RIGHTS OF THE CHILD UNDER STATE SOVEREIGNTY AND HUMAN RIGHTS REGIME: THE CASE OF CHILDREN PROSECUTED BY THE TURKISH ANTI-TERROR LAW BETWEEN 2006-2010

DEVLET EGEMENLİĞİ VE İNSAN HAKLARI REJİMİ ALTINDA ÇOCUK HAKLARI: TÜRKİYE'DE 2006-2010 YILLARI ARASINDA TERÖRLE MÜCADELE KANUNU'YLA YARGILANMIŞ ÇOCUKLAR

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Anahtar Kelimeler (Türkçe)

1) İstisna Hali
2) Olağanüstü Hal
3) Terörle Mücadele Kanunu
4) Çocuk Hakları
5) İnsan Hakları

Anahtar Kelimeler (İngilizce)

1) State of Exception
2) Anti-terror Law
3) Turkey
4) Human Rights
5) Children's Rights

Öz

Çalışmanın amacı devlet egemenliği ve insan hakları rejimi arasındaki ilişkiyi incelemektir. Bu ilişkiyi göstermek amacıyla istisna hali konsepti üzerine odaklanılmıştır. Çalışmanın bir diğer amacı Türkiye'de Terörle Mücadele Kanunu üzerinden yargılanan çocuklar vakkasının altında yatan esas problemi açığa çıkarmaktır.

Çalışmanın metodu niteldir. Ele alınan vakkanın oluştuğu 2006 ve 2010 yılları arasına odaklanılmaktadır. Disiplinler arası araştırma yapılmış olup, eleştirel hukuk teorisi paradigması benimsenmiştir. Özel olarak Giorgio Agamben, Costas Douzinas ve Jack Donnelly'nin eleştirilerine yer verilmiştir.

Bu çalışma açığa çıkarmıştır ki, devlet egemenliği ve insan hakları rejimi sanılanın aksine birbirini dışlayan değil birbirinin içine geçmiş bir ilişkiye sahiptir. Bu tür bir ilişkinin sonucu olarak insan hakları rejimi devlet egemenliğini korumaya yönelik mekanizmalar içermektedir. Bu mekanizmalardan biri olan istisna hali Birleşmiş Milletler Çocuk Hakları Sözleşmesi'nde de yer almaktadır. 2006- 2010 yılları arasında yürürlükte olan Terörle Mücadele Kanunu bu sözleşmenin açıkça ihlalidir. Çalışmanın sonucu, istisna halinin 2006-2010 arası yürürlükte olan Terörle Mücadele Kanunu ile çocuklara genişletilmiş olmasıdır. Dahası, 2010'da Terörle Mücadele Kanunu'na yapılan değişikliğin çocuklar üzerindeki istisna halini kaldırmaktan ziyade, Birleşmiş Milletler Çocuk Hakları Sözleşmesi'ne uygun hale getirilmiş olmasıdır.

Abstract

The purpose of this study was to investigate the relationship between state sovereignty and human rights regime. The concept of state of exception had been the main focus to demonstrate the relationship among state sovereignty and human rights regime. Another aim was to find out the fundamental problematic of the case of children prosecuted under anti-terror law in Turkey.

In this study qualitative method was applied. It limited its scope to the time period between 2006 and 2010 in which the case study occurred. An interdisciplinary research was conducted and the paradigm of critical legal theory was adopted. It mainly focused on the critiques of Giorgio Agamben, Costas Douzinas and Jack Donnelly.

The study revealed that the relationship between state sovereignty and human rights regime is mutually inclusive rather than mutually exclusive. As a result of this relationship, human rights regime contains mechanisms to safeguard state sovereignty. State of exception, as one of the mechanisms to safeguard state sovereignty, exists in the United Nations Convention of Rights of the Child. The Turkish anti-terror law enforced between 2006 and 2010 was a clear violation of the Convention. The principle conclusion is that, it was an expansion of the state of exception to children. Amendment made in 2010 to Turkish anti-terror law did not lift the state of exception to children. It was made in line with the state of exception in the Convention.

TABLE OF CONTENTS

Abbreviations

Charter	: United Nations Charter
Commission	: United Nations Human Rights Commission
Committee	: United Nations Convention of Rights of the Child Committee
Constitution	: Turkish Constitution
CRC	: United Nations Convention of Rights of the Child
CRC-OP-AC	: Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
CRC-OP-SC	: Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child prostitution and Child Pornography
GA	: United Nations General Assembly
ICCPR	: International Covenant on Civil and Political Rights
ICESCR	: International Covenant on Economic, Social and Cultural Rights
ILC	: International Law Commission
IMT	: International Military Tribunal
JCC	: Justice Callers for Children
JCI	: Justice for Children Initiative
Law no. 2911	: Turkish Assembly and Demonstrations Law
LN	: League of Nations
NGOs	: Non-governmental Organizations
Parliament	: Turkish Parliament
PCL	: Turkish Protection of the Child Law
PKK	: Kurdish Workers' Party
PLO	: Palestine Liberation Organization
PW	: Peace of Westphalia
SC	: United Nations Security Council
TMK	: Turkish Anti-terror Law
TMK no. 5532	: Turkish Anti-terror Law amendment law no.5532
TMK no.6008	: Turkish Anti-terror Law amendment law no.6008
TPC	: Turkish Penal Code
UDHR	: Universal Declaration of Human Rights
UN	: United Nations
UNICEF	: United Nations Children's Fund
USA	: United States of America
VCLT	: Vienna Convention on the Law of Treaties
WWI	: World War I
WWII	World War II

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I. Introduction

Amendments made to the Turkish Anti-Terror Law[1] (TMK) in 2006 and 2008 became a huge debate in Turkey between the years of 2006 and 2010, because the amendment of the TMK in 2006[2] (TMK no.5532) resulted in massive amounts of children being prosecuted with terror offenses. Before the TMK no.5532 was issued, demonstrations took place in Diyarbakır on March 28, 2006 at the funeral of 4 members of Kurdish Workers' Party[3] (PKK), spread to other surrounding cities. Children attending these demonstrations became an issue[4]. The mass media focused on the children who were throwing stones at the police forces in these demonstrations[5], which resulted in a debate on children who

[1] Hereinafter TMK. Turkish Anti-Terror Law will be used as its name in Turkish. In other countries laws that have similar aims and content have different names. But in Turkey it is openly written as Anti-Terror Law. That's why, it should be considered as unique and has to be highlighted. "Terörle Mücadele Kanunu" *Resmi Gazete* no. 20843 April 12, 1991, http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/arsiv/20843_1.pdf&main=http://www.resmigazete.gov.tr/arsiv/20843_1.pdf (accessed November 13, 2011).

[2] Hereinafter TMK no.5532. "Terörle Mücadele Kanununda Değişiklik Yapılmasına Dair Kanun." *T.C. Resmi Gazete*. No:26232. July 18, 2006. http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2006/07/20060718.htm&main=http://www.resmigazete.gov.tr/eskiler/2006/07/20060718.htm (accessed October 21, 2011).

[3] The Kurdish name is Partiya Karkerên Kurdistan. Hereinafter PKK.

[4] Milliyet "Diyarbakır'da Tahrikçiler İş Başında… Kent Savaş Alanına Döndü…" *Milliyet*, March 28, 2006 http://sondakika.milliyet.com.tr/2006/03/28/son/sontur21.asp (accessed December 2, 2011);"Diyarbakır'da Cenazeye Katılanlar polis Merkezine Saldırdı" *Milliyet*, March 30, 2006 http://sondakika.milliyet.com.tr/2006/03/30/son/sontur28.asp (accessed December 2, 2011); **"**Olaylar Bugün de Batman'a Sıçradı" *Milliyet*, March 30, 2006 http://sondakika.milliyet.com.tr/2006/03/30/son/sontur16.asp (accessed December 2, 2011);; "Gerginlik bugün Yüksekova'da…Esnaf Kepenk Kapattı" *Milliyet*, March 31, 2006 http://sondakika.milliyet.com.tr/2006/03/31/son/sontur19.asp (accessed December 2, 2011); Hürriyet "Adana'daki Cenazede de Polise Taşlı Saldırı" *Hürriyet* March 28, 2006 http://hurarsiv.hurriyet.com.tr/goster/haber.aspx?id=4161024&tarih=2006-03-28 (accessed December 2, 2011); Zaman "Terörist Cenazesindeki Provokasyona Özel Hareket Müdahale Etti" *Zaman* March 28, 2006 http://www.zaman.com.tr/haber.do?haberno=270416&keyfield=C3A76174C4B1C59F6D61 (accessed December 2, 2011); Vatan "PKK'lı Teröristin Cenaze Töreni Adana'da Bölücü Gösterisine Dönüştü" *Vatan* March 28, 2006 http://haber.gazetevatan.com/Haber/74450/1/Gundem (accessed December 2, 2011); Radikal "Diyarbakır Teröre Teslim" *Radikal* March 31, 2006 http://www.radikal.com.tr/haber.php?haberno=182962 (accessed December 2, 2011).

[5] Milliyet "Düşündüren Fotoğraflar" *Milliyet*, March 31, 2006 http://galeri.milliyet.com.tr/diger/20060331dusundurenfoto/default.asp?ID=13 (accessed December 2, 2011)

thereafter were referred to as 'children throwing stones[6]'. The bill of TMK no.5532 declared the necessity for amending the TMK to clarify articles on terror offenses in the Turkish Penal Code[7] (TPC) no.5237[8]. The bill contained an article[9] regarding children which was never discussed in the Turkish Parliament[10] (Parliament), but took effect on July 28 2006. In 2008 another bill was presented to the Parliament, which contained an article[11] change in the TMK no.5532 that also affected children. The bill passed and took effect on March 1, 2008. The amendments made in TMK have resulted in children above the age of 15 being prosecuted in high criminal courts as adults[12], and prohibited punishments to be converted to any other sentences[13]. Right after the changes were made in the TMK, children from Eastern provinces where Kurdish population is concentrated started getting detained after every demonstration. Although the numbers are hard to track, from 2006 to 2010 there were more than 4000[14] cases opened at which children were accused of several crimes such as 'committing crimes in the name of an illegal organization', 'being a member of an illegal organization', ' making of an illegal organization' and 'attending illegal protests'. The children faced with

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[6] Vatan " Yarın Ağlamanız Boşa Olacak" *Vatan* March 31, 2006 http://haber.gazetevatan.com/Haber/74751/1/Gundem (accessed December 2, 2011); Radikal "'Çocuk da, kadın da olsa gereken müdahale yapılır'" *Radikal* April 1, 2006 http://www.radikal.com.tr/haber.php?haberno=183107 (accessed December 1, 2011)**;** Hürriyet "Müdahale Şartlarımız Bellidir" *Hürriyet* March 31, 2006 http://hurarsiv.hurriyet.com.tr/goster/haber.aspx?id=4181749&tarih=2006-03-31 (accessed December 2, 2011); Milliyet "Erdoğan: Çocuk da Olsa Terör Maşası Olmuşsa Müdahale Yapılacaktır" *Milliyet*, March 31, 2006 http://sondakika.milliyet.com.tr/2006/03/31/son/sonsiy18.asp (accessed December 2, 2011).

[7] Hereinafter TPC.

[8] "Türk Ceza Kanunu" T.C. Resmi Gazete. No.25611 October 12, 2004. http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2004/10/20041012.htm/20041012.htm&main=http://www.resmigazete.gov.tr/eskiler/2004/10/20041012.htm (accessed October 21,2011).

[9] Article 9. TMK no.5532, 2006.

[10] Hereinafter Parliament.

[11] Article 13. "Çeşitli Kanunlarda Değişiklik Yapılmasına Dair Kanun" *T.C. Resmi Gazete* No. 26803 March 1, 2008 http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2008/03/20080301.htm&main=http://www.resmigazete.gov.tr/eskiler/2008/03/20080301.htm (accessed November 30, 2011)

[12] Article 9. TMK no.5532, 2006.

[13] Article 13. Law no. 5739, 2008.

[14] Taraf "Hey Ankara orda mısın" *Taraf* May 31, 2010 http://www.taraf.com.tr/haber/hey-ankara-orada-misin.htm (accessed December 1, 2011).

maltreatment, torture, long detainment periods and long years of imprisonment[15].

The TMK no.5532 and its practice were clear violations of the United Nations Convention on the Rights of a Child[16] (CRC) that Turkey has been state party of since April 4 1995[17]. Yet it did not stop the Parliament from issuing a legislation that is in clear violation. After massive demonstrations, reports from national and international Non-governmental Organizations[18] (NGOs) and the CRC Committee[19] (Committee) expressing serious concern[20], the TMK no.5532 was re-amended in 2010 especially for children as a reason of its clash with the CRC[21]. However, the re-amendment did not prevent children from being accused of terror offenses. It just enabled them to be prosecuted in juvenile courts.

In this study it will be argued that the TMK no.5532[22] was an expansion of

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[15] İnsan Hakları Derneği "28 Mart 2006 Diyarbakır Olaylarına İlişkin İnceleme Raporu" *İnsan Hakları Derneği* http://www.ihd.org.tr/index.php?option=com_content&view=article&id=106:28-mart-2006-darbakir-olaylarina-k-celeme-raporu&catid=34:el-raporlar&Itemid=90 (accessed June 15, 2011); Amnesty International "Çocuk Hakları Evrenseldir" 2010 http://www.amnesty.org.tr/ai/system/files/cocuk%20haklari%20evrenseldir%20web.pdf (accessed December 1, 2011); Justice for Children Initiative "Children Are Not Terrorists!" April 2009 http://www.ihop.org.tr/dosya/cocukadalet/opaceng.pdf (accessed December 1, 2011); UNICEF "Gösterilere Katılmaları Sebebi ile Terör Suçlusu Sayılan Çocuklar Hakkında" http://bianet.org/files/doc_files/000/000/105/original/kitap_tamam%C4%B1.pdf (accessed December 1, 2011); İnsan Hakları Derneği "2008 Yılı Kanunla İtilafa Düşen Çocuklar Raporu" May 2009 http://www.ihd.org.tr/images/pdf/ihd_kanunla_ihtilafa_dusen_cocuklar_raporu_mayis_2009.pdf (accessed December 1, 2011).

[16] Hereinafter CRC. United Nations."Convention on the Rights of the Child." *United NationsTreaty Collection.* November 20, 1989. http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (accessed October 20, 2011).

[17] United Nations "Convention on the Rights of the Child" *United Nations Treaty Collection.* November 25, 2011 http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (accessed November 25, 2011).

[18] Hereinafter NGOs.

[19] Hereinafter Committee.

[20] UN Committee on the Rights of the Child "Consideration of reports submitted by States parties under article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict : concluding observations : Turkey" *UNHCR* October 29, 2009 http://www.unhcr.org/refworld/publisher,CRC,,TUR,4afa9afb2,0.html (accessed April 26, 2011).

[21] T.C. Başbakanlık "Terörle Mücadele Kanunu İle Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun" *Hukuk Türk* December10, 2009 http://www.hukukturk.com/fractal/hukukTurk/pages/findMevzuatDetail.jsp?pSearchKeyToBold=ter%F6rle%20m%FCcadele%20kanunu&?pTabId=443&pInstanceId=2241814&pViewId=258&pObjectId=414 (accessed April 24, 2011).

[22] Hereinafter TMK no.5532 should be understood with including Law no. 5739.

the state of exception to children and the current version of the TMK[23] (TMK no.6008) did not secured children from the state of exception. Moreover, it will be argued that the CRC is also contains state of exception and now the TMK no.6008 is in line with it.

This study aims to unravel the relationship between state sovereignty and human rights with focusing on the case of children between the years of 2006 and 2010. It is becoming more and more crucial to analyze this relationship since states around the world are getting more and more violent toward their citizens in the name of securing their nation. It is important to explore the weak points of the human rights regime in depth, so that they can become an enduring reality, and not just a dream. This study also aims to emphasize the invalidity of stances human rights defenders have taken on certain human rights violations. Human rights violations are usually referred to as lawlessness or out of law by the human rights defenders. However, certain violations which have been perpetrated in the name of protecting state or state sovereignty do not fit into this category. Those kinds of violations have been accomplished through law but at the same time their practices are out of law. As will be explained in the third chapter, those kinds of human rights violations of states, has a state of exception character. Agamben suggests that state of exception has become a new paradigm of government[24]. In state of exception, on one hand law becomes a tool of violation, on the other hand its application of the law for violations are out of law. It is as Agamben calls a *zone of anomie*, neither in nor out of law[25]. Hence, the complex relationship of human rights and state sovereignty has to be analyzed in order to unravel the actual problematic of human rights violations. Such an analysis would lead us to the concept of state of exception which would indicate that the problem is not lawlessness. However, it is the *zone of anomie* that state of exception creates, that

[23] The current TMK hereinafter TMK no.6008. "Terörle Mücadele Kanunu ile Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun.". *T.C. Resmi Gazete*. No. 27652 July 25, 2010. http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2010/07/20100722.htm&main=http://www.resmigazete.gov.tr/eskiler/2010/07/20100722.htm (accessed October 21, 2011).

[24] Agamben, Giorgio. *State of Exception*. Translated by Kevin Attel. The University of Chicago, 2005: 1

[25] Agamben; 2005 23.

is both in and out of law.

The case of children prosecuted under TMK no.5532 has been selected to show different levels of the state of exception. The state of exception in this case is both domestic, by TMK no.5532, and international, by the CRC, leveled. This case clearly demonstrates the mutually inclusive relationship between state sovereignty and human rights regime from the concept of state of exception. Moreover, this case has been selected to argue that ongoing state of exception applications expended to children starting from the enactment of TMK no.5532 in Turkey. Children, especially Kurdish children, are the new targets of Turkey in order to preserve its sovereignty.

Although the aim of this study is to show the complex and mutually inclusive relationship of state sovereignty and human rights regime; it should not be taken as an aim or suggestion to abolish human rights regime. Likewise, the aim of indicating state of exception at the CRC should not be read as a suggestion to abandon it. What is problematized in this study is the mutually inclusive relationship of state sovereignty and human rights, and the state of exception.

The study limits its scope to the time period between 2006 and 2010 in which the TMK no.5532 was valid. However, in order to build its argument it goes beyond that time period. Another limitation is made in order not to shift the focus and main arguments of the study; it does not contain any discussions on what is considered the ‘Kurdish question’. I believe such an inclusion would require an in-depth study on the issue which would not be possible with the focus point of this study as a master thesis. It also does not contain a full historical background of the Turkish state of exception for the same reasons as stated above. However it does mention some legal and political history that is necessary to present the argument. This study does not contain arguments on childhood. However, in the third chapter there is an analysis on how TMK no.5532 creates a bio-politics on children; the debate on childhood is not covered. The reason of this exclusion is the worry of not being able to cover the issue as it has to be, without shifting the focus point. Lastly, the study does not contain individual court cases of children. The reason for such a choice is to show a broader picture of the

problematic situations presented above, to maintain focus, and to avoid victimization, which is totally in conflict with the aim and perception of the study.

The study is qualitative in methodology and an interdisciplinary research; it contains political science, political theory, law, legal theory, critical legal theory and philosophy. As Douzinas puts it, the problematic situation presented has a structure like an onion, and each skin represents different disciplines[26], however unlike the skins of an onion which are separated from each other, they are merged together. Hence, the problem that we are examining has to be handled within a multidisciplinary context. This research adopts the paradigm of critical legal theory. It mainly focuses on the critiques of Giorgio Agamben, Costas Douzinas and Jack Donnelly.

In the first part, a human rights regime analysis and its relationship to state sovereignty will be presented. It is crucial to establish the basis for this argument. The first part, after giving general information, will start with an examination of the foundation of state sovereignty; it will continue by looking at the foundation of human rights regime and its relationship to state sovereignty and end with critiques of their relationship. In the second part the case of Turkish violation of the CRC with TMK no.5532 will be introduced. The second part, starting with a brief summary of what has happened, will discuss the relationship of state sovereignty and the CRC, and end with an analysis of TMK.no5532's violation of the CRC and the stand the CRC takes on the issue. In the third, last, part, the main argumentation takes place. First the concept of state of exception will be introduced, it will continue with the exploration of state of exception in the CRC and lastly in the TMK.

FIRST CHAPTER

The Human Rights Regime

Jack Donnelly defines the international human rights regime as a strong

[26]. Douzinas, Costas *Human Rights and Empire: The political philosophy of cosmopolitanism*, 2007 : 14.

promotional regime[27]. He explains a strong promotional regime as a regime consisting of widely accepted norms, which are internationally institutionalized based on standard-setting and promotional work; however, with weak implementation[28]. The United Nations[29] (UN) human rights mechanisms have inserted and institutionalized human rights into the field of international law and international relations. Thus, UN human rights mechanisms are the basis of the international human rights regime. All the other non-UN human rights institutions and mechanisms are in line with the UN ones[30]. Hence, UN human rights mechanisms are densely carrying characteristics of international human rights regime per se[31].The UN human rights regime contains a widely accepted set of norms, and sets standards on human rights issues with conventions and committees by which promotional mechanisms are set. However, its implementation is weak since, countless human rights violations occur at and by the states' parties that can be read from the annual human rights reports of independent, international non-governmental organizations[32] that are respected at the UN level. Donnelly reasons that the weak implementation character of the human rights regime is due to its dependence on states, and when it comes to respecting and implementing human rights, the responsibility is still rests with the states[33]. Similar to Donnelly, Douzinas explains that weak implementation means "…the shield of national sovereignty is not seriously pierced[34]" and again similar to Donnelly, Douzinas also states that although there are numerous international

[27]Donnelly, Jack. "International Human Rights: a Regime Analysis." *International Organization*, Summer 1986 : 613.
[28] Donnelly, 1986 613.
[2929] Hereinafter UN.
[30] AIHM'in uyumu, UCM'nin uyumu...
[31] Because of that reason the reader should consider while mentioning human rights regime it is specifically the UN human rights regime and the whole human right regime derived with it.
[32] Annual reports of the Human Rights Watch and the Amnesty International can be named as one of the independent, reliable sources that the UN considers. To see their recent reports: Human Rights Watch, Annual Human Rights Report 2011, http://www.hrw.org/en/world-report-2011 (accessed October 6, 2011); Amnesty International, Annual Human Rights Report 2011, http://thereport.amnesty.org/sites/default/files/AIR2010_EN.pdf (accessed October 6, 2011)
[33] Donnelly, 1986 616-618.
[34] Douzinas, 2007 25.

mechanisms, "human rights are violated or protected at the local level[35]". Donnelly's and Douzinas's formulation seems valid in the case of the CRC violation in Turkey between the years 2006 and 2010. The Turkish government, by amending the TMK created the violation in 2006, and then found the solution to the violation by re-amending it in 2010[36]. The Turkish state itself caused the violation, and then acted to abolish it. Donnelly points out that "… human rights are ultimately a profoundly national -not international- issue"[37]. Then, one might ask what is the place of the CRC is if states are violating it without considering the provisions and then reverse it as they wish. This chapter will focus on state sovereignty and its relationship to the human rights regime in the legal sense, in order to unravel the Turkey's case of children sentenced under TMK no.5532 between 2006 and 2010. The chapter will start with introducing Westphalian state sovereignty to clarify points of sovereignty which exists as core principles of international relations and international human rights regime. In the second part, the foundation of human rights regime will be explained by discussing its relationship to the former part.

A- Westphalian state sovereignty

The treaty of Osnabrück[38] and the Treaty of Münster[39], signed in 1648 and known as the Peace of Westphalia[40] (PW), created a new order in international relations by ending the thirty years war. It is known as the Westphalian state system[41]. Its importance comes from a state sovereignty system in international

[35] Douzinas, 2007 26.
[36] By using the word solution I do not tend to state that the violations are solved. There is a notable criticism that the problem and violation that TMK no.5532 had created is quite far away than being solved by changing some articles of it. At the following chapters I aim discuss the solution regarding its effect.
[37] Donnelly, 1986 616.
[38] The treaty of Osnabrück is signed between the Holy Roman Empire and Sweden.
[39] The treaty of Münster is signed between the Holy Roman Empire and France.
[40] Hereian after refered as PW.
[41] Krasner, Stephen D. "Rethinking the Sovereign State Model." *Review of International Studies.* no. 27. 2001. 17 : 35; Nye, Joseph S. JR. *Understanding International Conflicts: An Introduction to Theory and History.* Pearson Longman, 2005: 159

relations which is attributed to the PW, and stands as a milestone in the development of today's state sovereignty. However, recently it is possible to read some scholars who criticize the existence of sovereignty in the PW. Scholars such as Krasner, Osiander and Croxton claim that the PW has nothing to do with the concept of sovereignty ascribed to it by early scholars[42]. In Croxton's words "[a] great deal of creativity is required to attribute sovereignty to the peace of Westphalia…"[43]. The major argument of these criticisms comes from the fact that the world sovereignty does not originally exist in any of the treaties, since sovereignty as a word did not exist in Latin which was the language of the treaties[44]. Furthermore, these critiques argue that neither the signatories nor the writers of the treaties had sovereignty on their minds as an aim[45]. Additionally these scholars stress that even outcomes of the treaties do not provide a sovereign state system, since political entities were still bound to the Emperor[46]. They might be correct; there is no evidence that shows sovereignty as one of the aims of the PW. However, there is a key point that even these critics agree with, which is that the PW eroded the Papacy's absolute authority over states[47].It happened when the

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[42] Osiander, Andreas. "Sovereignty, International Relations, and the Westphalian Myth." *International Organizations.* Vol. 2. no. 55. 2001. 251, Croxton, Derek. "The Peace of Westphalia of 1648 and the Origins of Sovereignty." *The International History Review, Vol. 21, No. 3.* September 1999. ; Krasner, 2001.

[43] Croxton, 1999 588

[44] However as Croxton puts it 'supremum dominium' is frequently translated as sovereignty, which actually took place in the PW; Croxton, 1999 577.

[45] While Osiander reads the thirty years war as a hegemonic ambition, Osiander, 2001 252-260, Croxton only states that building a sovereign state system was not an intention of the actors, Croxton, 1999 589.

[46] The article 65 (LXV) states "[t]hey shall enjoy without contradiction, the Right of Suffrage in all Deliberations touching the Affairs of the Empire; but above all, when the Business in hand shall be the making or interpreting of Laws, the declaring of Wars, imposing of Taxes, levying or quartering of Soldiers, erecting new Fortifications in the Territorys of the States, or reinforcing the old Garisons; as also when a Peace of Alliance is to be concluded, and treated about, or the like, none of these, or the like things shall be acted for the future, without the Suffrage and Consent of the Free Assembly of all the States of the Empire: Above all, it shall be free perpetually to each of the States of the Empire, to make Alliances with Strangers for their Preservation and Safety; provided, nevertheless, such Alliances be not against the Emperor, and the Empire, nor against the Publick Peace, and this Treaty, and without prejudice to the Oath by which every one is bound to the Emperor and the Empire"; "Treaty of Westphalia." *Avalon Project.* October 24, 1648. http://avalon.law.yale.edu/17th_century/westphal.asp (accessed April 4, 2011). By Krasner, this article has been interpreted as the Emperor's authority on its states at their international affairs still continues; Krasner, 2001 37.

[47] Croxton, 1999 572; Krasner, 2001 38; Hayman, P. A., and John Williams. "Westphalian

Emperor signed a treaty with the Catholic state, France, namely the treaty of Münster, and with the Protestant state, Sweden, the treaty of Osnabrück even though the Papacy was clearly opposed[48]. Moreover, the article[49] that enables religious freedom is shown as the core evidence of the declining authority of the Papacy on relations among states. Even Pope Innocent X's reaction towards the PW could lead to such a conclusion[50]. Boucher also points out that the PW enabled the broad acceptance of territorial sovereignty[51] among states with the decline in authority of the Papacy. Although there are criticisms of its attributions to state sovereignty, the PW, with or without aiming for it, enabled a sovereign state system. Undermining high authority of the Papacy over states established territorial sovereignty of states and signing treaties with Catholic and Protestant states established mutual recognition. With this achievement, as Gross puts it, the states became equal to one another[52]. As a result, it is evident that state sovereignty found its ground with the PW and has continued to exist until now, centering on two main principles that are the legacy of the PW[53] .

The Westphalian state system has two main principles that still shape politics domestically and internationally. First, states have the right to absolute authority over a certain territory[54], which can also be termed as domestic

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Sovereignty: Rights, Intervention, Meaning and Context." *Global Society.* Vol. 20. no. 4. October 2006. 521 : 541.

[48] Krasner, 2001 35; Gross, Leo. "The Peace of Westphalia, 1648-1948." *The American Journal of International Law* Vol 42, no. No.1. January 1948 : 20

[49] Treaty of Westphalia, Article 28 (XXVIII): "That those of the Confession of Augsburg, and particularly the Inhabitants of Oppenheim, shall be put in possession again of their Churches, and Ecclesiastical Estates, as they were in the Year 1624. as also that all others of the said Confession of Augsburg, who shall demand it, shall have the free Exercise of their Religion, as well in publick Churches at the appointed Hours, as in private in their own Houses, or in others chosen for this purpose by their Ministers, or by those of their Neighbours, preaching the Word of God"; Treaty of Westphalia 1648.

[50] Hayman and Williams start their article from a quote of Pope Innocent X saying "[The Peace of Westphalia] is null, void, invalid, unjust, damnable, repobate, inane, empty of meaning and effect for all time" ; Hayman and Williams, 2006 521- 541.

[51] Boucher, David "Resurrecting Pufendorf and Capturing the Westphalian Moment" *Review of International Studies* no:27 2001, 557: 567

[52] Gross, 1948 20-41.

[53] Navari, Cornelia "State and State Systems: democratic, Westphalian or both?" *Review of International Studies* no: 33 2007, 577 : 595; Hayman and Williams, 2006 521- 541.

[54] Krasner refers it as domestic sovereignty and highlights importance of control within the certain territory; Krasner, 2001 20.

sovereignty. Secondly, their authority over that territory is recognized by other states[55], by which mutual recognition and, thus, equality among states is established[56].

State sovereignty's two main principles, domestic sovereignty and equality among states which are the core factors shaping political life, filtered down into modern society as a heritage of the PW, securing their important and decisive roles in international organizations . Currently, the world is witnessing the Palestine Liberation Organization's[57] (PLO) bid for membership in the UN[58]. The UN, as it is clearly stated in the UN charter[59] (Charter) article 2, is an international organization that is based on equality among states. Additionally this maintains that all the UN members hold domestic sovereignty that must be recognized by the others[60]. Thus, it is vitally important for the PLO to become a member of the UN, since it would means achieving domestic sovereignty, recognition of this fact, and becoming an equal among states. That means the UN is an international institution which legitimizes and secures domestic sovereignty and equality among states namely, as will be called here after, state sovereignty. However, the UN also stands as the founder of the human rights regime. For some, state sovereignty and human rights are mutually exclusive, but they both exist strongly in the UN system.

In the next section, the place of state sovereignty in the UN and the foundation of the human rights regime will be introduced, analyzing the relationship between state sovereignty and human rights.

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[55] Krasner names mutual recognition aspect of sovereignty as international legal sovereignty; Krasner, 2001 21. Hayman and Williams stress vitality of recognition of sovereignty by other states. They state that unless a state's sovereignty is recognized it is unable to exercise its sovereign powers; Hayman and Williams, 2006 524.

[56] Croxton 1999, 570.

[57] Hereinafter PLO.

[58] UN News Center. "Ban sends Palestinian application for UN membership to Security Council." *The UN*. September 23, 2011. http://www.un.org/apps/news/story.asp?NewsID=39722&Cr=palestin&Cr1 (accessed September 30, 2011)

[59] Hereinafter Charter.

[60] Article 2 of the Charter regulates relations among member states and relations of states with the UN itself, which will be explained in the next part United Nations. "Charter of the United Nations." *The United Nations.* June 26, 1945. http://www.un.org/en/documents/charter/intro.shtml (accessed January 9, 2011)

B- Foundation of the human rights regime and its relationship to state sovereignty

Right after World War II[61] (WWII) ended the UN, which can be seen as an attempt to remake the League of Nations[62] (LN), was established with the aim of maintaining and securing peace[63]. Fresh memories and pains of the Holocaust and national leveled rights declarations and bills affected the structure and characteristics of this new international organization[64]. The Charter, the foundation document of the UN, was debated and signed by 50 states at the meeting held in San Francisco on 26 June 1945 and after ratifications were made on 24 October 1945, it came into force[65] and the UN was officially established as an international organization made of sovereign states seeking to achieve human rights as one of its goals.

Article 2 of the Charter sets the principles of the UN. Article 2(1) states "the organization is based on the principle of the sovereign equality of all its Members"[66]. Article 2(4) states that all members should respect "territorial integrity or political independence of any state"[67] and article 2(7) ensures that the

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[61] Hereinafter WWII:

[62] Hereinafter LN.

[63] The United Nations which is founded right after the WWII seeks for similar goals with and taking the legacy of the League of Nations. At the first session of the UN General Assembly adoption of the League of Nations legal and political legacies like treaties, agreements and monetary legacies like assets were discussed. United Nations "Official records of the first part of the General Assembly."1946. http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL4/610/71/PDF/NL461071.pdf?OpenElement (accessed October 11, 2011).

[64] Eleanor Roosevelt in her speech during adoption of the Universal Declaration of Human Rights on 10 December 1948 attributes to the Declaration of the Rights of Man by the French people in 1789, the adoption of the Bill of Rights by the people of the United States and other national level rights documents and wishes the Universal Declaration of Human Rights will take its place among them "Roosevelt, Eleanor: On the adaptation of the universal decleration of human rights ." *American Rhetoric Online Speech Bank.* 1948. www.americanrhetoric.com/speeches/eleanorrooseveltdeclarationhumanrights.htm (accessed October 8, 2011).

[65] Charter, 1945.

[66] Charter, 1945.

[67] "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"; Charter, 1945.

UN does not "intervene in matters which are essentially within the domestic jurisdiction of any state" with securing the Security Council's[68] (SC) duty to determine and take measures against an act of aggression[69].

Article 2 of the Charter clearly adopts two principles of state sovereignty that are the legacy of the PW, as explained in the previous section. Article 2(1) sets equality among states as the core principle of the UN. Article 2(4) and article 2(7) secures domestic sovereignty of states. While the former secures equality among states; the latter secures it among the UN and states. Additionally, the SC, which can decide whether there is a threat or aggression and holds power to take measures is an organ made up of member states[70]. By which, states are the solely decision makers of the UN system. In other words, the UN is a state-centric international organization in which, the legacy of PW, states' domestic sovereignty, and equality among states is preserved.

The Charter puts significant importance on human rights at every level. The preamble of the Charter starts with a confirmation of respect for human rights[71]. In Chapter I, promoting and respecting human rights is set as one of the purposes of the UN[72]. In addition, the authority to make recommendations for the

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[68] Herein after refered as SC.

[69] "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll"; Charter, 1945.

[70] SC is made of 5 permement members and other 10 members which are elected in GA for two years period. There are committees (standing committees and ad hoc committees) and working groups which are also run by the member states; United Nations "Members" UN Security Council, http://www.un.org/sc/members.asp (accessed on December 14, 2011); United Nations "Structure" UN Security Council, http://www.un.org/Docs/sc/unsc_structure.html (accessed on December 14, 2011).

[71] "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and..."; Charter, 1945.

[72] "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and…"; Charter ,1945; Karlı, Mehmet. "Küresel İnsan Hakları Mücadelesinin Mihenk Taşı İnsan Hakları Beyannamesi:60. Yılında Tarihi Önemi, Hukuki Etkileri ve Siyasi Mesajları." *TESMERALSEKDİZ*, 2009: 21 pp 24; Henkin, Louis. "The United Nations and Human Rights." *International Organization*, May 22, 2009: 504; Griller, Stefan. "International Law, Human Rights and the European Community's Autonomous Legal Order: notes on the European Court Justice desicion on Kadi." *European Constitutional Law Review*, 2008: 528; Hsiung, James C. *Anarch & Order The Interplay of Politics and LAw in International Relations.* Lynne Rienner Publishers,

promotion and observation of human rights is given to the General Assembly[73] (GA)[74] and the Economic and Social Council[75]; which, one year later in 1946 established the Commission on Human Rights[76]. Lastly, in Chapter IX article 55 of the Charter, all member states are charged with responsibility for respecting and securing human rights[77].

However, it would be wrong to place the foundation of human rights in legal terms with the establishment of the UN. The 1689 the British Bill of Rights[78], the 1791 US Bill of Rights[79] and the 1789 French Declaration of the Rights of Man and of the Citizen[80] can all be cited as the first legally recognized

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1997 : 110.

[73] Hereinafter GA.

[74] Article 13(1) "The General Assembly shall initiate studies and make recommendations for the purpose of: a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification; b. promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"; Charter ,1945; Griller, 2008 528; Henkin, 2009 504, Hsiung, 1997 110; Karlı; 2009 24.

[75] Article 62 "It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all" and article 68 ".The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions"; Charter ,1945; Griller, 2008 528; Henkin, 2009 504, Hsiung, 1997 110; Karlı; 2009 24.

[76] In 3 April 2006, with the desicion of GA the Commission on Human Rights gave its place to Human Rights Council. United Nations. "A/RES/60/251." *United Nations Dag Hammarskjöld Library.* April 3, 2006. http://www.un.org/depts/dhl/resguide/r60.htm (accessed October 15, 2011); Steiner, Henry J., Philip Alston, and Ryan Goodman. *International Human Rights in Context.* New York: Oxford University Press, 2007 pp 135

[77] "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."; Charter ,1945; Griller, 2008 528; Henkin, 2009 504; Hsiung, 1997 110; Karlı; 2009 24.

[78] "English Bill of Rights 1689." *Avalon Project.* 2008. http://avalon.law.yale.edu/17th_century/england.asp (accessed October 9, 2011).

[79] "Constitution of the United States: Bill of Rights." *Avalon Project.* 2008. http://avalon.law.yale.edu/18th_century/rights1.asp (accessed October 9, 2011).

[80] "Declaration of Rights of Man- 1789." *Avalon Project.* 2008. http://avalon.law.yale.edu/18th_century/rightsof.asp (accessed October 9, 2011). In 1791 Olympia de Gouges re-wrote the French Decleration of Rights of Man and of the Citizen as Decleration of Rights of Woman and of the Female Citizen. However, her version is not welcomed and became of

national human rights documents[81]. Moreover, the LN[82], although it did not take the question of human rights in hand, had to solve disputes concerning minorities and the massive amount of refugees that the World War I[83] (WWI) caused[84]. However, human rights entered the domain of international relations and international law after the WWII as a widely accepted norm with a set of international legal standards[85].

Between the signing and ratifying of the Charter another meeting was held in London on 8 August 1945 to finalize the charter of the International Military Tribunal[86] (IMT). It was this charter that governed both the Nuremberg trials and the Tokyo trials that were held in order to prosecute major war criminals of the WWII[87]. Although the legal legacy and legality of the IMT has been criticized, it is mostly agreed that the IMT played a significant role in the institutionalization and legalization of human rights. Its importance comes from holding individuals as responsible, doing away with legal immunity for heads of states and crimes listed in article 6[88] of the IMT charter. Additionally the IMT charter stresses in

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the reasons of her execution *Encyclopædia Britannica Online*, s. v. "Olympia de Gouges**,"** http://www.britannica.com/EBchecked/topic/850593/Olympia-de-Gouges (accessed November 23, 2011); Otto, Dianne. "Lost in translation: re-scripting the sexed subjects of." In *International Law and Its Others*, by Anne Orford,. 2006, 318-356.

[81] Although they can be seen as foundations of today's human rights documents, it should be remembered that they had more of a citizen aspect which is quite narrow than human rights.

[82]League of Nations established right after the WWI with the aim of securing peace and promoting cooperation among states "The Covenant of the League of Nations." *Avalon Project.* 2008. http://avalon.law.yale.edu/20th_century/leagcov.asp (accessed October 10, 2011).

[83] Hereinafter WWI.

[84] Arendt, Hannah. *The Origins of Totalitarism.* Florida: Harcourt Brace & Company, 1973: 273; (Nye, 2005 86-88); (Hsiung, 1997 107).

[85] Following sources can be checked in this issue: Karlı, 2009; Steiner, Alston and Goodman, 2007; Hsiung, 1997; Maogoto, Jackson Nyamya "Transforming Westphalian Sovereignty, Human Rights and International Justice as a Transnational Crucible" *Notre Dame Law Review*, Vol.5, 2005; Buchanan, Allen. *Human Rights and the Legitimacy of the International Order.* 2008.

[86] Hereinafter IMT.

[87] United Nations . "Charter of the International Military Tribunal." *UNHCR The UN Refugee Agency.* August 8, 1945. http://www.unhcr.org/refworld/docid/3ae6b39614.html (accessed January 11, 2011)

[88] "The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international

article 8[89] that it does not accept 'acting under superior orders' as a defense. Taking into consideration criticisms on their vagueness[90], crimes listed at the IMT played an important role in setting the standards of international law and international institutions. The International Law Commission[91] (ILC) agreed on seven crucial principles called the Principles of International Law based on the IMT charter and the Nuremberg trials[92] which were affirmed in the GA on 11 December 1946[93]. Moreover, the Rome Statute which was signed by 120 states on 17 July 1988 and came into force on 1 July 2002 with a ratification by 60 states, established the first UN-free international court institution called the International Criminal Court[94]. Listed crimes in the Rome Statute show similarity with the ones

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treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing; (b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to Wave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan" (Ibid.)

[89] "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires." (Ibid.)

[90] Gross, 1956 10; Schieke, Müller, and Irina Kaye. "Defining the Crime of Aggression Under the Statute of the International Criminal Court." *Leiden Journal of International Law.* no. 14. 2001. 409; Kirsch, Stefan. "Two Kinds of Wrong: On the Context Element of Crimes againstHumanity." *Leiden Journal of International Law.* no. 22. 2009. 525; Garibian, Sévane. "Crimes Against Humanity and International Legality in Legal Theory After Nuremberg." *Journal of Genocide Research.* Vol. 9. Translated by G.M. Goshgarian. 2007. 93.

[91] Hereinafter refered as ILC.

[92] International Law Commission. "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries." *United Nations Treaty Collection.* 1950. http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_1_1950.pdf (accessed October 15, 2011).

[93] United Nations. "Affirmation of the Priniples of International Law." *Audiovisiual Library of International Law.* December 11, 1946. http://untreaty.un.org/cod/avl/ha/ga_95-I/ga_95-I.html (accessed October 15, 2011).

[94] United Nations. "Rome Statute of the International Criminal Court." *United Nations Treaty Collection.* July 17, 1998. http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=1&mtdsg_no=XVIII-10&chapter=18&lang=en (accessed October 15, 2011).

in IMT[95]. It can be clearly seen that the Rome Statute was fueled by the evaluations that followed the Nuremberg and Tokyo trials[96]. Some other remarkable concepts that have a background in the IMT charter, such as crimes against humanity and crimes against peace entered into the vocabulary of international relations and international law through the IMT. As Borgwardt points out, though human rights were expressed as wishes and advice in the Charter, the Nuremberg trials took the further step of carrying human rights to the legal and political arena by using an international legal institution[97].

Furthermore, the establishment of the Commission on Human Rights[98] (Commission) by the Economic and Social Council of the UN in 1946[99] secured the place of human rights within international relations, not only in extraordinary times, but also in peace times. The Commission[100] prepared the Universal Declaration of Human Rights[101] (UDHR) which was then adopted on 10 December 1948[102]. This declaration established the UN as the core norm maker for the human rights regime that affects international law and international relations mechanism[103]. At the very same session the GA gave power to the Commission to prepare a covenant version of the UDHR[104]. However, it was not until 1976 with the ratification of two treaties[105], the International Covenant on

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[95] Crimes against humanity and war crimes exist in IMT Charter and at Nuremberg principles both. However unlike those two ICC establishes defense of superior orders; IMT, 1945; International Law Commission, 1950; Rome Statute, 1998.

[96] Garibian, 2007 93; Kirsch; 2009 525; Schieke and Kaye, 2001 409; McCoubrey, Hilaire. "From Nuremberg to Rome: Restoring the Defence of Superior Orders." *International & Comparative Law Quarterly.* no. 50. 2001 . 386; Borgwardt, Elizabeth. "A New Deal for the Nuremberg Trial: The Limits of Law in Generating Human Rights Norms." *Law and History Review.* Vol. 26. no. 3. 2008. 679.

[97] Borgwardt, 2008 695.

[98] Hereinafter Commission.

[99] United Nations. "Commission on Human Rights." *Office of the United Nations High Commissioner on Human Rights.* 2007. http://www2.ohchr.org/english/bodies/chr/index.htm (accessed October 15, 2011).

[100] In 2006 it is replaced with the Human Rights Council at 60th session of General Assembly; A/RES/60/251, 2006.

[101] Hereinafter refered as UDHR.

[102] United Nations. "A/RES/3/217 A." *UN Documents.* 10 December 1948. http://www.un.org/Docs/asp/ws.asp?m=A/RES/217%20%28III%29 (accessed October 15, 2011).

[103] Steiner, Alston and Goodman, 2007 135.

[104] Under the section F;A/RES/3/217, 1948.

[105] ICCPR and ICESCR was adopted in 1966 at 21st session of the GA however it needed 10 years

Civil and Political Rights[106] (ICCPR) and the International Covenant on Economic, Social and Cultural Rights[107] (ICESCR), that the norms of the UDHR reached a convention version which could impose relative authority on states that had agreed to be a party to the treaties[108] The UDHR, the ICCPR and the ICESCR are referred to as the Bill of Rights[109], and are considered to be the core of human rights treaties and mechanisms of the interstate epoch.

The potential barrier posed by state sovereignty to reaching, spreading and improving human rights has been an issue since right after WWII[110]. Scholars, especially law scholars, mainly take on the subject within the scope of the restrictions or liabilities of states. For some the international system is restricts the Westphalian state system and they state that human rights mechanisms especially impose liabilities to states that they cannot afford to resist. For others state sovereignty is still an issue to limit, however proposals to limit state sovereignty are severe. Buergenthal points to the political and economic consequences that a state would face if it conducted large scale[111] human rights violations, or even from not preventing other states' human rights violations[112]. He adds that a state that conducted serious human rights violations would lose its legitimacy

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to reach enough ratifications to be in force; United Nations "International Covenant on Economic, Social and Cultural Rights." *Office of the United Nations High Commissioner for Human Rights.* December 16, 1966. http://www2.ohchr.org/english/law/cescr.htm (accessed October 16, 2011); United Nations."International Covenant on Civil and Political Rights." *Office of the United Nations High Commissioner for Human Rights.* December 16, 1966. http://www2.ohchr.org/english/law/ccpr.htm (accessed October 16, 2011).

[106] Hereinafter ICCPR.

[107] Hereinafter ICESCR:

[108] Steiner, Alston and Goodman, 2007 136.

[109] Jeong, Ho-Won. *Peace and Conflict Studies; An Introduction.* Ashgate Publishing Limited, 2000: 211; Reus-Smit, Christian. "Human Rights and the Social Construction of Sovereignty." *Review of International Studies* 27, 2001, 519: 522; Buergenthal, Thomas. "The Contemporary Significane of International Human Rights Law." *Leiden Journal of International Law* 22, 2009, 217: 219; Alam, M. Shah. "Enforcement of International Human Rights Law by Domestic Courts: A Theoretical and Practical Study." *Netherlands International Law Review* LIII 2006, 399: 400; Buchanan, 2008 49.

[110] Hannah Arendt in her book , *The Origins of Totalitarianism,* criticizes human rights. Her main critique is on nation states crucial role on securing and implementing human rights; Arendt, 1973 267.

[111] Buergenthal uses large scale human rights violations which rises another problematic. What is a large scale human rights violation? How and with which means can we measure it?

[112]Buergenthal, 2009 218.

domestically and internationally[113]. Moreover, he emphasizes the role that non-governmental organizations[114] (NGOs) play to force states to protect human rights by reminding them of their obligations and by making state's human rights violations public when they occur. [115]. McCorquodale, also, argues about the criticisms on the state- centric structure of human rights law by stressing the importance of NGOs on establishing and securing human rights laws[116]. He reminds of NGOs contribution on formulating the CRC[117] and thus claims that the international legal system, in which human rights mechanisms partake, is an inclusive system that consists of NGOs, non-state actors and even individuals, rather than an exclusive one in which states are the only main actors[118]. Reus-Smit takes issue from a different angle but comes to nearly the same conclusion as Buergenthal and McCorquodale who suggest that the international system contains legal regulations and non-state actors which restrict state sovereignty. Different from what has been said Reus-Smit asserts that an understanding of sovereignty changes according to social values.He adds that while human rights, as a rising social value since WWII, give shape to the understanding of sovereignty., While human rights restrict the absoluteness of state sovereignty, on the other hand it also provides legitimacy to state sovereignty[119]..

As shown above, there is a strong belief in the impact of human rights mechanisms on state sovereignty. Supporting arguments highlights how the prosecutions of criminals in an international court rather than a national one in the Nuremberg and Tokyo trials changed the understanding for good of Westphalian state sovereignty, by changing the understanding of what before WWII had been considered to be a national matter, to now being considered an international matter. [120]. Additionally, it is argued that the international mechanism set by the

[113]Buergenthal, 2009 223.
[114] Hereinafter NGOs.
[115]Buergenthal, 2009 222.
[116] McCorquodale, Robert. "An Inclusive International Legal System." *Leiden Journal of International Law* 17, 2004 477-504: 477.
[117]McCorquodale, 2004 493.
[118]McCorquodale, 2004 503.
[119] Reus-Smit, 2001 538.
[120] Maogoto, 2005 13.

UN with its' Charter and with further declarations and treaties, restricts the state sovereignty and puts crucial importance on human rights to which states cannot risk to be out of or to go against. Lastly, in response to the critiques that the UN and its mechanisms are state centric, they respond with the role of NGOs on securing and protecting human rights. However these answers do not seem enough, and critiques seems valid. I would like to present the most fundamental critiques under three categories; sovereignty, state-centric, and legitimacy.

1. Sovereignty

Most definitely, the concept of sovereignty and the way it has been practiced has changed over time. And certainly the human rights regime has had an impact on these changes. However, the two main principles of sovereignty, which were explained above, are still at the core of the concept which directly shapes the structure of human rights regime and a basic understanding of human rights.

David Held categorizes three models of sovereignty to show the transformation of sovereignty from the PW to today.[121]The first model is, as he calls it , the classic regime of sovereignty. By this he means sovereignty starting from the PW to the early 20th century[122]. He defines the classic regime of sovereignty as:

"…states are nominally free and equal; enjoy supreme authority over all subjects and objects within given territory; form separate and discrete political orders with their own interests (backed by their organization of coercive power); recognize no temporal authority superior to themselves; engage in diplomatic initiatives but otherwise in limited measures of cooperation; regard cross- border processes as a "private matter" concerning only those immediately affected; and accept the principle of effectiveness, that is, the principle that might eventually makes right in the international world – appropriation becomes legitimation[123]".

He continues to the second model of sovereignty which he calls liberal

[121] Held, David. "Law of States, Law of Peoples: Three Models of Sovereignty." *Legal Theory*, no. 8 2002, 1.
[122] Held, 2002 3.
[123] Held, 2002 4.

international sovereignty, and starts it from the beginning of WWII when it became more concrete[124]. He claims the shift from the classic regime of sovereignty to the liberal international sovereignty began with "the principles of self-determination, democracy, and human rights[125]". He also believes that human rights have played the main role in this transformation[126]. He attributes the IMT as its turning point as a result of its rejection of superior orders as a defense. He further asserts that the understanding of crimes limited to national jurisdiction has changed since the Nuremberg and Tokyo trials[127]. He states that within the liberal international order, states might lose their sovereignty when they violate standards and principles of the liberal international order; since, such violations became a legal code instead of being only a moral issue[128].

However, Held sees what still exists and has not transformed in the liberal international order. Even when he is pointing to the effect of human rights on the shift of sovereignty, he mentions that this shift happened through the consent of states[129]. Additionally, when he mentions the liberal international order's ability to give shape to sovereignty and to take it away, he stresses that all the measures are formulated by states[130] and not to forget that states are bound to their consent to these measures. He asserts that the third model of sovereignty, the cosmopolitan sovereignty is the solution to this problematic[131] of state-centrism[132].

"Cosmopolitan sovereignty is sovereignty stripped away from the idea of fixed borders and territories governed by state alone, and is instead thought of as frameworks of political regulatory relations and activities, shaped and formed by an overarching cosmopolitan legal framework[133]"

Without degrading the shift of understanding and practicing sovereignty,

[124] Held, 2002 5.
[125] Held, 2002 5.
[126] Held, 2002 9.
[127] Held,2002 7.
[128] Held,2002 13.
[129] Held,2002 5.
[130] Held, 2002 12-13.
[131] Not only Held but many scholars are considering cosmopolitan sovereignty or cosmopolitan law as a solution to restrict state sovereignty and to secure human rights; Ingram, James D. "What is a "Right to Have Rights"? Three Images of the Politics of Human Rights" *American Political Science Review* vol. 102, no.4 November, 2008: 406.
[132] Held, 2002 23.
[133] Held, 2002 33.

my critique is that the two principles of sovereignty still exist in all models. With the transformation of sovereignty, the practice and understanding of two principles, domestic sovereignty and equality among states, changes as well, but they do not disappear. They exist at the heart of every model, even when the sovereignty is de-linked from the state as cosmopolitan sovereignty suggests. Since the PW they have been the shaping factors in the political and legal arena, which also secured its place in the human rights regime as well. With the help of those principles states can easily create their escapes from the liabilities they do not want to be bound to. So actually it is doubtful that, since sovereign states comes up, gives consent and decide to be in or out, human rights regime have any impact on the core of state sovereignty, since sovereign states give form to human rights documents and have full authority to give or not to give consent to being a part of human rights treaties. From such a perspective, international human rights regime's relation to sovereignty appears to be imminent rather than being determined one by the other. While the sovereign states agrees on measures and establishes human rights regime, the human rights regime contains immunity from domestic sovereignty and equality among states in a scope that sovereign states can accept.

2. State-centric

The critiques to human rights regime being state-centric, as explained above, replied with highlights the importance of the NGOs. Before going on to the debate of the role and place of NGOs, it would be more expedient to analyze the place of states.

Jodoin tackles the issue of state sovereignty's place within international law by analyzing its ontological character[134]. He argues that with the overlapping understanding of sovereign as a monarch ruler and the state, the state gained the

[134] Jodoin, Sébestien. "International Law and Alterity: The State and the Other." *Leiden Journal of International Law*, no. 21 2008, 1.

characteristics of an individual being[135]. Thus, states like individuals, as a being that is autonomous in its actions and has a will, should be subjected to the natural law which arose from the law of God[136]. "Since nations are free and independent of each other as men are by nature, it is a general law of their society that each Nation should be left to the Peaceful enjoyment of that liberty which belongs to it by nature[137]. Afterwards, the natural existence of state will be derived from the natural law constructed as a reality by positivist approach, by which the law of God gave its place to earthly made law[138]. States which were subjected to the law of God lost their higher power regulating their being and relations that needed to be ordered, hence, international law took its place, "…the state is conceived as a subject first and a legal subject second, and as such it is international law which is subject to the law of statehood[139]". Jodoin concludes, with states characterized as a being first, then a legal being, the international law exists only for states to order states within the ontology of statehood, thus, non-state elements are not allowed to be included[140] . Jodoin formulates such an absolute state-centric existence of international law as a violation of states to the non-state actors and continues; "…the original violence of Westphalia permeates the entirety of the international legal system and lies at the origins of other instances of violence[141].

After such an explanation it is impossible to talk about the impact of NGOs. Individuals and non-state actors cannot really be actors to in a human rights regime subjected to statehood[142]. They can never be at the same level as the state that is the determining and determined actor, "absolute mastery of the Self by the Self[143]".

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[135] Jodoin, 2008 5-6.
[136] Jodoin, 2008 5-6.
[137] Jodoin, 2008 7. The quote used above also been quoted in the source, the original source of the quote: E. De Vattel, *The Law of Nations*, trans. C. G. Fenwick (1916), 6.
[138] Jodoin, 2008 8.
[139] Jodoin, 2008 8.
[140] Jodoin, 2008 9.
[141] Jodoin, 2008 9.
[142] Jodoin, 2008 13.
[143] Jodoin, 2008 7.

3. Legitimacy

In addition to criticisms of sovereignty's and states' steadiness in international law, specifically in human rights regime, another major critique is the legalization it provides to state sovereignty, and to the status-quo (like to a certain governing system namely democracy, to a certain economic system namely capitalism).

Similar to the argument of Jodion explained above, Douzinas argues that human rights were incorporated in the establishment of a world order[144]. There was an urgent need to establish a new world order because pre-WWII institutions and principles became invalid by the WWII[145]. "They[146] provided a high moral ground for the new order and the United Nations, its prime institutional expression. But the commitment to morality and rights was schizophrenically accompanied by the principle of non-intervention in the internal affairs of states[147]". Hence, Douzinas adds that, as directly linked with Jodion's explanation of state as being, if human rights regime guided an era of individuality, as states "the mirror-image of the individual[148], it also initiated an era of states and stresses that states and human rights are immanent rather than mutually exclusive[149].

In addition to human rights regime's usage to legitimize an establishing world order, which is not against the aims of the human rights regime anyhow, Douzinas presents the argument that, by a state being a member of international human rights agreements and mechanisms, it can introduce itself as "a human rights state[150]". Hence human rights regime becomes a tool to legitimize the state[151] and additionally, its actions. The world had witnessed how arguments of human rights have been used as justification and legalization for state politics including declaring war. Douzinas reminds how human rights and governmental

[144] Douzinas, 2007 27.
[145] Douzinas, 2007 27.
[146] Meaning human rights.
[147] Douzinas, 2007 28.
[148] Douzinas, 2007 98.
[149] Douzinas, 2007 98.
[150] Douzinas, 2007 24.
[151] Douzinas, 2007 24.

aims have been combined. He highlights that this combination was also used for legitimizing sovereign interests[152]. Douzinas shows that human rights can be used to declare war[153] by quoting from Colin Powell's[154] speech on the Afghanistan war[155]. In addition to that, human rights have also been used to legitimize the Iraqi war[156]; while the difference between democracy and human rights blurred and became one[157].

Lastly, in relation to the last example above, there is another strong critique on human rights legitimization of status-quo, as being in favor of a certain type of government, democracy, and a certain type of economic model, capitalism[158]. While Held lists articles from human rights agreements referring to democracy[159], Douzinas focuses on the effect of such favoring. He argues that human rights regime normalizes and secures "dominant economic and social relations[160]" He suggests that with human rights regime securing certain rights on

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[152] Douzinas, 2007 24.
[153] Douzinas 2007 61.
[154] During that time Powell was the Secretary of the United States of America; *Encyclopædia Britannica Online*, s. v. "Colin Powell," http://www.britannica.com/EBchecked/topic/473238/Colin-Powell (accessed November 23, 2011).
[155] Douzinas, 2007 60-61. The Afghanistan War started in 2001 right after the attacks to International Trade Center, known as the date of the event 9/11 and still continues; *Encyclopædia Britannica Online*, s. v. "Afghanistan War," http://www.britannica.com/EBchecked/topic/1686268/Afghanistan-War (accessed November 24, 2011).
[156] George W. Bush uses human rights as a legimization of taking harder measures, including war at speech in 2002 "America believes that all people are entitled to hope and human rights, to the nonnegotiable demands of human dignity"; The Guardian, "Transcript:George Bush's speech on Iraq" *The Guardian*, October 7, 2002 http://www.guardian.co.uk/world/2002/oct/07/usa.iraq (accessed November 24, 2011).
[157] CNN World, "Bush: 'Democracy will succeed'in Iraq" November 19, 2003 http://articles.cnn.com/2003-11-19/world/bush.speech_1_alternative-state-procession-bush-and-first-lady-protesters?_s=PM:WORLD (accessed November 24, 2011); CNN U.S., "President Bush's address to the United Nations" September 12, 2002 http://articles.cnn.com/2002-09-12/us/bush.transcript_1_generations-of-deceitful-dictators-commitment-peace-and-security/3?_s=PM:US (accessed November 24, 2011); Youtube, "George Bush 2003 Speech – Democracy in Iraq" January 26, 2011 http://www.youtube.com/watch?v=hJyhqlkaHB0 (accessed November 24,2011).
[158] Douzinas, 2007 101-110; Held, 2002 9-11.
[159] "The American Convention of Human Rights, along with other regional conventions, contains clear echoes of Article 21 of the Universal Declaration as well as of the Article 25 of the Covenant on Civil and Political Rights, while the European Convention on Human Rights is most explicit in connecting democracy with state legitimacy, as is the statue of the Council of Europe, which makes a commitment to democracy a condition of membership"; Held, 2002 11.
[160] Douzinas, 2007 102.

"property, contractual relations, the family, religion[161]", that he names as core institutions of capitalism, human rights regime prevents these issues from being criticized politically; "the main contemporary effect of human rights is to depoliticize politics itself[162]".

To sum up, critiques of human rights regime focus on three aspects. While the critique of sovereignty argues that two principles of sovereignty still shapes the international politics and hence, shaped the human rights regime, the critique of state-centric adds that the new international order, upon which human rights regime was founded, is highly state-centric and runs by the laws of statehood without letting non-state actors to be as decisive as they are. And the final critique is that human rights regime is a way of legitimizing state sovereignty, and its actions, as used in the Afghanistan war and Iraqi war, and existing world order by favoring certain political and economic models allows them to be outside of political debate. Replies to these critiques were far from being satisfactory. John Dugard who worked at ILC and then at the Human Rights Council as a Special Rapporteur, stresses that although domestic sovereignty is not as absolute as it used to be since the UN human rights mechanisms were established, international law is still based on state consent. He adds that human rights are actually are not taken seriously by states[163].

States enjoy being a part of the human rights regime that gives states and their ambitions credibility and legitimization, while at the same time enjoy being the only actor that decides the scope of declarations and treaties and decides whether to be bound in or not. Since the main human rights violators are states, it would not be surprising to see states trying to escape from the restrictions and liabilities that human rights treaties impose. While they do not want their domestic sovereignty to be strictly tied to human rights obligations, at the same time they do not want to jeopardize their name with human rights violations. So they seek

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[161] Douzinas, 2007 102.
[162] Douzinas, 2007 102.
[163] Dugard, John. "The Future of International Law: A Human Rights Perspective-With Some Comments on the Leiden School of International Law." *Leiden Journal of International Law* 20 2007,729.

legally legitimate explanations for their violations within the human rights regime.

In the next chapter, Turkey's violation of the CRC will be introduced. First the CRC's relation to state sovereignty will be analyzed and later after case of TMK law between the years 2006 and 2010 will be introduced.

SECOND CHAPTER
The CRC and the TMK

The rights of children have a longer background than most of the thematic rights. Even LN adopted a declaration on children's rights, the Geneva Declaration of the Rights of the Child, on 24 September 1924[164]. Although it is a quite minimally scoped declaration[165], it opened a way for the UN. The UN Declaration of the Rights of the Child adopted on 20 November 1959 at the 14th session of the GA[166], which is slightly longer than the former but still quite narrow in scope. Articles on children's rights are present in UDHR[167], ICCPR[168] and ICESCR[169]. However it was not until 20 November 1989 that the issue of children's rights was brought to a convention. The CRC took effect on 2 September 1990[170] and currently has 193 states parties[171]. On 17 December 1999,

[164] "Geneva Declaration of the Rights of the Child" September 26, 1924. http://www.unicef.org/vietnam/01_-_Declaration_of_Geneva_1924.PDF (accessed November 25, 2011).

[165] "By the present Declaration of the Rights of the Child, commonly known as "Declaration of Geneva," men and women of all nations, recognizing that mankind owes to the Child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed: 1. The child must be given the means requisite for its normal development, both materially and spiritually; 2. The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored;3. The child must be the first to receive relief in times of distress; 4. The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation; 5. The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men."; (Geneva declaration, 1924).

[166] "Declaration of the Rights of the Child" November 20, 1959 http://www.unicef.org/lac/spbarbados/Legal/global/General/declaration_child1959.pdf (accessed November 25, 2011).

[167] Especially article 25(2) highlights children, however the whole decleration can be considered of including children since there is no adult, children division in the UDHR; UDHR, 1948.

[168] Article 23(4) and article 24 in ICCPR; ICCPR, 1966.

[169] Article 10 in ICSECR, ICSECR, 1966.

[170] CRC, 1989.

after receiving reports on both subjects, the GA urged the Committee to prepare two optional protocols to the CRC[172]. On May 25, 2000, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict[173] (CRC-OP-AC) and Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography[174] (CRC-OP-SC) were adopted by the GA[175]. Turkey has been a state party to the CRC since 4 April 1995 with a reservation on the articles 17, 29 and 30[176]. CRC-OP-AC and CRC-OP-SC both signed on 8 September 2000, the former ratified on May 4 2004[177] and the latter ratified on August 19 2002 with a declaration[178]. Reservation and denunciation are two legally arranged ways of bypassing liabilities of a treaty, while enjoying the benefit of legitimization with being inside the human rights regime. Although, the case of Turkey is not directly linked with the reservation it placed on CRC, it is important to analyze how they are constructed in order to get a picture of CRC's relation to state sovereignty.

In this chapter, first with a brief look at the construction of denunciation and reservation in international law and in the CRC, its relation to state sovereignty will be analyzed. Then the case of Turkey will be introduced and will be analyzed with the CRC provisions and related general comments.

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[171] CRC status, 2011.
[172] United Nations "Fifty-fourth session Agenda item 112" February 25, 2000 http://www.unhchr.ch/Huridocda/Huridoca.nsf/%28Symbol%29/A.RES.54.149.En?Opendocument (accessed November 25, 2011).
[173] Hereinafter CRC-OP-AC.
[174] Hereinafter CRC-OP-SC:
[175] United Nations "Fifty-fourth session Agenda item 116 (*a*)" March 11, 2001 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/625/67/PDF/N0062567.pdf?OpenElement (accessed November 29, 2011).
[176] CRC status, 2011.
[177] United Nations "Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict" *United Nations Treaty Collection.* November 29, 2011 http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en (accessed November 29, 2011).
[178] United Nations "Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child prostitution and Child Pornography" *United Nations Treaty Collection* November 30, 2011 http://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11-c&chapter=4&lang=en#EndDec (accessed November 30, 2011).

A- The CRC and state sovereignty

Denunciation and reservation are recognized actions that a state can take on a treaty. The Vienna Convention on the Law of Treaties[179] (VCLT) signed on 23 May 1969, and entered to force in 27 January 1980 regulates the procedures of international treaties, including human rights treaties[180]. The Preamble of VCLT highlights "principles of free consent and of good faith and the *pacta sunt servanda*[181] rule" and recalls the principles of the UN which exists in the Charter article 2[182]. The stress on 'free consent' embodies two concepts, equality among states and domestic sovereignty, which are basically the fundamentals of the international law[183], which justifies the critiques of the state-centric and state sovereignty based structure of the human rights regime. In other words in every international treaty including the human rights treaties sovereign states, which are the only recognized decision maker as a result of their domestic sovereignty, holds the power to be bound in an agreement. International law system can only have a good faith that states will respect human rights obligations which results in human rights regime being a weakly implemented but highly promotional regime as Jack Donnelly suggests[184]

Article 2(d) of VCLT reservation is described in such a way that prohibits late reservations[185]. In other words, reservations have to be made before the treaty

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[179] Hereinafter VCLT.

[180] United Nations. "Vienna Convention on the Law of Treaties." *Treaty Series.* Vol. 1155. 2005. 311.http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed October 21, 2011).

[181] *Encyclopædia Britannica Online*, s. v. "international law," http://www.britannica.com/EBchecked/topic/291011/international-law (accessed November 29, 2011).

[182] "Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,"; Charter, 1945.

[183] Alam, 2006 407; Dugard, 2007 732.

[184] Donnelly, 1986 613.

[185] "(*d*) reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to

is ratified. The provision regarding denunciation is not so clear. In article 56 it states that if denunciation is not mentioned in the treaty, states either cannot denunciate or basically they have to decide when a state party declares its wish before twelve months[186]. However, in order to secure human rights treaties from arbitrary acts of states which would not coincide with the purpose and aim of the treaty, each treaty can choose to contain provisions explaining how reservations and denunciations may take place.

The CRC contains provisions on both denunciation and reservation. Article 51 states reservations can be made before the ratification process is ended and specifies that if reservations contradict with objects and purposes they won't be void[187]. Denunciation of the CRC is permitted in article 52[188] . However, it is added that denunciation will be valid after one year, which prevents states from using denunciation arbitrarily to avoid obligations of the treaty. Moreover, to safeguard obligations it establishes the Committee (article 43)[189] which is made

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exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;"; VCLT, 2005.

[186] " A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (*a*) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (*b*) a right of denunciation or withdrawal may be implied by the nature of the treaty. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1."; VCLT, 2005.

[187] "1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary General"; CRC, 1989.

[188] "A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General" (CRC, 1989).

[189] "1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided. 2. The Committee shall consist of eighteen experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems 3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. 4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United

up of eighteen elected [190] professionals from this field chosen from among the nominees of member states whom are their own nationals. Article 44[191] requires states to provide reports to the Committee within two years after it becomes valid, then every five years thereafter. Additionally it is stated that, in article 45(a) and (b)[192], UN Children's Fund[193] (UNICEF) and specified agents in the field can

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Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention. 5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting. 6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting. 7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee. 8. The Committee shall establish its own rules of procedure. 9. The Committee shall elect its officers for a period of two years. 10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly. 11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention. 12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide. ."; CRC, 1989.

[190] The number of the professionals was ten however Article 43(2) was amended and changed to eightteen; United Nations "Fiftieth session Agenda item 110" 21 December 1995 http://daccess-dds ny.un.org/doc/UNDOC/GEN/N96/769/45/PDF/N9676945.pdf?OpenElement (accessed November 30, 2011).

[191] "1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights (a) Within two years of the entry into force of the Convention for the State Party concerned; (b) Thereafter every five years. 2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned"; CRC, 1989.

[192] "(a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may

contribute to the implementation and assistance of the CRC. On paper the CRC sets up a system that can secure its obligations from the arbitrary will of states, and can keep track of how states adjust to the CRC from reports. With contributions from other actors, the CRC gives the impression that non-state centric decisions can be made. Similar to the answers that are given to the critiques at the end of the previous part, the one might claim that the CRC does not have a state-centric structure since it is open to NGOs, especially UNICEF, and, the Committee which is obliged with keeping states' records is made up eighteen professionals. Moreover, it can be claimed that the CRC contains provisions to restrict state sovereignty, like articles on restriction, and denunciation. However, these answers do not seem so objective and valid since, states are the only decision makers within the CRC, which have a direct link to domestic sovereignty. Also they have a free consent to join, which is in line with equality among states, by which the CRC carries both principles of state sovereignty, that are mentioned in the previous part. Moreover, the election structure of the Committee is further proof that the CRC is entirely state-centric. Member states nominate professionals from their own nationality and if a nominated person quits, that member state appoints another person from their same nationality[194]. Thus, this group of professionals is actually just another group of state representatives. This then only creates a totally state-centric structure on decision making and implementing the CRC.

Between the years 2006 and 2010 Turkey provide one report on July 2009to the Committee.[195]. This report did not mention TMK no.5532 although it

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invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities; (b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications"; CRC 1989.

[193] Hereinafter UNICEF.

[194] Article 43(7); CRC, 1989.

[195] Turkey's first report to CRC was due to 5th of March 1997, next report should have been provided after five years in 2002 and if Turkey would have been followed the pattern the third report had to be in 2007. However Turkey submitted its first report on 7th July 1999 and the following on 2009, Turkey has submitted two reports until now United Nations. "Submitted by

was clearly affecting children. In spite of that, the Committee showed concern about the discrimination faced by Kurdish children at different levels and on TMK as was states in their 9 July 2001 response[196] to the initial report submitted by Turkey in 1999. However, overall the Committee voiced its satisfaction with measures in Turkey, while calling for some improvements[197]. On the other hand the violation of the CRC by Turkey could not be prevented by any of those measures. The amendment of TMK, which caused the violation, was accepted on 29 June 2006[198]. During the 122nd meeting of the Parliament, at which the amendment passed, no one raised the issue of its conflict with the CRC. Neither the previous concerns of the Committee nor the provisions were taken into consideration at domestic legislation as was its intention by the founding of the CRC as it is in the founding of every human rights mechanism.

B- The TMK No.5532 and the CRC

Several amendments have been made to the TMK which was established in 1991[199]. An amendment made in 2006 (TMK no.5532) was a response to the

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Country." *Treaty Body Database*. October 21, 2011.http://www.unhchr.ch/tbs/doc.nsf/newhvsubmittedbycountry?OpenView&Start=1&Count=250&Expand=178.6#178.6 (accessed October 21, 2011).

[196] "13. The Committee notes that part of the national legislation is currently under review, in particular the Civil Law, the Criminal Code and the Code of Criminal Procedure. Nevertheless, it expresses its concern that relevant parts of the legislation, such as the "Anti-terror Law" of 1991 and some provisions on juvenile courts, are still not in full conformity with the provisions and principles of the Convention …29. The Committee is concerned that the principle of non-discrimination (art. 2 of the Convention) is not fully implemented for children belonging to minorities not recognized under the Treaty of Lausanne of 1923, in particular children of Kurdish origin; children with disabilities; children born out of wedlock; girls; refugee and asylum-seeking children; children who are internally displaced; and children living in the south-eastern region and in rural areas, especially with regard to their access to adequate health and educational facilities." UN Committee on the Rights of the Child, "UN Committee on the Rights of the Child: Concluding Observations: Turkey" *UNHCR* 9 July 2001. http://www.unhcr.org/refworld/docid/3cb53c404.html (accessed October 20, 2011).

[197] CRC/C/15, 2001.

[198] The amendment discussed and passed in the 122nd meeting of 4th legislation year of 22nd term; TBMM. "22/4/122." *TBMM*. June 29, 2006. http://www.tbmm.gov.tr/tutanak/donem22/yil4/bas/b122m.htm (accessed October 21, 2011). Entered into force on 18 July 2006; TMK no.5532, 2006.

[199] The TMK had amended respectively on October 301995, November 16 1995, November 19 1996, July 10 1999, May 5 2001, February 28 2006, July 18 2006, Mart 1 2008, July 25 2010 until now; "3713 Sayılı Terörle Mücadele Kanununun Bazı Maddelerinin Değiştirilmesi Hakkında

demonstrations started on 28 March 2006 at the funeral of four PKK guerillas in Diyarbakır. These demonstrations continued all week, spreading to surrounding cities, with the media coverage[200] of street clashes that showed children throwing

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Kanun" *T.C. Resmi Gazete*. No. 22448. October 30, 1995. http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/arsiv/22448.pdf&main=http://www.resmigazete.gov.tr/arsiv/22448.pdf (accessed November 30, 2011); "Terörle Mücadele Kanununun Bazı Maddelerinde Değişiklik Yapılması ve Bu Kanuna Bir Ek Madde Eklenmesi Hakkında Kanun" *T.C. Resmi Gazete*. No. 22465. November 16, 1995. http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/arsiv/22465.pdf&main=http://www.resmigazete.gov.tr/arsiv/22465.pdf (accessed November 30, 2011); "Terörle Mücadele Kanununun Bir Maddesinde Değişiklik Yapılmasına Dair Kanun" *T.C. Resmi Gazete*. No. 22822 November 19, 1996: 14. http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/arsiv/22822.pdf&main=http://www.resmigazete.gov.tr/arsiv/22822.pdf (accessed November 30,2011); "Terörle Mücadele Kanununun Bir Maddesinde Değişiklik Yapılması Hakkında Kanun" *T.C. Resmi Gazete* No. 23751 July 10, 1999: 8 http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/arsiv/23751.pdf&main=http://www.resmigazete.gov.tr/arsiv/23751.pdf (accessed November 30, 2011); "Terörle Mücadele Kanununun Bir Maddesinde Değişiklik Yapılmasına Dair Kanun" *T.C. Resmi Gazete* No. 24393 May 5, 2011 http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2001/05/20010505.htm&main=http://www.resmigazete.gov.tr/eskiler/2001/05/20010505.htm (accessed November 30, 2011); "Terörle Mücadele Kanununda Değişiklik Yapilmasina Dair Kanun" *T.C. Resmi Gazete* No. 26094 February 28, 2006 http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2006/02/20060228.htm&main=http://www.resmigazete.gov.tr/eskiler/2006/02/20060228.htm (accessed November 30, 2011); "Terörle Mücadele Kanununda Değişiklik Yapılmasına Dair Kanun." *T.C. Resmi Gazete*. No:26232. July 18, 2006. http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2006/07/20060718.htm&main=http://www.resmigazete.gov.tr/eskiler/2006/07/20060718.htm (accessed October 21, 2011);"Çeşitli Kanunlarda Değişiklik Yapılmasına Dair Kanun" *T.C. Resmi Gazete* No. 26803 March 1, 2008 http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2008/03/20080301.htm&main=http://www.resmigazete.gov.tr/eskiler/2008/03/20080301.htm (accessed November 30, 2011); "Terörle Mücadele Kanunu ile Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun.". *T.C. Resmi Gazete*. No. 27652 July 25, 2010. http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2010/07/20100722.htm&main=http://www.resmigazete.gov.tr/eskiler/2010/07/20100722.htm (accessed October 21, 2011).

[200] Milliyet "Diyarbakır'da Gösteriler Yeniden Başladı!" *Milliyet*, March 29, 2006 http://sondakika.milliyet.com.tr/2006/03/29/son/sontur11.asp (accessed December 2, 2011).Milliyet "Diyarbakır'da Tahrikçiler İş Başında… Kent Savaş Alanına Döndü…" *Milliyet*, March 28, 2006 http://sondakika.milliyet.com.tr/2006/03/28/son/sontur21.asp (accessed December 2, 2011). Milliyet "Diyarbakır'da Cenazeye Katılanlar polis Merkezine Saldırdı" *Milliyet*, March 30, 2006 http://sondakika.milliyet.com.tr/2006/03/30/son/sontur28.asp (accessed December 2, 2011).Milliyet "Olaylar Bugün de Batman'a Sıçradı" *Milliyet*, March 30, 2006 http://sondakika.milliyet.com.tr/2006/03/30/son/sontur16.asp (accessed December 2, 2011). Milliyet "Batman'da Bilanço Ağır" *Milliyet*, March 31, 2006 http://sondakika.milliyet.com.tr/2006/03/31/son/sontur31.asp (accessed December 2, 2011).Milliyet Fotogaleri "Düşündüren Fotoğraflar" *Milliyet*, March 31, 2006 http://galeri.milliyet.com.tr/diger/20060331dusundurenfoto/default.asp?ID=13 (accessed December 2, 2011).Milliyet "Gerginlik bugün Yüksekova'da…Esnaf Kepenk Kapattı" *Milliyet*,

stones at police. And which ended with a response from police which caused twelve dead, several injured and the detainment of 200 children between the ages of 12 to 18[201]. The bill of the TMK no: 5532, which was sent to the Parliament on 18th April 2006, cited the necessity of amendment to clarify provisions in Turkish Penal Code regarding terror offences[202]. In the reasons part of the bill none of the provisions on children had been mentioned. Yet the added provision to article 9[203] which states that children above the age of 15 should be prosecuted in high criminal courts as adults, passed without any opposition or even mention. The TMK no.5532 passed in the Parliament on June 29 2006[204] and entered into force on July 18 2006[205]. In 2008 protests children were again in demonstrations[206]. On 26 February 2008 another bill containing an amendment to the article 13 of the

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March 31, 2006 http://sondakika.milliyet.com.tr/2006/03/31/son/sontur19.asp (accessed December 2, 2011). Hürriyet "Diyarbakır'da PKK'lıların Cenazesinde Olay" *Hürriyet* March 28, 2006 http://hurarsiv.hurriyet.com.tr/goster/haber.aspx?id=4160330&tarih=2006-03-28 (accessed December 2, 2011).Hürriyet "Adana'daki Cenazede de Polise Taşlı Saldırı" *Hürriyet* March 28, 2006 http://hurarsiv.hurriyet.com.tr/goster/haber.aspx?id=4161024&tarih=2006-03-28 (accessed December 2, 2011).Hürriyet "Diyarbakır'da Polislerle Göstericiler Arasında Yine Çatılma Çıktı" *Hürriyet* March 29, 2006 http://hurarsiv.hurriyet.com.tr/goster/haber.aspx?id=4167043&tarih=2006-03-29 (accessed December 2, 2011).Hürriyet "Provakatörler Şimdi de Batman'da Sahneye Çıktı" *Hürriyet* March 30, 2006 http://hurarsiv.hurriyet.com.tr/goster/haber.aspx?id=4174092&tarih=2006-03-30 (accessed December 2, 2011). Zaman "Terörist Cenazesindeki Provokasyona Özel Hareket Müdahale Etti" *Zaman* March 28, 2006 http://www.zaman.com.tr/haber.do?haberno=270416&keyfield=C3A76174C4B1C59F6D6 (accessed December 2, 2011). Vatan " Diyarbakır'da Provokatörler İşbaşında" *Vatan* March 28, 2011 http://haber.gazetevatan.com/Haber/74449/1/Gundem (accessed December 2, 2011).Vatan "PKK'lı Teröristin Cenaze Töreni Adana'da Bölücü Gösterisine Dönüştü" *Vatan* March 28, 2006 http://haber.gazetevatan.com/Haber/74450/1/Gundem (accessed December 2, 2011).Vatan "Diyarbakır Gerildi" *Vatan* March 28, 2006 http://haber.gazetevatan.com/Haber/74492/1/Gundem (accessed December 2, 2011).Vatan " Batman'a Sıçradı" *Vatan* March 30, 2006 http://haber.gazetevatan.com/Haber/74643/1/Gundem (accessed December 2, 2011).Radikal "Diyarbakır Savaş Alanı" *Radikal* March 29, 2006 http://www.radikal.com.tr/haber.php?haberno=182820 (accessed December 2, 2011).Radikal "Diyarbakır Teröre Teslim" *Radikal* March 31, 2006 http://www.radikal.com.tr/haber.php?haberno=182962 (accessed December 2, 2011)

[201] Human Rights Association Diyarbakır report, 2006. Darıcı,Haydar"Şiddet ve Özgürlük: Kürt Çocuklarının Siyaseti" Toplum ve Kuram vol.2, 2009: 18.

[202] To see the reasoning, click on the reasoning (gerekçe) part; T.C. Başbakanlık "Terörle Mücadele Kanununda Değişiklik Yapılmasına Dair Kanun" *Hukuk Türk* April 18, 2006 http://www.hukukturk.com/fractal/hukukTurk/pages/findMevzuatDetail.jsp?pInstanceId=571447&pObjectId=414&pViewId=496&pTabId=443&pKunye=&pSearchKeyToBold=ter%F6rle+m%FCcadele+kanunu (accessed December 1, 2011).

[203] TMK no: 5532, 2006.

[204] 22/4/122, 2006.

[205] TMK no. 5532, 2006.

[206] Darıcı, 2009 19.

TMK no.5532, at which contained a provision on children, was included, passed[207] and put into force on March 1, 2008[208]. Changes in article 13 prevented sentences for terror offenses from being converted to other means of punishment, and added that this provision could not be administered to children below the age of 15[209]. That meant that children between the ages of 15 and 18 were subjects of article 13, and subject to be prosecuted in high criminal courts as adults. During the discussion in the Parliament, only Hasip Kaplan raised the issue that the provision was in conflict with the CRC. However, this concern did not lead a discussion and was not taken into account[210].

The definition of a child found in the TPC no.5237 article 6 (b)[211] and in the Law on Child Protection[212] (LCP) article 3(1) (a)[213] is stated as those under the age of 18. This is compatible with the article 1[214] of the CRC. Contrary to these descriptions, the provisions of article 9 and 13 created a division between children above and under the age of 15, and set forth different procedures for their prosecution. With the articles 9 and 13 of the TMK no. 5532, children above the age of 15 were prosecuted in high criminal courts like adults and their sentences were not converted to any other means. As such, the legal definition of children in Turkey was changed according to a division set by the TMK no.5532 stating that those children above the age of 15 and accused according to the TMK no.5532 are lost their status as children in the eyes of the Turkish legal and legislative system.

Moreover, several reports on the issue state that children below the age of 15 have faced prosecuted in high criminal courts as a result of the absence of juvenile courts in some cities where the massive detention of children has taken

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[207] Türkiye Büyük Millet Meclisi "Türkiye Büyük Millet Meclisi Tutanak Dergisi" *Türkiye Büyük Millet Meclisi* vol. 15 February 26, 2008 http://www.tbmm.gov.tr/tutanak/donem23/yil2/bas/b069m.htm (accessed December 1, 2011).
[208] Law no. 5739.
[209] Law no. 5739.
[210] 23/02/069, 2008.
[211] TPC no.5237, 2004.
[212] Hereinafter LCP.
[213] "Çocuk Koruma Kanunu.". *T.C. Resmi Gazete*. No: 25876 July3, 2005. http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2005/07/20050715.htm&main=http://www.resmigazete.gov.tr/eskiler/2005/07/20050715.htm (accessed December 19, 2011).
[214] (CRC, 1989).

place such as Van and Adana[215]. Although the numbers are vague, according to Sevahir Bayındır's parliamentary question on May 2009 to the Ministry of Justice between the years of 2006 to 2008, 1,308 children between the ages of 12 to 18 were prosecuted under the TMK no.5532[216]. Children were mainly charged with "being a member of an armed illegal organization[217]", "making propaganda for an illegal organization[218]", "acting against the assembly and demonstrations law[219]" and "damaging public property[220]". They received sentences proposed under TMK no. 5532 article 5[221] and article 7(2)[222] which called for long detainment periods and sentences of long years of imprisonment[223].

The TMK no.5532 was a clear violation of the CRC at every level, including legislative and judiciary decisions[224] and their practices. Provisions in articles 9 and 13 of the TMK no. 5532 were a clear violation of article 37 (b) of the CRC which states that detention or imprisonment of children should be considered as a last resort and should always be the shortest possible sentence allowable. [225]. Since 28 March 2006 children have been detained from areas where demonstrations have taken place, mainly from Eastern provinces where the Kurdish minority, (which Turkey does not legally recognize[226]), is found. This is also seen as a violation of article 2 that stresses children and their rights should be free of discrimination "irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion,

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[215] AI children report, 2010; JCI report, 2009; Human Rights Association children report, 2009.
[216] AI children report, 2010 6.
[217] TPC no.5237, article 220; Yalvaç, Gürsel. *Ceza ve Yargılama Hukuku Yasaları :T.C. Anayasası, TPC, CMK, CGTİK ve İlgili Mevzuatlar.* 2008: 232.
[218] TPC no. 5237, article 220(8); Yalvaç, 2008 232.
[219] "Toplantı ve Gösteri Yürüyüşleri Kanunu" *T.C. Resmi Gazete.* No. 18185 October 9, 1983 http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/arsiv/18185.pdf&main=http://www.resmigazete.gov.tr/arsiv/18185.pdf (accessed December 19, 2011). Hereinafter Law no.2911
[220] TPC no. 5237, article 152(1) (a); Yalvaç, 2008 204.
[221] TMK no.5532, 2006.
[222] TMK no.5532, 2006.
[223] Human Rights Association children report, 2009.
[224] The issue will be explained under the next title.
[225] "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;" , CRC, 1989.
[226] Turkey recognizes only religious minorities according to Treaty of Laussanne. Orhan, Baskın. *Türk Dış Politikası Cilt 1*, 2001: 222.

national, ethnic or social origin, property, disability, birth or other issues[227]"

The Committee has released thirteen general comments up to now and eight of them were released before the TMK no.5532[228]. The common points in the related general comments gave high importance to articles 2, 3, 6 and 12 which are also referred to the general principles of the CRC[229]. Article 2, as explained above, is a non-discrimination article; while article 3 stresses out that in every decision taken "the best interest of the child should be a primary concern[230]".Article 6 mentions the right to life, survival and development[231] of the child and article 12 highlights the child's right to express her opinions and her right to be heard[232]. In the general comments to no.5 which is released in 2003, what should be understood by the principles above was clearly explained[233]. Regarding to article 3 it is highlighted that in every decision, on the judicial, legislative, and administrative leveled, the best interest of the child should be the priority[234]. It would be hard to say that Turkey with the TMK no.5532 did not violate article 3 of the CRC since it caused massive amounts of children to be detained for long periods, prosecuted as adults, and to be imprisoned. The Committee suggests that article 6 should be understood in a broader sense[235]. In another general comment released in 2007 on juvenile justice, the Committee stresses that "use of deprivation of liberty has very negative consequences for the child's harmonious development… including arrest, detention and imprisonment[236]".

On the issue of juvenile justice, the Committee released a special general

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[227] CRC, 1989.
[228] United Nations "Committee on the Rights of the Child- General Comments" *OHCHR* December 3, 2011 http://www2.ohchr.org/english/bodies/crc/comments.htm (accessed December 3, 2011).
[229] Committee on the Rights of the Child "General Comment No.5" *OHCHR* November 27, 2003 http://tb.ohchr.org/default.aspx?Symbol=CRC/GC/2003/5 (accessed December 3, 2011).
[230] CRC, 1989.
[231] CRC, 1989.
[232] CRC, 1989.
[233] CRC/GC/2003/5, 2003.
[234] CRC/GC/2003/5, 2003 4.
[235] CRC/GC/2003/5, 2003 4.
[236] Committee on the Rights of the Child "General Comment No.10" *OHCHR* April 25, 2007 http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf (accessed December 3, 2011).

comment on the subject in 2007 and in 1995 a day of general discussion was held on this specific issue[237] and the Committee stressed that detention and imprisonment should be considered as "a measure of last resort[238]". Most important of to all, in 2000 another day of general discussion was held which included juvenile justice under the title "State Violence against Children[239]". In that discussion the Committee made a statement which partly cleared its position on the matters of national security and emergency;

"The Committee recommends that States parties review emergency and/or national security legislation to ensure that it provides appropriate safeguards to protect the rights of children and prevent violence against them, and that is not used inappropriately to target children (for example, as threats to public order or in response to children living or working on the streets)[240]".

Articles 13[241] and 15[242], which respectively states freedom of expression and freedom of association of a child, both include provisions of restrictions due to protection and interests of national security or public safety[243]. From the example that the Committee gives above, it is hard to understand the scope of the liberties and their restrictions. Since children prosecuted according to TMK no. 5532 (those who are detained as a result of, or with the claim of attending demonstrations) are perceived as terrorists, one could claim that restriction of their

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[237] Committee on the Rights of the Child "C. General Discussion on the Administration of Juvenile Justice" *OHCHR* 1995 http://www2.ohchr.org/english/bodies/crc/docs/discussion/juvenile_justice.pdf (accessed December 3, 2011).

[238] CRC/C/GC/10, 2007 10.

[239] Committee on the Rights of the Child "State Violence against Children" *OHCHR* September 22, 2000http://www.ohchr.org/EN/HRBodies/CRC/Documents/Recommandations/violence.pdf (accessed December 3, 2011).

[240] State violence against children, 2000 12.

[241] CRC, 1989.

[242] CRC, 1989.

[243] Article 13(2) "The exercise of this right may 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; or (b) For the protection of national security or of public order (ordre public), or of public health or morals." Article 15(2) "No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others"; CRC, 1989.

freedom of expression and association is in line with the articles 13(2) (b)[244] and 15(2)[245], which can easily be fitted to the arguments of Turkish state, which claims that children are used by the PKK[246].

During that period, NGOs and individuals opposed to the legislation regarding violations of children started to work on this issue. Amnesty International[247], UNICEF[248] and the Human Rights Association[249] all wrote reports on these violations and the Justice for Children Initiative[250] (JCI), which was formed by numerous local and national NGOs and human rights activists, sent a shadow report to the Committee on April 2009 regarding the violations[251]. However different form all the reports, the JCI structured the violations based on the CRC-OP-AC, that Turkey has been a state party since 2004, as mentioned before. The JCI seized the opportunity of the Committee's discussion of the initial report of the Turkey on the CRC-OP-AC scheduled for its 52nd session between the dates 14 September and 2 October 2009. JCI's shadow report stated that there had been a war going on between the PKK and Turkish military, under the context of a fight against terrorism, which had caused massive human rights violations of all kinds for more than 25 years and this issue had to be considered from such a viewpoint[252]. Moreover, the report added that Turkey had the obligation to secure and protect children rather than sentencing them for being member of an armed illegal

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[244] CRC, 1989.
[245] CRC, 1989.
[246] The prime minister Erdoğan stated that even if they are children since are used by the terrorist organization necessary intervention will be made. Radikal "'Çocuk da, kadın da olsa gereken müdahale yapılır' April 1, 2006 http://www.radikal.com.tr/haber.php?haberno=183107 (accessed December 1, 2011). Vatan " Yarın Ağlamanız Boşa Olacak" *Vatan* March 31, 2006 http://haber.gazetevatan.com/Haber/74751/1/Gundem (accessed December 2, 2011). Hürriyet "Müdahale Şartlarımız Bellidir" *Hürriyet* March 31, 2006 http://hurarsiv.hurriyet.com.tr/goster/haber.aspx?id=4181749&tarih=2006-03-31 (accessed December 2, 2011).Miliyet "Erdoğan: Çocuk da Olsa Terör Maşası Olmuşsa Müdahale Yapılacaktır" *Milliyet*, March 31, 2006 http://sondakika.milliyet.com.tr/2006/03/31/son/sonsiy18.asp (accessed December 2, 2011).
[247] AI children report, 2010.
[248] UNICEF report, 2011.
[249] Human Rights Association children report, 2009.
[250] Herein after JCI.
[251] JCI report, 2009.
[252] See Introduction and background part of the report; JCI report, 2009.

organization[253]. In the report published on 29 October 2009, the Committee expressed its serious concern about the TMK no. 5532 and recommended amending it, to detain or imprison children only as a last option and as for as short a time as possible, and to restore international standards during detainment or imprisonment periods[254].

After numerous of massive demonstrations, and press releases another bill to make changes on the TMK no. 5532 was sent to the Parliament on 10 November 2009[255]. One of the reasons written in the amendment bill was that articles regarding children conflicted with the CRC[256]. The issue was discussed in Parliament and accepted on 21 July 2010[257], and it was decided to add the words "these provisions cannot be executed on children[258]" to article 5, as well as to take out the second sentence of article 9[259] which enabled children above the age of 15 to be sentence in high criminal courts as adults, and to change the term "below the age of 15[260]"to; the provision cannot be executed on children at article 13.

However these changes did not satisfy the human rights activists[261], or the lawyers defending the children. It is stated that since related articles of the TPC no.5237 and the assembly and demonstration law were not amended, children would still be facing with violations, and that children who had been charge ac-

[253] JCI report, 2009.
[254] CRC/C/OPAC/TUR/CO/1, 2009.
[255] Bill of TMK no.6008, 2009.
[256] To see the reasoning of the TMK no.6008 click to reasoning (gerekçe) stated in first and second paragraph of general reasons part of the bill; Bill of TMK no.6008, 2009.
[257] In some documents the date is written as 22nd July 2010 however according to the official record of the parliament it is on 21st July 2010. See: http://www.tbmm.gov.tr/tutanak/donem23/yil4/bas/b138m.htm (reached on 20 April 2011)
[258] TMK no.6008, 2010.
[259] TMK no.6008, 2010.
[260] TMK no.6008, 2010.
[261] Bianet "Af Örgütü: TMK Değişikliği Memnun Edici Ama Yetmez" *Bianet* July 26, 2010 http://www.bianet.org/bianet/ifade-ozgurlugu/123712-af-orgutu-tmk-degisikligi-memnun-edici-ama-yetmez (accessed April 26, 2011).

cording to the articles of these laws mentioned would not be freed[262]. After the amendment had passed, while some children were freed, some were re-trailed[263], According to the press conference of Justice Callers for Children (JCC)[264] on 11 December 2010, there are more than 20 children still being held in prison[265]. Additionally, new detentions of children from demonstrations continues and prosecutions takes place within juvenile courts according to the articles 220(6)[266] and 314(2)[267] of the TPC no.5237, with charges of 'making propaganda for an illegal organization' and 'committing offenses in the name of an illegal organization' and according to Law no. 2911[268] [269]. Within the first nine months after the TMK no.5532 was amended to TMK no.6008 with specific provisions to secure children, 424 children were taken into custody and 192 of them detained[270].

This picture shows us that little has been changed since the re-amendment in 2010. Children are still seen as a threat in the eyes of the Turkish state and considered as potential terrorists. The re-amendment does not contain provisions or changes to secure children's rights of attendance at demonstrations, but continues to associate it with terrorism. Although the Committee advised state members not to use emergency or security measures against children[271], in 2000 before the

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[262] Bianet "Yeni TMK Çocuklar İçin Ne Getiriyor?" *Bianet* July 22, 2010 http://www.bianet.org/bianet/bianet/123625-yeni-tmk-cocuklar-icin-ne-getiriyor (accessed April 28, 2011).Bianet "TPC'de Değişiklik Yapılmazsa Çocuklar Tutuklu Kalacak" *Bianet* August 23, 2010 http://www.bianet.org/bianet/ifade-ozgurlugu/124322-TPC-de-degisiklik-yapilmazsa-cocuklar-tutuklu-kalacak (accessed April 28, 2011). Bianet "Tepki Gösteren Çocuklar Ceza Tehdidinden Kurtulmadı" *Bianet* January 16, 2011 http://www.bianet.org/bianet/ifade-ozgurlugu/127283-tepki-gosteren-cocuklar-ceza-tehdidinden-kurtulmadi (accessed April 28, 2011)

[263] Bianet "Aktar: TMK Mağduru Çocuklar Yeniden Yargılanacak" *Bianet* July 26 2010 http://www.bianet.org/bianet/ifade-ozgurlugu/123708-aktar-tmk-magduru-cocuklar-yeniden-yargilanacak (accessed April 30, 2011).

[264] The Turkish name of the group is Çocuklar İçin Adalet Çağrıcıları (ÇİAÇ), hereinafter JCC.

[265] BirGün "14 yaşında çocuğa tecrit işkencesi!" *BirGün* April 15, 2011 http://www.birgun.net/actuels_index.php?news_code=1302864720&year=2011&month=04&day=15 (accessed April 25 2011).

[266] Yalvaç, 2008 232.

[267] Yalvaç, 2008 277.

[268] Mainly on article 33, Yalvaç, 2008 1021.

[269] Bianet "TMK değişti, Bir Haftada 55 Çocuk Tutuklandı!" *Bianet* February 23, 2011 http://www.bianet.org/bianet/insan-haklari/128112-tmk-degisti-bir-haftada-55-cocuk-tutuklandi (accessed March 1, 2011).

[270] Bianet "12 Ayda 95 Çocuk, Son Dört Ayda 116 Çocuk Tutuklandı" Bianet May 20,2011 http://www.bianet.org/bianet/insan-haklari/130144-12-ayda-95-cocuk-son-dort-ayda-116-cocuk-tutuklandi (accessed December 3, 2011).

[271] State violence against children, 2000 12.

TMK no.5532 was enforced, the detentions of children from demonstrations could be paraphrased as accordant to CRC since article 13(2)(b)[272] enables the limitations on the right to freedom of expression of a child and article 15(2)[273] enables the limitations on the right to association and peaceful assembly in matters of the protection of national security, public security and public order. Moreover, none of the provisions of the CRC and explanations in the general comments affected the legislation of Turkey while passing TMK no.5532.

While having equality among states and domestic sovereignty as core principles regulates international relations and international treaties, human rights mechanisms are only tied to be suggestive, and advising in another words promotional. As happened in Turkey while passing the TMK no.5532, states may not feel the necessity of checking to make sure that their decisions are in line with the human rights treaties they have agreed to be a part of. At the same time, states are also the decision makers of the treaties and mechanisms they set. In this paper it is specifically the CRC and the Committee, but in the bigger picture it is the Charter and the SC. Hence, while describing liberties, they also set their limitations which are not as well described. In this case, the second provisions of the articles 13 and 15 allow restrictions to the rights and liberties. However its scope is not clear, there is only one recommendation made by the Committee on this issue. Also the concepts that those provisions set the restrictions on are quite vague, such as national security, public safety, public order and public health or morals[274]. Those concepts can only be associated with state sovereignty and can only be considered if they are under danger or not by the sovereign. In other words, the second provisions of articles 13 and 15 are creating some kind of state of exception that the power to decide on such circumstances is given to the states and to their sovereign power. Any anti-terror legislation or decision can be considered as a domestic sovereignty issue which can be legitimized as laws of exceptional situations.

In the previous part starting with the state sovereignty's two fundamental principles' foundation and their significant place as a building structure of the UN

[272] CRC, 1989.
[273] CRC, 1989.
[274] CRC, 1989.

system, their place and relation to human right regime was explored and analyzed. There were mainly three critiques on human rights regime in relation to how those two principles configure inside the human rights regime; sovereignty, state-centric, and legitimization. In this part, the CRC's structure regarding state sovereignty and the case of Turkey's violation of the CRC has been introduced. The critiques to human rights regime carry to the CRC. It is argued that the structure of security mechanism of the CRC is sovereignty based and state- centric, and while it is providing legitimization on one hand it also includes vague provisions on restrictions of certain rights which are not fully clarified by the Committee, which are providing a maneuver space for states in creating state of exception.

In the next chapter the concept of state of exception will be introduced. Then state of exception within the CRC will be analyzed and finally Turkish violation of the CRC will be taken in hand within the concept of state of exception.

THIRD CHAPTER
State of Exception and Human Rights Regime

The UN aims to regulate relation among and within states by including them as actors and subjects. Similar to the whole UN system, the human rights regime endeavors to regulate states' obligations on human rights by incepting them as a state party to treaties. In other words, human rights regime sets standards on what states are ought and ought not to do to secure the human rights of people within their territory by international (human rights) law. Similar to the UN that presupposes order among states and within states can be established by an international system in which international law partakes, the human rights regime, presupposes human rights can be maintained and secured by setting international mechanisms among and within states by treaties. However as we have seen in the Turkish violation of the CRC case, which is only one of countless violations of member states, the presupposition that the whole regime is built on is far from being a solid ground.

In the first part, with taking Donnelly's characterization of human rights regime, as strongly promotional but weak on implementation[275], as a starting point, the relationship of human rights regime to state sovereignty is analyzed. It is highlighted that the UN and the human right regime that is established by the UN, take the principles of the state sovereignty as fundamental principles of their systems. Hence it is argued that it would be wrong to structure the relation between human rights regime and state sovereignty as a mutually exclusive, clashing one rather than a mutually inclusive one As a result of such a structure, the critiques to the human rights regime mainly contain three aspects, high emphasis on sovereignty, being state-centric, and providing legitimacy. In the second part, the case of Turkey's violation of the CRC is presented. First, a brief look at the arrangement of state sovereignty in international treaties is introduced and then, with carrying the critiques raised to human rights regime, the CRC's relation with state sovereignty is discussed. Finally, the case of Turkey's violation to the CRC is presented. It is emphasized that Turkey as a state party to the CRC did not take in to consideration of the fact that the new legislation, TMK no 5532, is a clear violation of the CRC. Moreover, it is stressed that, the provisions of the CRC can be interpreted in a way that legitimizes Turkey's decision, because those provisions describe state of exception, and gives the power to decide to the sovereign states. To sum up, the human rights regime is a strong promotional regime that sets state sovereignty principle as a core, thus there is maneuvering space for states to actually escape from the liabilities and regulations they set. As shown in the second part, state of exception is an accepted action that a state can employ which only states can decide.

State of exception was first introduced by Carl Schmitt[276] a German law professor who is known by his affiliation with the National Socialist Party[277]. Later the concept was revisited by Giorgio Agamben[278]. Agamben emphasizes that

[275] Donnelly, 1986 613.
[276] Schmitt, Carl. *Political Theology: Four Chapters on the Concept of Sovereignty.* Translated by George Schwab. 1985.
[277] Carty, Anthony "Carl Schmitt's Critique of liberal International Legal Order Between 1933 and 1945" *Leiden Journal of International Law* 2001: 25
[278] Agamben; 2005.

"the state of exception tends to increasingly appear as the dominant paradigm of government in contemporary politics[279]" which is also the case in Turkey's violation of the CRC as will be explained in this chapter.

In this part, the concept of state of exception will be introduced. Then, the role of state of exception in the CRC will be discussed. Finally the CRC violation of Turkey will be analyzed with the concept of state of exception. This part will be the final part in which all the issues of the previous parts meet and unravel the main problematic on the case subject with the focus on state of exception.

A- The concept of state of exception

The human rights regime expects member states to act according to the treaties and recommendations of the established monitoring mechanisms like the Committee. Such a structure of the UN and human rights regime shows great correspondence to what Koskenniemi calls the legal approach[280]. Kelsen, as one of the best known scholars on sovereignty and law relation from a legal approach, projects state as a follower and implementer of a legal system in which a state finds its presence within legal descriptions. He ascribes sovereignty to the highest legal system which is international law[281]. On the contrary, as Turkey did, states still continues to make decisions without considering their consistency with the human rights treaties they are party to. Kelsen's legal approach does not provide an explanation for such cases. Schmitt argues against Kelsen from totally the opposite direction[282]., from what Koskenniemi names as the pure fact approach[283]. Schmitt describes sovereignty as "…the highest, legally independent, underived

[279] Agamben; 2005 2.
[280] Koskenniemi, Martti. *From Apology to Utopia: The Structure of International Legal Argument.* Cambridge University Press, 2009.pp226
[281] Suganami, Hidemi. "Understanding Sovereignty Through Kelsen/Schmitt." *Review of International Studies*, 2007: 511-530.pp 518.
[282] Schmitt at his *Political Theory* book's second chapter gives a considerable space to Kelsen and his followers and all though the chapter, Schmitt answers to confute Kelsen's formulation of sovereignty; Schmitt, 1985 16-36.
[283] Koskenniemi, 2009 231.

power[284]" since for him "the legal idea cannot realize itself, it needs a particular organization and form before it can be translated into reality[285]". Thus Schmitt attributes sovereignty to state as the organization that gives a form for the legal to be realized[286]. Schmitt's argument can explain why and how states act uncoordinatedly toward the human rights standards they are part of, but it does not provide why states feel the necessity to be bound to human rights regime and its treaties. Those two opposite arguments on positioning sovereignty resemble the clashing perception between the aim of human right regime and its structure. While human rights regime by binding states to treaties tries to limit states' actions, (in other words tries to have the sovereignty over states), states continue to act without considering the provisions of treaties they are bound to, since the regime gives the sovereignty to the states. The human rights regime is a state-centric regime that places principles of state sovereignty at the core of decision making, implementing and monitoring. Thus it cannot be constructed separately from states and their desires. Although Kelsen has a point on international law's descriptive function, Schmitt's point that the monopoly to decide the legally defined exception is on states[287], explains the violence to the CRC measures by Turkey and state of exception defined in the CRC. In other words, as Kelsen argues state of exception is described within law but at the same time, as Schmitt argues, states are the only decision makers for calling state of exception and implementing it. Hence, as Agamben puts it, state of exception is the *zone of anomie* that is neither in nor out of law but a zone of correspondence[288].

During and after the WWI and throughout the WWII the state of exception was the commonly seen policy of involved states such as France, Britain, Germany and Italy. Moreover, in Germany and Italy state of exception measures taken after the WWI rate high among the reasons used by fascist dictatorial regimes[289]. Between the two wars, Carl Schmitt introduced the concept of state of exception

[284] Schmitt, 1985 17.
[285] Schmitt, 1985 28.
[286] Schmitt, 1985 19.
[287] Schmitt, 1985 13.
[288] Agamben, 2005 23.
[289] Agamben, 2005 14-18.

in his book Political Theology. It starts with "[s]overeign is he who decides on the exception"[290]. In other words, Schmitt suggests that sovereignty belongs to the one that holds the power to decide on if the public order and security has been disturbed and which means to use[291]. For Schmitt deciding on state of exception is a result of states' rights to self-preservation, against a threat to public order and security, which resembles states unlimited authority of their territory[292]. Thus, he asserts that sovereignty is an inherent character of the state, and the sovereign power of the state is the one that decides on the exception. The laws can foresee the state of exception and can have provisions on the state of exception, like suspension of the existing legal system, but only states can decide and call the state of exception[293]. So in other words, as Kelsen argues, state of exception might be defined by law but, Schmitt highlights that it cannot decide if it exists or not. Since deciding on state of exception relies on making decisions concerning public order and public security for self-preservation of states, he asserts that a state that does not have the right to decide on state of exception is no longer a state[294], because it means the state has lost its unlimited authority over its territory, in other words its sovereignty. According to Schmitt, state of exception is free from law as well as free from international law[295], since law cannot grasp the political. However, he adds that the state of exception does not mean lawlessness, but that it contains extraordinary legal measures[296].

Agamben stressed that the importance of Schmitt's state of exception lies on his distinction between norm and decision[297]. As explained above, the sovereign is the only decision maker for state of exception. However, at the same time, the state of exception and sovereign's ability to decide exists within the law[298]. Hence, Agamben argues, Schmitt's localization of state of exception allows the

[290] Schmitt, 1985 5.
[291] Schmitt, 1985 9.
[292] Schmitt, 1985 12.
[293] Schmitt, 1985 14.
[294] Schmitt, 1985 11.
[295] Koskenniemi, 2009 231.
[296] Schmitt, 1985 12.
[297] Agamben, 2005 34.
[298] Agamben, 2005 34.

sovereign power to expand to the legal area that it is not bound to[299]. Within the state of exception law becomes either inside or outside of the sovereign[300]. Such a configuration of norm and decision, sovereign and law places state of exception in what Agamben calls in a *zone of anomie* that is not inside but also not outside of law[301].

Schmitt asserts that legality cannot conceive whether there is a threat to public security, order or presence of the state[302], in other words, what is political. For this reason, it cannot have a power over the state of exception. Agamben argues this point by showing that it is a paradox that the state of exception is a legal measure that the legal system cannot grasp[303]. Therefore, Agamben explains the state of exception as "the legal form of that which it cannot have, the legal form[304]. As Agamben puts it, in other words, state of exception "is a force of law without law[305]", since "the law is in force… but is not applied[306]".

Moreover, Agamben implies that starting with the WWI state of exception has become an instrument of governance[307]. For this reason, state of exception has a foundation linked to the state of war[308]. This results in the emergence of war discourse, by the sovereign power of the state, before and throughout the state of exception in order to back up exceptional measures. The perception of right of state to suspend the law in case of necessity occurred as a result of a threat to public order, security or existence of the state[309]. What this means is; that in order to secure the legal order, what is legal itself can be suspended. In other words, as Agamben puts it, "in order to apply a norm it is ultimately necessary to suspend

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[299] Agamben, 2005 35.
[300] Agamben, 2005 35.
[301] Agamben, 2005 23.
[302] Schmitt, 1985 6.
[303] Agamben, 2005 1.
[304] Agamben, Giorgio "Giorgio Agamben. The State of Exception – Der Ausnahmezustand." Transcriped by Anton Pulvirenti *The European Graduate School* http://www.egs.edu/faculty/giorgio-agamben/articles/the-state-of-exception (accessed on December 9, 2011).
[305] Agamben, 2005 39.
[306] Agamben, 2005 38.
[307] Agamben, 2005 11.
[308] Agamben, 2005 21.
[309] Schmitt, 1985 12.

its application[310]". Such a conceptualization attaches to the state of exception measures introduced by articles 13(2) (b) and 15(2) of the CRC which are mentioned in the previous chapter. In order to apply the rights mentioned in the first provisions, the rights can be suspended and the decision to suspend is given to the member states. Moreover, the fact that the Committee did not give enough clarifications on the provisions shows the expansion of state sovereignty at the CRC by state of exception.

With such a perception of state of exception, Agamben suggests, starting from the acceptance of a degree for protection and of the people and the state on 28 February 1933 one day after the Reichstag fire[311] which suspended the articles of the constitution regarding liberties, it is possible to define the Third Reich period as a state of exception[312]. By using the Third Reich's character as a state of exception, Agamben also highlights the bio-political application of state of exception. Through reminding of how people in concentration camps were stripped of all their legal identity and reduced to the classification of just as being a Jew[313], he stresses how through the use of state of exception, a targeted group of people lost all their legal identity, become a de facto and moved out of reach of legal norms[314].

As a result of these practices which took place during the holocaust and WWII, and which are viewed as illegal, the need for international order and peace became the aim of the UN who tried to restore peace and order by establishing international mechanisms by which states would be bound. Such a need is based on the aim of limiting and controlling state sovereignty by law so that such a catastrophe could not happen again. For Kelsen, who is referred to as an influential person in the establishment of the UN[315], the legal system is a higher form; states are present only as a result of their attachment and subjection to international

[310] Agamben, 2005 40.
[311] Kennedy, David M. *The Library of Congress World War II Companion* 2007: 18.
[312] Agamben, 2005 2.
[313] Agamben, 2005 4.
[314] Agamben, 2005 3.
[315] Hardt, Michael and Negri, Antonio. *Empire* 2000 pp5.

law[316]. So state of exception is considered as out of law according to him. However as argued above, Schmitt's point on state sovereignty and state of exception is still relevant. However, his localization of the state of exception as being in-law lacks much correspondence with the reality. Agamben's argues to both perception in placing state of exception neither in nor out of law, and suggests the state of exception is a *zone of anomie*, which is present within the law however, is not subjected to law, and in which the force of law exists but the law does not. Moreover, he highlights the bio-political aspect of the state of exception at which people subjected to it are stripped of all their legal identity and become a de facto.

Turkey is a state party to the CRC. However, an amendment violating the CRC that was perceived as necessary to protect national security could easily pass through the Parliament without any hesitation about its correspondence with the CRC. Although the Committee, which is actually made up of state representatives under the title of professionals, showed its concerns, it was still up to Turkey to consider those concerns or not. The consequences of not considering would be losing the legitimacy that the human rights regime provides to sovereignty of state parties. Turkey made amendments the TMK no.5532 especially for children; however children are still getting arrested, detained and imprisoned as a result of their attendance or claim of attendance in demonstrations with accusations of having ties to an armed organization that Turkey recognizes as a terrorist organization[317]. The second provisions of the articles 13 and 15 of the CRC which state the right to expression and right to association creates state of exception based on national security, public order and public health which allows states to decide on the scope of application or in other way, suspension. Consequently, the situation right now can be claimed to be in line with the CRC.

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[316] Suganami 2007, 519.

[317] Terörle Mücadele ve Harekat Dairesi Başkanlığı " Türkiye'de Halen Faaliyetleri Devam Eden Başlıca Terör Örgütleri" *Emniyet Genel Müdürlüğü* http://www.egm.gov.tr/temuh/terorgrup1.html (accessed December 8, 2011).

B- State of exception at the CRC

"The modern state of exception is instead an attempt to include the exception itself within the judicial order by creating a zone of indistinction in which fact and law coincide[318]" Agamben's remark is valid for the CRC as well. The CRC, as mentioned in the previous chapter and above, contains two provisions[319] that enable rights to be restricted by states according to their decision of necessity. The provisions are written so broadly that it is impossible to grasp the scope of the restrictions that are allowed. It can even be read as suspension of rights that are subject to them. Moreover, the Committee has not provided a concrete clarification on these provisions. Only in the day of general discussion titled as State Violence against Children the Committee recommended that states not to use emergency measures against children[320]. The Committee's recommendation was not making any attribution to the provisions and was not providing any clarification. The articles 13(2) (b) and 15 (2) are articles of state of exception in the CRC. With norms taking presence in the CRC they are in-law, and with their application decision given to states to restrict or suspend the liberties they are out of law. They create the *zone of anomie* in the CRC, "the legal form of that which it cannot have, the legal form[321]"

In treaty wise states decision power is limited to the measures of ratification, reservations, and denunciation of a treaty. In the CRC those measures are covered in a way to restrict arbitrary use/abuse by the member states[322]. However, articles 15 and 13, by including state of exception, create a *zone of anomie* in which the line in between the legal and state sovereignty blurs. Agamben suggests that in state of exception the application of a norm and the norm itself separates[323]. Precisely, that it what happens in articles 15 and 13. While articles 13(1)

[318] Agamben, 2005 26.
[319] Articles 13(2) (b) and 15(2); CRC, 1989.
[320] State violence against children, 2000 12.
[321] EGS, 2003.
[322] As explained in the second chapter.
[323] Agamben, 2005 36.

and 15(1) explain the norms, the former the freedom of expression and the latter freedom of association and peaceful assembly, the second provisions of the articles mentions the circumstances under which those rights can be restricted (or suspended). In other words, articles 13(1) and 15(1) are referred to as the norms, while 13(2) (b) and 15(2) are referred to as the applications of those norms.
Dividing the norm and its application, results in state sovereignty deciding on the application. In other words, it results in state sovereignty deciding on the state of exception, whether to restrict, to suspend, or to act accordingly to the norm[324]. Within such a blurred picture, state sovereignty enlarges into the legal arena as being the one deciding on the application[325]. Hence, the CRC, within articles 13 and 15 allows member states more than ratification, reservation and denunciation. While the CRC sets clear standards on these measures, it opens room for arbitrary decisions on application of the freedoms mentioned in article 13(1) and 15(1) by establishing state of exception.

Additionally, the CRC fails to give any clarification for the articles 13(2) (b) and 15(2). As mentioned above, the issue of emergency measures of member states not to be used against children was pointed out by a recommendation[326]. Recently, at the 66th session of the GA the Committee's concern about lowering criminal responsibility of children as a result of public security issues was mentioned[327]. However, those two statements of the Committee lack any clarifications on the scope, or limits of the articles 13(2) (b) and 15(2). Another outcome of the division of the norms, stated in articles 13(1) and 15(1), and their applications, stated in articles 13(2) (b) and 15(2), gives the law the power to define the norm but not the application. Since it's not the law's territory any more, it can only affirm state sovereignty's place and establish a legal form of that which cannot have

[324] Agamben, 2005 35.
[325] Agamben, 2005 35.
[326] State violence against children, 2000 12.
[327] "Notably, the spread of public insecurity has led in a rising number of countries the lowering of the age of criminal responsibility and increasing deprivation of liberty, not as a last resort but as the first" United Nations "CRC Chair Oral Statement to the 66th session of the General Assembly" *Committee on the Rights of the Child* October 12, 2011 http://www2.ohchr.org/english/bodies/crc/statement.htm (accessed on December 15, 2011).

a legal form[328], in other words, the state of exception. Hence, it is not unusual to find no concrete explanation provided by the Committee regarding those provisions.

Lastly, Agamben argues "[t]he normative element seems to need the anomic element in order to be able to apply, to refer to reality so that it has to maintain itself[329]". If Agamben's point is interpreted to include the CRC, this means the CRC had to contain provisions that are providing state of exception to be ratified and to enter into force. If the concepts that are creating state of exception in articles 13(2) (b) and 15 (2) are considered, Agamben's analysis fits perfectly with the CRC.

Article 13(2) (b) states "[f]or the protection of national security or of public order (ordre public), or of public health or morals[330]" and article 15(2) states "…in the interests of national security or public safety, public order (ordre public), the protection of public health or morals[331]". The concepts of national security, and public safety, order, health and morals are the cause of the *zone of anomie*. They are concepts of politics rather than concepts of law. They are the factors named by the CRC which states can consider on the application of norms. Agamben argues they have to be taking part in the CRC in order to be applicable.

Agamben's point on the norm that has to contain the *zone of anomie* in order to be valid, illustrates the immanent relationship of state sovereignty and human rights law. As explained in chapter one, the human rights regime and state sovereignty both strongly exist in the Charter. As Douzinas stressed human rights regime and state sovereignty established together with a mutually inclusive structuring after the WWII within the UN[332]. State of exception is the best example reflecting this immanent relationship. As Schmitt suggests, in order to understand the regular situation, one needs to examine state of exception, since at state of exception the relationship between state sovereignty and the law unravels[333].

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[328] EGS, 2003.
[329] EGS, 2003.
[330] CRC, 1989.
[331] CRC, 1989.
[332] Douzinas, 2007 98.
[333] Schmitt, 1989 15.

Similar to the Charter which establishes and secures state sovereignty[334], the CRC establishes and secures state sovereignty by setting up state of exception on articles 13 and 15. The provisions at articles 13(2) (b) and 15(2) refer to the preservation of state and its sovereignty. It is as a result of the concepts[335] that are mentioned that the state of exception incurs. While domestic sovereignty has decision power over the application of the norms, equality among states is present with states parties being equal on applying the state of exception. In other words, it is possible to track the two principles of state sovereignty, which is presented in the first chapter, within the state of exception created by the CRC. If the critiques of human rights regime that are presented in the first chapter were carried to state of exception in the CRC, it can be evidently seen that, there is actually a deeper state-centrism in the CRC than having member states as only actors. There is a deeper impact of sovereignty on the CRC measures that cannot be regulated or restricted within the legal zone. Lastly, since, the state of exception measures that the member states take, are legitimized by the CRC. Similar to the critiques of Douzinas and Held on human rights regime's favoring a certain type of government (democracy) and economic model (capitalism) (as if human rights regime cannot occur under any other circumstances, which causes legitimacy for them[336]), the CRC, with its state of exception, favors protection of states and state system upon which the whole international law, international relations and human rights law are established. If it is considered from a different approach, this means "in order to apply a norm it is ultimately necessary to suspend its application[337]". To be more precise, in order to be able to apply or use freedom of expression (article 13(1))[338], as and freedom of association and peaceful assembly (article 15(1))[339], national security, public safety, public order, public health and public morals should not be under threat. If that is the case than the creation of circumstances in which those freedoms can exist; the application of the freedoms can be

[334] In article 2; Charter, 1945.
[335] National security, public safety, public order, public health, and public morals; CRC, 1989.
[336] Douzinas, 2002 101-110; Held, 2002 11.
[337] Agamben, 2005 40.
[338] CRC, 1989.
[339] CRC, 1989.

limited or suspended as states are authorized in articles 13(2) (b) and 15(2) [340]. This is a clear legitimacy of state of exception and the exceptional measures taken by the member states.

To sum up, the state of exception placed on the freedom of expression and freedom of association and peaceful assembly results in member states being in position of sole determiner of their application. Hence the Committee cannot argue over the application of children's freedom of expression and freedom of association and peaceful assembly in Turkey. The *zone of anomie*, created in articles 13 and 15 allows Turkey to decide on the application of the norms. At this point it would be appropriate to be reminded of Donnelly's and Douzinas's critique on human rights regime that is mentioned at the very beginning of the first chapter. Donnelly characterizes human rights regime as a highly promotional but weakly implemented regime[341] due to its dependence on states. In addition to its dependence at the structural level, state of exception embodies a deeper dependence on implementation that cannot be restricted with human rights regime due to its concern in preserving state sovereignty, which also results in the legitimacy of exceptional measures. Douzinas states that human rights are a domestic issue[342]. In the CRC, the state of exception placed in articles 13 and 15 results in weak implementation, since the application of the articles are solely dependent on member states, by which freedom of expression, and freedom of association and peaceful assembly of the child becomes a domestic issue rather than the CRC's.

Furthermore, Agamben stresses that state of exception is normalized and becomes a regular instrument of governance[343] and he emphasizes the biopolitical aspect of state of exception towards the very people it is targeted to[344]. Under the next title, the TMK no. 5532's character as state of exception will be analyzed with Agamben's points on state of exception being regular, and its biopolitics.

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[340] CRC, 1989.
[341] Donnelly, 1986 613-618.
[342] Douzinas, 2007 26.
[343] Agamben, 2005 11.
[344] Agamben, 2005 3-4.

C- State of exception and the TMK

TMK itself is an exceptional measure, it is an anti-terror law. The TMK, TMK no.3713[345], was established in 1991. Since that time it has been enforced by keeping it up to date with several amendments. It might be sufficient to mention about the reasons given to establish TMK no.3713 in the first place. It was indicated that a measure against terrorism has to be taken[346]. Moreover, while fighting with terror, rights and freedoms of citizens have to be protected. Acts of terror and rights and freedoms have to be divided and explained[347]. During those times, there was a huge debate about the TPC, especially about its articles 141, 142 and 163[348]. They were considered of being removed from the TPC. With adopting TMK no.3713, those articles of the TPC removed[349]. However, they were placed to TMK no.3713 with an extended scope. Before people sentenced according to the articles of TPC was named as political prisoners, by the TMK no.3713, they have become terrorists[350].TMK no. 5532 is an exceptional measure which was targeted toward children. It was conflicted with other domestic laws and with the international human rights standards that Turkey is bound to. It is clearly stated in article 3(1) (a)[351] of LCP and in article 6(b)[352] of the TPC no.5237 that, children are those who are below the age of 18. However, in article 9 of TMK no.5532[353] made a division was made between children above and a below the age of 15, and stated that the ones above 15 would be prosecuted in high criminal courts as adults. Hence, TMK no.5532 was in a conflict with its own legal standards since the status of children over the age of 15 was taken away. Moreo-

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345 "Terörle Mücadele Kanunu" *T.C. Resmi Gazete.* No. 20843. April 12, 1991, http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/arsiv/20843_1.pdf&main=http://www.resmigazete.gov.tr/arsiv/20843_1.pdf (accessed November 29, 2011).
346 İnanıcı,Haluk ed. *Parçalanmış Adalet: Türkiye'de Özel Ceza Yargısı.* İletişim Yayınları, 2011.
347 İnanıcı, 2011 130.
348 The issue will be explained more detailly under the next title.
349 İnanıcı, 2011 48.
350 İnanıcı, 2011 48.
351 Yalvaç, 2008 679.
352 Yalvaç, 2008 128.
353 TMK no.5532, 2006.

ver, it was a clear violation of the CRC that Turkey is bound to. It was in clear violation of article 1[354], stating that children are the ones below the age of 18, article 37(b)[355], stating detention and imprisonment should be the last resort and should be the shortest sentence possible, article 2[356]; non-discrimination, article 3[357], stating the primary concern must be the best interest of the child, and article 6[358] stating right to life, survival and development of the child, of the CRC. Violating the CRC can be understood within human rights regime's weak implementation character. But, article 90 of the Turkish Constitution[359] (Constitution) states that if domestic laws and provisions are in conflict with international treaties on rights and freedoms, international treaties should take precedence[360], by which the CRC's place is secured domestically as well. However, the Constitution also states, in article 15, that rights and freedoms can be limited or suspended during the time of war, mobilization, martial law or state of emergency without violating the liabilities of international law[361]. In that sense, the liabilities of the CRC were considered as rights and freedoms that can be limited and suspended instead of liabilities that should be secured in every condition.

TMK no.5532 passed in the Parliament and resulted in massive amounts of children being subjected to it. The TMK, being an anti-terror law, is a state of exception law by itself. With the TMK no.5532 its scope was expanded to children, and as with all state of exception measures, it is both in and out of law. It is in-law since it exists in the Constitution and it is out of law since the political power has the sole decision to decide on it

[354] CRC, 1989.
[355] CRC, 1989.
[356] CRC, 1989.
[357] CRC, 1989.
[358] CRC, 1989.
[359] Hereinafter Constitution.
[360] "Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinin Değiştirilmesi Hakkında Kanun" Resmi Gazete no.25469, May 22, 2004 http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2004/05/20040522.htm&main=http://www.resmigazete.gov.tr/eskiler/2004/05/20040522.htm (accessed December 19, 2011).
[361] Constitution, 2004.

Beginning with Benjamin[362], scholars have highlighted that the state of exception ends up becoming the rule and a normal instrument of government[363]. Such claims became more evident with recent global war on terror measures within the domestic level and wars in the name of democracy and human rights on the international level. Additionally, Agamben stresses the bio-political outcome of the state of exception, through which the sovereignty controls life. He explains this by citing a recent current event. During the Afghanistan war[364], the United States of America[365] (USA) under its war on terror acts that were introduced after the September 11 attacks, the exceptional measures taken resulted in the people who were captured from Afghanistan ending up in a de facto status. They were neither prisoner of war nor a suspected criminal. Hence they had no legal identities, meaning they were not subject to any legal measures[366], they were open to any arbitrary act of state.

Turkey is not an alien to such concepts. Turkey had always had measures to preserve the Turkish state, as will be explained under the next title. And it has always governed according to state of exception which has caused the targets to be subjected to bio-politics. The TMK no. 5532 is the expansion of the state of exception towards children. And actually this expansion is not prevented by re-amending it in 2010. The exceptional state still continues targeting children who are defined and determined by the bio-politics. In order to present a deeper analysis, first, Turkey's continuing state of exception will be introduced and then, bio-politics that are used on children within the state of exception will be discussed.

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[362] Benjamin, Walter "On Concept of History" ed. Howard Eiland and Michael W. Jennings *Selected Writings vol. 4, 1938-1940,* 2003: 392.

[363] Boever, Arne de " Agamben and Marx: Sovereignty, Governmentality and Economy" *Law Critique* vol. 20, 2009: 259; Whyte, Jessica " Particular Rights and Absolute Wrongs: Giorgio Agamben on Life and Politics" *Law Critique* vol. 20, 2009: 147; Wilde, Marc de " Locke and the State of Exception: Towards a modern understanding of emergency government*" European Constitutional Law Review* vol 6, 2010: 249

[364] Afghanistan War, 2011.

[365] Hereinafter refered as the USA.

[366] Agamben, 2005 3.

1. State of exception and Turkey

Agamben states that the characteristic of the state of exception as the blend of executive, juridical and legislative powers, a *zone of anomie*, which are supposed to be in clear separation from each other in a democratic state[367].He adds that with state of exception parliamentary democracies can be totalitarian, and totalitarian regimes can be parliamentary democracies[368]. That's also the main reason of state of exception becoming a paradigm of governance, since the state of exception is accepted as a necessity for the preservation of the state. By applying state of exception the states do not lose their legitimacy as being democratic. States do not have to abolish the whole constitutional legal system, instead, they build a dual system in which both the legal system and state of exception exists. As a result of such a structure, executive, judicial and legislative powers become inseparable, which results in a *zone of anomie*. As argued above the state of exception has always been existed in Turkey's governance.

The foundation of the Turkish Republic[369], was a result of a wide ranged war that is called the independence war[370]. Since its foundation, all opposition and groups that have been seen as a treat to Turkish Republic have been silenced violently[371]. From the declaration of the republic in 1923 till the Şeyh Sait revolt in 1925 there were attempts of multi-party regime[372]. However, after the Şeyh Sait

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[367] EGS, 2003.

[368] Giorgio, Agamben *Homo Sacer: Sovereign Power and Barelife.* Translated by Daniel Heller-Roazen. Standford University Press, 1998: 72.

[369] Alhough the first Parliament meeting held in 1920, it was a constituent mechanism. The republic is founded in October 29, 1923 with the declaration made in the Parliament; "Turkey," *Encyclopædia Britannica Online*, http://www.britannica.com/EBchecked/topic/609790/Turkey (accessed December 9, 2011); Özbudun, Ergun " The Nature of the Kemalist Political Regime" *Atatürk: Founder of a Modern State* Ed. Ali Kazancıgil and Ergun Özbudun, 1997 pp79-103: 80

[370] Turkey, 2011.

[371] Bianet " "Dersim" için Bkz. Bianet" *Bianet* November 25, 2011 http://www.bianet.org/bianet/azinliklar/134317-dersim-icin-bkz-bianet (accessed December 5, 2011); Bianet"Ermeni Katliamı Oldu, Sorumlu Orduydu" *Bianet* April 25, 2005 http://www.bianet.org/bianet/siyaset/59818-ermeni-katliami-oldu-sorumlu-orduydu (accessed December 5, 2011).

[372] Özbudun, 1997 80

revolt *Takrîr-i Sükûn Kânunu*[373] (the Law for Maintenance of Order) ended the multi-party regime and single party rule took place until 1945[374]. With the Law for Maintenance of Order, the government gained extraordinary powers, and martial law came into force[375]. In 1971 and 1980 two coups d'état occurred[376]. This followed by State of Emergency Law enforced in 1983[377] that was enforced mainly in Eastern provinces[378]. In additional to the perceived threats that the Turkish state was founded on, amendment made to articles 141 and 142 to TPC no. 765[379] in 1951 added communism as a treat as a result of the cold war period[380]. While article 141[381] was criminalizing any acts to abolish a social class, to establish rule of one social class above others, and to change the economic and state structures,

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[373] "Takrîr-i Sükûn Kânunu" *Resmi Gazete* no. 87 March 3, 1925 http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/arsiv/87.pdf&main=http://www.resmigazete.gov.tr/arsiv/87.pdf (accessed on December 22, 2011).

[374] Özbudun, 1997 80; Zürcher, Erik Jan "The Emergence of the One Party State, 1923-7" *Turkey a Modern History,* London, 1993: 176- 180.

[375] Özbudun, 1997 80.

[376] İnanıcı, Haluk 2011 19.

[377] "Olağanüstü Hal Kanunu" *Resmi Gazete* no.18204 October 27, 1983 http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/arsiv/18204.pdf&main=http://www.resmigazete.gov.tr/arsiv/18204.pdf (accessed on May 8, 2012)

[378] İnanıcı, Haluk 2011 19.

[379] "Türk Ceza Kanunu" *T.C. Resmi Gazete* No.320 March 13, 1926 http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/arsiv/320.pdf&main=http://www.resmigazete.gov.tr/arsiv/320.pdf (accessed October 21, 2011).

[380] "Türk Ceza Kanununun 141 ve 142 nci Maddelerinin Değiştirilmesi Hakkında Kanun" Resmi Gazete, no. 7979 December 11, 1951 http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/arsiv/7979.pdf&main=http://www.resmigazete.gov.tr/arsiv/7979.pdf (accessed on December 20,2011).

[381] "1. Sosyal bir sınıfın diğer sosyal sınıflar üzerinde tahakkümünü tesis etmeye veya sosyal bir sınıfı ortadan kaldırmaya veya memleket içinde müesses iktisadi veya sosyal temel nizamlardan her hangi birini devinmeye matuf cemiyetleri her ne suret ve nam altında olursa olsun kurmaya tevessül edenler veya kuranlar veya bunların faaliyetlerini tanzim veya sevk ve idare edenler veya bu hususlarda yol gösterenler sekiz yıldan on beş yıla kadar ağır hapis cezası ile cezalandırılırlar. Bu kabil cemiyetlerin bir kaçını veya hepsini sevk ve idare edenler hakkında ölüm cezası hükmolunur. 2.Devlet siyasi ve hukuki nizamlarını topyekûn yoketmek gayesini güden cemiyetleri her ne suret ve nam altında olursa olsun kurmaya tevessül edenler veya kuranlar veya bunların faaliyetlerimi tanzim veya sevk ve idare edenler veya bu hususlarda yol gösterenler sekiz yıldan on beş yıla kadar ağır hapis cezası ile cezalandırılırlar. 3. Amacı Cumhuriyetçiliğe aykırı olan veya demokrasi prensiplerine aykırı alarak Devletin bek bir fert veya bir zümre tarafından idare edinmesini hedef tutan cemiyetleri kurmaya tevessül edenler veya kuramlar veya bunların faaliyetlerimi tanzim veya sevk ve idare edenler veya bu hususlarda yol gösterenler sekiz yıldan on beş yıla kadar ağır hapis cezası ile cezalandırılırlar. 4. Anayasanın tanıdığı kamu haklarını ırk mülâhazası île kısmen veya tamamen kaldırmayı hedef tutan veya millî duygulan yok etmeye veya zayıflatmaya matuf bulunan cemiyetleri kurmaya tevessül edenler veya kuranlar veya bunların faaliyetlerini tanzim veya sevk ve idare edenler veyahut bu hususlarda yol gösterenler bir yıldan üç yıla kadar ağır hapis cezası ile cezalandırılırlar" ; TPC no.765, 1951.

article 142[382] was criminalizing making propaganda or writing in favor of crimes listed in the article 141. Anti- terror law established in 1991[383] were seen as a more comprehensive version of the articles 141, 142 and 163 of the TPC no. 756[384] which are abolished after the TMK no.3713[385] was passed. Since anti-terror law still exist[386]. In reviewing this situation, it could not be considered incorrect to suggest that Turkey was founded on the state of exception. Turkey has been adapted state of exception in its legal system and state of exception has become a way of governing.

The Kurdish people always have been on the target of the state of exception in Turkey[387]. Since the foundation of Turkish Republic, assimilation and oppression policies have been issued on Kurdish people. Other than the military operations, state of exception has been the most common instrument used for this purpose. Since 1925 *Şark İstiklal Mahkemesi* (East Independence Court), Kurdish people have been prosecuted and imprisoned as a result of exceptional measures taken[388]. Hence, Turkey's violation of the CRC with the TMK no. 5532 is a result of state of exception expanded to children, namely Kurdish children, targeting children as the subject of bio-politics. Moreover, it can be argued that the re-

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[382] "1. Sosyal bir sınıfın diğer sosyal sınıflar üzerinde tahakkümünü tesis etmek veya sosyal bir sınıfı ortadan kaldırmak yahut memleket içinde müesses iktisadi veya sosyal temel nizamlardan her hangi birini devinmek veya Devlet siyasi ve hukuki nizamlarını topyekûn yoketmek için her ne suretle olursa olsun propaganda yapan kimse beş yıldan on yıla kadar ağır hapis cezası ile cezalandırılır. **2.** Cumhuriyetçiliğe aykırı veya demokrasi prensiplerime aykırı olarak Devletin tek bir fert veyahut bir zümre tarafından idare edilmesi için her ne suretle olursa olsun propaganda yapan kimse aynı ceza ile cezalandırılır. 3. Anayasanın tanıdığı kamu haklarımı ırk mülâhazasiyle kısmen veya tamamen kaldırmayı hedef tutan veya millî duygulan yoketmek veya zayıflatmak içim her ne suretle olursa olsun propaganda yapan kimse bir yıldan üç yıla kadar hapis cezası ile cezalandırılır. 4. Yukarıki fıkralarda yazılı fiilileri övenler, birinci ve ikinci fıkralarda yazılı hailende beş yıla kadar ağır hapis ve üçüncü fıkrada yazılı halde altı aydan akli yıla kadar hapis cezaları ile cezalandırılırlar. **5.** Yukarıki fıkralarda yazılı fiilleri 141 inci maddenin 6 nci fıkrasında yazılı kimseler arasında veya aynı fıkrada tasrih edilen yerler içinde işliyenlere verilecek ceza üçte bir nispetinde artırılır. 6**.** Yukarıki fıkralarda yazılı fiililer neşir vasıtası ile işlendiği takdirde verilecek ceza yan nispetinde artırılır"; TPC no.765, 1951.

[383] TMK, 1991.

[384] Coşkun Kırca "Gerçekten Kalktı mı?" *Milliyet* May 10, 1991: 13 http://gazetearsivi.milliyet.com.tr/Madde%20142 (accessed on December 19, 2011).

[385] See article 23; TMK, 1991.

[386] TMK no.6008, 2010.

[387] For detailed information on this issue see; *Toplum ve Kuram* vol. 4, 2010; *Toplum ve Kuram* vol.5, 2011 and *Toplum ve Kuram* vol 6-7, 2012.

[388] "Bir Halkı Yargılamak: Türkiye'de Ulus-Devlet ve Kürt Meselesi" *Toplum ve Kuram* vol. 6-7, 2012:13.

amended version of the TMK, TMK no.6008, does little to secure children from being subjected to the state of exception. Turkey seems to apply the state of exception provided in the articles 13(2) (b) and 15(2) of the CRC[389]. Children are still accused of having ties with organizations[390] that Turkey recognizes as terrorist organizations[391], as a result of their attendance at demonstrations or as a result of allegations of their attendance. Children are still being trialed as terrorists; the only difference is that the trials are held in juvenile courts[392]. In other words, the continuity of state of exception within Turkish government and/or the Turkish legal system (it is a *zone of anomie* that is both in and out of the legal area) is not disturbed, and the children are not saved from being its target. The only difference achieved by the TMK no. 6008 is that state of exception regarding children was adjusted to the state of exception standards of the CRC. Their attendance at demonstrations, in other words their freedom of expression (article 13(1)) and their freedom to association and assembly (article 15(1)) is still restricted and becomes a criminal act as a result of national security, public order, public health etc, as fitting to the state of exception defined within the articles 13(2)(b) and 15(2)[393]. The re-amendment of the TMK no.5532, that caused the violation of the CRC did not changed the actual problematic of children in Turkey. The CRC cannot secure freedom of expression and freedom of association and assembly of children in Turkey since those articles contain provisions of state of exception that allows member states to be the sole decision maker of their applications. Children are now violated accordingly to the CRC. In this sense, as stated by Agamben, "the law itself that becomes the instrument of exploitation[394].

In state of exception democracies become totalitarian because of the bio-political aspect of the state of exception, because of its shaping and decision mak-

[389] CRC, 1989.
[390] According to TPC no.5237, 2004 and Law no. 2911, 1983.
[391] Security head office, 2011.
[392] "12 Ayda 95 Çocuk, Son Dört Ayda 116 Çocuk Tutuklandı" Bianet May 20,2011 http://www.bianet.org/bianet/insan-haklari/130144-12-ayda-95-cocuk-son-dort-ayda-116-cocuk-tutuklandi (accessed December 3, 2011).
[393] CRC, 1989.
[394] Boever, 2009 265.

ing on life. As Foucault states in state of exception[395] scarifying people or group of people is considered as necessary for the salvation of the state[396]. In other words, bio-politics is how state of exception is implemented. Bio-politics of state of exception applies in two ways. While the first way is to define the subject, the other is deciding at its own fate. In the case of children subjected to the TMK no. 5532 and for the current situation it is valid as well. While the first way is to define the subject, the second is deciding its own fate. In the case of children subjected to the TMK no.5532 and in the current situation it is valid as well. On one hand, with the tool of bio-politics, a definition of children has been made. On the other hand, the fate of those who insist on being inside politics is to be labeled as terrorists.

2. TMK and bio-politics

The case of children who have been faced with state of exception measures should also be debated within the analysis of 'childhood'. Children, who are mentioned in this paper, were grown up inside violence, and they are highly politicized[397].Additionally, this issue can be analyzed within construction of childhood[398]. However, this study is focusing on the bio-politics imposed towards children by the state of exception.

Agamben uses the term inclusive exclusion to define the relationship between people and state sovereignty[399]. It means that people are included in the political arena by being excluded from it[400] In terms of children in Turkey; they are included in politics by being treated as terrorists, and thus are excluded from their rights of expression and right of association and assembly. As mentioned

[395] Foucault actually uses the term *Raison d'Etat*.
[396] Foucault, Michel *Security, Territory, Population: Lectures at the Collége de France 1977-78* Ed. Arnold I. Davidson, Trans. Graham Burchell pp 345; Wilde, 2010 252.
[397] Alkın, Rojin Canan; Danışman, Funda *Bildiğin Gibi Değil: 90'larda Güneydoğu'da Çocuk Olmak*, Metis, 2011.
[398] Darıcı, 2009 20.
[399] Whyte, 2009 152.
[400] Whyte, 2009 152.

above, the bio-politics have targeted children in two aspects, defining the child, and deciding on its fate.

In addition of being a new and hidden form of oppression state of exception creates a new form of people, as a result of another zone of anomie created between life and politics[401]. Agamben argues that state of exception results in a depoliticization of people[402]. Since in state of exception, the sovereign power includes people into politics by excluded them; state of exception measures results in people being depoliticized.

When the images of children clashing with police started being pumped out by the media, the existing state of exception aimed at target children. With the amendment of the TMK no. 5532 children became the subject of the existing state of exception, and were depoliticized. In other words, they were redefined to what it meant to be a child. According to the TMK no. 5532 children cannot have a political opinion that they express by attending a demonstration or even walking nearby of a demonstration. If that happens, they are losing their identity as children, since the concept of children is detached from politics. Because children attending to demonstrations, who are mainly Kurdish children, started to be seen as a threat to the Turkish state[403]

Agamben explains the loss of identity by state of exception with the situation in concentration camps of the Third Reich. Agemben observes that people who were stripped from citizenship also lost all their legal identities and were reduced to just being defined as a Jew[404]. Likewise, children sentenced according to the TMK no. 5532 were stripped of their legal identity as a child. Article 9[405] of the TMK no. 5532 allowed children above the age of 15 to be prosecuted as adults in high criminal courts. They were no longer considered to be a child within the judicial system as well. They were stripped of their legal identity as a child. How-

[401] Whyte, 2009 158.
[402] Agamben, Giorgio "Security and Terror" Trans.Carolin Emcke *Theory& Event* vol.5 issue:4 2001.
[403]Darıcı, 2009 18.
[404] Agamben, Giorgio " Beyond Human Rights" *Means Without End Notes on Politics* Trans. Vincenzo Binetti and Casare Casarino, 2000, 21: 2; Agamben, 2005 4; EGS, 2003.
[405] TMK no.5532, 2006.

ever, different from Agamben's example, they gained another legal identity, they were marked as terrorists. The new identity of being a terrorist remained even after the re-amendment of the TMK no.5532. This new identity can be interpreted as a punishment given to children who do not obey the Turkish states' definition of a child. The only difference is that after the TMK no.5532, children linked to acts of terrorism are prosecuted in juvenile courts, which results in them to re-gaining their identity as children but becoming terrorist children. They are still subjected to the state of exception, but this time within the framework of the state of exception in the CRC. The recent declaration made by the International Terror Center president Özeren stated that in the war on terrorism the target should be people between the ages of 12 and 25[406]. This can be cited as evidence that children are and will be exposed to bio-politics of state of exception regardless of the changes made in the TMK.

As Agamben summarizes, "totalitarianism can be defined as the restoration, by means of the state of exception, a legal civil war which allows for the physical elimination not only of political enemies but of civil citizens which one reason or another cannot be integrated into the political system[407]".To sum up, state of exception is a rising method of governing, which enables the sovereign power to decide on the application of the norms. Articles 13 and 15 stating the freedom of expression and freedom of association and assembly respectively contains state of exception provisions which enables states to determine their application. Turkey's violation of the CRC with TMK no.5532 is an expansion of ongoing state of exception towards children. However, changing the TMK no.5532 did not freed children from being subjected to the state of exception, rather it became inline with the state of exception in the CRC.

[406] "Kürtler Neden Dağa Çıkıyor?" *NTVMSNBC* December 11, 2011 http://www.ntvmsnbc.com/id/25304866 (accessed December 12, 2011).
[407] EGS, 2005.

Conclusion

Agamben argues that in addition to human rights declarations, treaties can be included as well, in the area where state sovereignty (domestic sovereignty) is configurated[408]. Douzinas continues from here and suggests that human rights declarations, (again treaties can be included), results in state sovereignty (domestic sovereignty) having unrestricted power[409]. Although it is hard to defend such an overall proposal, regarding the state of exception Agamben's and Douzinas's arguments are convincing. State sovereignty based, state-centric structured human rights regime which also provides legitimacy to its member states is highly criticized and shown to be the cause of human rights regime's weak implementation[410]. In addition to that, establishing state of exception on human rights mechanisms provides member states with more power on the implementation of rights. With state of exception human rights becomes merely a domestic issue as Donnelly and Douzinas argue[411].

In Turkey between the years of 2006 and 2010 more than 1.500[412] children were prosecuted according to the TMK no.5532 and articles 220[413] and 314[414] of the TPC. At demonstrations started in March 2006 in Eastern provinces where the Kurdish population is concentrated, the mass media made created huge propaganda against children attending these demonstrations with footages of children throwing stones at the police forces[415]. Prime Minister Erdoğan stated it did not matter if they are children or women, the government would do what it had to

[408] Homo Sacer, 1998 76
[409] Douzinas, 2007 97.
[410] Donnelly, 1986 613-618.
[411] Donnelly, 1986 616; Douzinas, 2007 26.
[412] There are no single statistical data available on the subject. In the reports there are data per year and numbers do not match in each report, however the numbers differ between 1,500 and 2,000. AI children report, 2010; JCI report, 2009; UNICEF report 2011; Human Rights Association Diyarbakır report, 2006; Human Rights Association children report, 2009.
[413] Article 220; TPC no. 5237, 2004.
[414] Article 314; TPC no. 5237, 2004.
[415] Milliyet "Düşündüren Fotoğraflar" *Milliyet*, March 31, 2006 http://galeri.milliyet.com.tr/diger/20060331dusundurenfoto/default.asp?ID=13 (accessed December 2, 2011).

do[416]. This was followed by the TMK amendment passed on June 29, 2006 and put in enforcement on July 18, 2006[417] which permitted children above the age of 15 to be prosecuted as adults in high criminal courts. After another series of massive demonstrations, further measures continued with another amendment in 2008 which prevented sentences on terror offences from being converted to any means other than imprisonment[418] which affected children as well.

TMK no.5532 was a clear violation of the CRC to which Turkey is a state party since 1995 and to its optional protocols, CRC-OP-AC and CRC-OP-SC since 2004 and 2002 respectively. However, being a member state of the CRC did not stop Turkey from adopting those measures. In the Parliament there were no discussions on the issue of its confliction with the CRC. Between 2006 and 2010 in addition to massive demonstrations against this subject, human rights NGO's issued reports[419]. JCI, an initiative made of local human rights NGO's and human rights activists, sent a shadow report to the Committee[420]. The Committee showed its concern on the TMK no.5532 and recommend that Turkey amend it[421]. The Committee stressed that detention and imprisonment of a child should be a last resort and should be as short as possible and that the detention and imprisonment standards should be in line with the international ones[422]. The Committee did not make any statements on freedom of expression and freedom of association and assembly of the child[423]. The TMK no.5532 was re-amended in 2010. The reason given was that it was in violation of the CRC. However, the TPC articles 220 and 314 were not amended. Hence, children are still prosecuted according to the TPC articles 220 and 314 in juvenile courts, although the numbers are not as dramatic

[416] Milliyet "Erdoğan: Çocuk da Olsa Terör Maşası Olmuşsa Müdahale Yapılacaktır" *Milliyet*, March 31, 2006 http://sondakika.milliyet.com.tr/2006/03/31/son/sonsiy18.asp (accessed December 2, 2011).
[417] TMK no.5532, 2006.
[418] Article 13 Law no. 5739, 2008.
[419] AI children report, 2010; JCI report, 2009; UNICEF report 2011; Human Rights Association Diyarbakır report, 2006; Human Rights Association children report, 2009.
[420] JCI report, 2009.
[421] CRC/C/OPAC/TUR/CO/1, 2009.
[422] CRC/C/OPAC/TUR/CO/1, 2009
[423] CRC/C/OPAC/TUR/CO/1, 2009.

as they used to be[424]. They are accused of being terrorists or committing crimes for a terrorist organization when they attend to demonstrations or are claimed to have attended to demonstrations. Their freedom of expression and freedom of association and assembly are suspended as a result of state of exception, the war on terror.

Agamben focuses on the bio-political aspect of the state of exception. From the time that TMK no.5532 passed, children who are attending or found being around the demonstrations have been seen as terrorists. With passing of article 9 of the TMK no.5532 which enabled children above the age of 15 to be prosecuted as adults, children above the age of 15 lost their legal identity of being children, and gained an adult terrorist identity. The article was also conflicted with the domestic jurisdiction, TPC article 6(b)[425] and LCP article 3(1) (a)[426] which states that children are those who are below the age of 18. TMK no.5532 placed children above the age of 15 in a de facto position. As Agamben emphasizes, the bio-politics of state of exception cause its subjects to be de facto[427]. After the amendment of the TMK no.5532, children who are attending to demonstrations or are claimed to be attending are still perceived as terrorists. This means freedom of expression and freedom of association and assembly of the child that also exists in the CRC in articles 13 and 15 respectively, are in suspension. The state of exception still continues.

Turkey, since the foundation of the Turkish Republic, has always been in state of exception or had exceptional measures provided within the law. Two years after the declaration of the republic, as a response to the Şeyh Sait revolt, the martial law was declared. The government gained extraordinary powers by adapting the Law for Maintenance of Order, which also ended the multi-party

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[424] Bianet "Savcılar Çocuğun Yararını Gözetmeli" *Bianet* December 7, 2011 http://www.bianet.org/bianet/cocuk/134584-savcilar-cocugun-yararini-gozetmeli (accessed December 28, 2011);"14 Yaşında Cezaevine Giren Ö.S. 14,5 Ay Sonra Serbest" *Bianet* October 10, 2011 http://www.bianet.org/bianet/insan-haklari/133305-14-yasinda-cezaevine-giren-o-s-14-5-ay-sonra-serbest (accessed December 28, 2011); "17 Yaşında "Örgüt Kuran ve Yöneten" A.Ş. Beş Aydır Tutuklu" *Bianet* October 10, 2011 http://www.bianet.org/bianet/insan-haklari/133324-17-yasinda-orgut-kuran-ve-yoneten-a-s-bes-aydir-tutuklu (accessed December 28, 2011).

[425] Yalvaç, 2008 128.

[426] Yalvaç, 2008 678.

[427] Agamben, 2005 3.

regime until 1945[428]. Then, in 1951 with an amendment made to articles 141 and 142 of the TPC no. 765, yet another kind of exceptional measure was established, in the name of securing the state and its existence, public order and public safety[429]. With the adaptation of an anti- terror law in 1991, TMK no.3713, these articles of the TPC were abolished. However, TMK no. 3713, which have been amended several times, is a broader and more detailed version of the abolished articles. With the amendment of TMK no.5532 made, this state of exception expanded to children and its re-amended version, TMK no.6008, does not exclude children from the state of exception.

On this point the Committee's approach on TMK no. 5532 is worth analyzing. The Committee did not point to the violation of freedom of expression and freedom of association and assembly of the child while asserting its serious concern about the TMK no.5532. The Committee did not spot any violations to the articles 13 and 15 concerning the rights mentioned above respectively on TMK no.5532, which attached children attending to demonstrations with a terrorist act. The Committee did not miss a point here, since the second provisions of the articles list the circumstances under which those rights described in the first provisions can be restricted[430]. The second provisions of the articles 13 and 15 of the CRC state the freedoms described in the first provisions of the articles that can be limited to preserve national security, public order, public health and public morals[431]; and are establishing state of exception for those freedoms. Moreover, The Committee fails to give any clarifications on the scope and level of the restrictions[432] which allows member states to even suspend those rights. Agamben implies that the state of exception lies in separating the norm and its application[433]. As argued before, the CRC articles 13 and 15 have separated the norm, freedoms described in the first provisions, and its application, by enabling states to limit those norms. On those freedoms it is only up to the member states how to apply

[428] Özbudun, 1997 80.
[429] TPC no.765, 1951.
[430] CRC, 1989.
[431] CRC, 1989.
[432] CRC general comments, 2011.
[433] Agamben, 2005 36.

them. They can fully implement them or if they see a threat to national security, public order, or anything that could harm the states presence, they can restrict them or even suspend them. Hence, the CRC cannot clarify what it means to limit those freedoms since it is a matter of state sovereignty that the CRC cannot embody. As Agamben stated, a *zone of anomie* is a blurred zone hovering between sovereign power and law, "the legal form of that which it cannot have, the legal form[434]".

Another important point that the Agamben raises is that the normative element, in this case it is the CRC, needs to contain the *zone of anomie* in order to be applicable, since the *zone of anomie* is the binding factor of norm with reality[435]. In this sense, the CRC has to contain state of exception within for it to be realistic, for it to be accepted and applied, in order for states to become members. Because the reality is, it would not exist as it is without sovereign states and sovereignty would not be so powerful and preserved without the CRC.

When the CRC and the structure of the Committee are analyzed, it is clearly seen that the critics towards human rights regime on its state centrism, sovereignty based structure which at the same time provides legitimacy to state sovereignty, is valid on them too. The CRC's main actors are states. Only with enough ratification can it be enacted. The states can declare reservations on articles, and denounce the CRC. The Committee which is keeping track of member states' applications, giving suggestions on implications, and/or warning the member states, are actually state representatives under the title of professionals. They are nominated by states that they are a citizen of and if a seat is vacated, the state from which the previous professional was selects another professional from its nationals again. This is the structure of state representation. However, all of those can only be regulated by the state of exception which shows us the unraveling in the relationship between state sovereignty and human rights regime. They are not in a clash, they are in a harmony; they are not mutually exclusive, they are mutually inclusive.

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[434] EGS, 2003.
[435] EGS, 2003.

The human rights regime was established right after the WWII with the foundation of the UN. The Charter which is the foundation document of the UN contains strong emphasis on human rights, which led to the human rights regime that exists now. The Charter starts with respect for human rights[436], sets human rights as an aim and purpose[437], places it as a working subject of its organs[438], and sets human rights as a responsibility of member states[439]. At the same time the establishment of the UN consolidated the sovereign state based international relations which had disintegrated after WWII. The UN is an international organization that aims to preserve order and peace among sovereign states. The UN is made up of sovereign states and at the same time provides legitimacy to member states' sovereignty. It clearly states that the UN is based on sovereign equality and the member states should respect to each other's territorial and domestic sovereignty. Furthermore it assures that the UN will not intervene on member states' domestic sovereignty[440]. Thus, it is inevitable for the human right regime not to contain these principles since the foundation of the human rights regime relies on the UN. From that perspective, critiques to human right regime criticize its sovereignty based, state-centric structure which provides legitimacy to the sovereignty of member states. Hence, the CRC, as Agamben suggests, has to have state of exception in order to be applicable. And with having state of exception, the human rights norms becomes a domestic issue rather than an international one, as Donnelly suggests[441]. The mutually inclusive relationship between state sovereignty and human rights regime is very dense at this point. While the sovereign states enables human rights regime to be founded, the human right regime gives legitimacy to their sovereignty and with state of exceptions leaves the application decision of human rights regime to the states.

[436] The preamble; Charter, 1945.
[437] Article 1(3); Charter, 1945.
[438] In article 13(1) to the GA and in articles 62 and 68 to the Economic and Social Council, Charter, 1945.
[439] Article 55; Charter, 1945.
[440] Article 2(1), 2(4) and 2(7) respectively; Charter, 1945.
[441] Donnelly, 1986 614.

Agamben highlights Arendt's observation that human rights and state sovereignty are in such a relation that crisis of the one means crisis of the other[442]. As the state of exception of the CRC on articles 13 and 15 implies, when the state sovereignty is in crisis, with threats to national security, public order, public health and moral[443], in order to preserve its existence it can limit and/or suspend the freedoms so that it can be valid again with the consolidation of the state sovereignty's existence.

Lastly, the TMK no.5532 was an exceptional measure that the sovereign power seized to preserve its existence, claiming that children were seen as a threat. Although it was a state of exception per se, it was not in line with the state of exception within the CRC. Even with re-amending it, the bio-politics on children still continues as a result state of exception targeting them. Now it is in accordance with the CRC, and it is both in law and out of law, in a *zone of anomie*.

[442] Homo Sacer, 1998 76.
[443] CRC, 1989.