody in the society can take this so-called insult as if it is directed to themselves. Moreover, the non-discrimination principle applies to the right to freedom of expression. Nevertheless, many people tried under this article have been with Kurdish identity. If a law frequently accuses certain groups in the society, the neutrality of the state to the groups in its territory should be questioned.

Consequently, Turkey prefers to focus on the "content" of the expression – mostly if it is about the creation of minorities other than non-Muslims or articulation of Kurds as a minority and 1915 events. Among these principles only the necessity of the restriction may require content review, but the others are also essential for democratic society. Content review alone is problematic because opinions "those that offend, shock or disturb the State or any sector of the population" are protected under the right to freedom of expression. [159] Moreover, the reiteration of issues reflects persistent state policies. The prosecutors have given legitimate authority to open cases on the basis of this vague article and they have especially targeted silencing publishers, editors, writers, journalists, intellectuals. The scope of violation is

[159] The decision of the ECHR on Handyside v. United Kingdom, 7 December 1976, 1 EHRR 737, Para. 49. İn Commonwealth Secretariat, "Freedom of Expression, Assembly and Association Best Practice", 2002, p.16 http://publications.thecommonwealth.org/,

enormous given 1481 cases, 2724 individuals, 14 of them children tried under Article 301 "which have been brought to the courts in the three years since its inception in 2005."[160]

High-profile cases have been important for the EU to monitor human rights in Turkey. There have been several declarations by the EU officials during these cases and they are included in the Progress Reports. Orhan Pamuk has been charged under Article 301 because of his comments during an interview with a Swiss newspaper (Tages Anzeiger) on 5 February 2005. He stated that, "30,000 Kurds and a million Armenians were murdered. Hardly anyone dares mention it, so I do. And that's why I'm hated". The charges against him dropped but he has been continuously threatened by extreme nationalists. Although the existence of the article has been criticized, acquittals have been perceived by Brussels as "a litmus test of Turkey's EU membership credentials."[161]

In 2006, Elif Şafak, a young novelist, also faced trial because of a statement of a character in her novel called *The Bastard of Istanbul* regarding Armenian genocide. Although this high-profile case also dropped, this has been an illustration of the limitlessness of violation of freedom of expression in the sense that even a statement of fictitious character in the novel can be a matter of accusation as Şafak noted: "the way [ultranationalists] are trying to penetrate the domain of art and literature is quite new, and quite disturbing."[162]

Another writer on trial charged under Article 301 in October 2005, was Hrant Dink, a journalist and the editor of the Armenian-language weekly newspaper Agos, he received a six month sentence, but it is suspended till he gave an interview to Reuters about the trial which led another trial demanded 3 years imprisonment for

[160] http://www.internationalpen.org.uk/go/news/turkey-publisher-sentenced-under-article-301

[161] "Court drops Turkish writer's case" 23 January 2006 http://news.bbc.co.uk/2/hi/europe/4637886.stm

[162] Susanne Fowler, "Turkey, a Touchy Critic, Plans to Put a Novel on Trial"Published: September 15, 2006 available at New York Times http://www.nytimes.com

Hrant Dink.[163] Dink, in fact, had called for Armenians "to step back from insisting that Turkey recognize the Armenian killings of the Ottoman era as "genocide" as this had become an "unhealthy fixation." He had said today's Turks should not be punished for the sins of their forefathers 90 years ago."[164] He had been a target and hate figure for extreme nationalists as Article 301 marked him out as a denigrator of Turkishness and after receiving death threats and demanding protection from the state which was not provided on time, he was assassinated on 19 January 2007. The public in Turkey as well as domestic and international civil society organizations protested the murder on the streets while criticizing the clause Article 301, its reference to "Turkishness", the state's inability to protect freedom of expression as well as physical security of its citizen, and they chanted all over: "We are all Armenians, we are all Hrant Dinks". Although high-profile cases already had made the violation of freedom of expression known to the public, the popularity of the article on international scene, the debate in media and academia as well as consciousness at societal level have increased after this tragic event. Abdullah Gul, Turkish foreign minister at the time of assassination, acknowledged that ""With its current state, there are certain problems with article 301. We see now that there are changes which must be made to this law."[165]

The EU has been monitoring the cases related to Article 301 closely especially since the negotiations have started. Joost Lagendijk, the chair of the Joint Parliamentary Committee with Turkey, attended the cases against Orhan Pamuk by himself. He also prepared a report for the President of the European Parliament, Hansgert Pöttering, about the controversies inherent to the Article 301 and the assassination of Hrant Dink. EU Enlargement commissioner Olli Rehn has continuously demanded that Turkey should amend its laws on limiting non-violent expression, in particular Article 301 of its penal code, but he said that "after the murder of Hrant Dink, our expectation has increased."[166] The EU has also warned Turkey about the consequences of slowdown of the reform process due to a possible

[163] See Amnesty International Website http://www.amnestyusa.org/document.php?lang=e&id=ENGEUR440352005

[164] http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=164468

[165] http://hurarsiv.hurriyet.com.tr/goster/haber.aspx?id=5835918

[166] http://arsiv.ntvmsnbc.com/news/400470.asp

support among the EU member states of Nicholas Sarkozy's anti-Turkey ideas. The President of European Commission, Jose Manuel Barroso, said that "freedom of expression is an essential component of EU standards, if Turkey wants be a member." [167] The Commission's Progress Report in November 2006, which harshly criticized the arbitrariness of the article soften the AKP government's approach towards Article 301. In November 2006, Turkish Prime Minister, Recep Tayyip Erdogan, consulted to the representatives of civil society organizations, trade unions how to change the Article 301. Nevertheless, the delay in amendment to the article 301 was criticized 2007 Progress Report as well. EU with hundreds of declaration specifically targeting Article 301 put such a pressure which could not be ignored by the government.

The Article 301 has been both a norm violation and also a legal breaching of domestic law as well as the international treaties incorporated into Turkish constitution. With a strong criticism by the EU officials and by the individual member states Turkish parliament amended the Article in 2008 by changing the expression of 'Turkishness' to 'Turkish Nation', by limiting the duration of imprisonment, and by requiring the permission of Minister of Justice to start an investigation which means that no authority other than the minister is eligible to interpret the appropriateness of the case. This has been an effective amendment because the number of the cases opened using this Article has been reduced since the amendment along with the number of persons who can interpret this Article. When we compare 1500 cases opened by only few nationalist prosecutors till 2008, and only 70 cases permitted and 403 refusals by the Minister of Justice since the amendment, it is obvious that this amendment has been sufficient to call as norm compliance. [168]

When the membership prospect has been less credible, Turkey preferred to see human rights problems "as an excuse for the EU officials rather than a reason for keeping out of the EU." It is true that the inconsistent nature of the EU policies caused a lot of vicissitudes in Turkish human rights record prior to the accession negotiations. Nevertheless, when Turkey is obliged to bring its human rights policies

[167] http://arsiv.ntvmsnbc.com/news/442602.asp

[168] http://arsiv.ntvmsnbc.com/news/475376.asp

to EU standards by following a roadmap for full membership, the EU is proved to be successful in changing the calculations of Turkish government on norm compliance.

CONCLUSION

The prominence of human rights norms in international relations is pertinent to the creation of international organizations preceding the end of Second World War. Since human rights issues are deeply embedded in national governments; neither international treaties alone nor the individual foreign policies could have an all-encompassing impact on delinquent states. Institutionalization of these organizations provided standard-setting to international law and accelerated norm diffusion through their enforcement and monitoring mechanisms.

Nevertheless, the level of impact of these institutions differed significantly. As a starting point to explain this discrepancy, this thesis preferred to apply logic of expected consequences rather than logic of appropriateness because the case studies illustrated that the deterrence of violations occur only when the respondents perceive involvement beneficial, and when complying with a norm meets the violator's interests. This can be either because of primarily an excessive cost concern or an appealing nature of abundant benefits of compliance, but not in the case studies of this thesis because of the willingness to follow the norm because of its appropriateness and legitimacy and violate it due to its illegitimate nature.

This thesis focused on the role of the UN and the EU as influential agents of norm diffusion and human rights promotion. Although they are not comparable institutions at first glance due to different membership requirements and area of focus, this thesis preferred solely to depict their enforcement capacities on specific human rights norms. In doing so, the presence and absence of political conditionality on the delinquent states has been the center of attention, rather than specific substantive features of these enforcement mechanisms.

First, the basic physical security of individuals is evaluated in Darfur case. This preference is derived from the fact that the UN has achieved most substantial innovations in such security related norms such as fight against torture, gross human rights violations rather than less vital norms such as freedom of expression. Even so, the UN lacked enforcement capacity on the violator states and could not be successful to alter their cost-benefit calculations on norm compliance This is mostly because the UN is destined to use negative conditionality on violator states due to the problem of offering a reward at global level, which proved to have less deterring impact compared to positive conditionality. Although this lack of success on the UN side is due to the arbitrary responses of the respondent states in the UN on the violator states, this is also related to the UN's inability to change the major actors' calculations on taking action against the human rights violations.

Second, the right to freedom of expression is portrayed as a less vital compared to genocide, but a more ignorable violation of human rights norms because it deeply reflects domestic structure. The EU's approach to human rights violations in its region and its level of impact on norm compliance is completely different from that of the UN due to diversity of willingly rewarded political conditionalities and their appealing nature for the violator states. Membership incentive still has been the most influential one among others. It is important to note that this thesis did not account for the extent to which the conductivity of domestic environment helped the EU's success in Turkey as an agent of norm diffusion, but rather focused on the ability of the EU to change the calculations of domestic governments in its immediate neighborhood. Moreover, this thesis has not treated the legal amendment in article as a major change. Still, the impact of the EU has been enormous regarding the increase in public debate.

Since the EU has been successful in Turkish case and failed in Darfur do not lead us to think that the EU is not a global player. The nature of violations and thereby the ways of reactions differ significantly. While the EU has to operationalize its material resources, and even military resources in Darfur case; a declaration, or a threatening rhetoric about the withdrawal or suspension of membership is enough to take a position in Turkish case. Nevertheless, this thesis compensates this incompatibility with the EU's concerned approach to freedom of expression, which is ignorable in nature. Even so, as this thesis does not aim to provide a general rule about

the impact of these organizations on domestic change and norm diffusion, it also acknowledges the possibility of different conclusions drawn from different case studies about the very same organizations.

In conclusion, the history of international organizations promoting human rights norms is relatively short. Thus, one cannot claim that the best way to norm diffusion for all organizations is positive conditionality, and preferably membership incentive. Every organization has its unique features. The EU has the ability to use this carrot for norm diffusion effectively in its immediate neighborhood. The lack of reward by the UN at global level might be compensated by an increase in its autonomy from its members.

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