The (In-)Validity of Turkey's Reservation to Article 27 of the International Covenant on Civil and Political Rights

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Abstract
The aim of this article is to examine Turkey's reservation to Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and to advance a plausible argument for its invalidity based upon the relevant secondary rules of international law.

Keywords
Turkey; Article 27 of the International Covenant on Civil and Political Rights (ICCPR)

Introduction

The aim of this article is to examine Turkey's reservation to Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and to advance a plausible argument for its invalidity based upon the relevant secondary rules of international law.

The article will proceed as follows: section 1 will examine Turkey's reservation to the ICCPR and its meaning; section 2 will set out the relevant secondary rules of international law on treaty reservations and examine the compatibility of the reservation with the object and purpose of the ICCPR; and section 3 will consider the possible legal consequences of the invalidity of the reservation. The article will conclude that there are plausible grounds for deeming the reservation invalid and that, if it is invalid, Turkey will remain bound by the ICCPR without the benefit of its reservation. The conclusion will also offer some brief reflections on the practical consequences of that finding.

By way of introduction, it is necessary to provide a brief sketch of the concrete legal and political situation in Turkey at the time of writing in order to situate the following legal analysis in its proper context. It is also necessary to highlight the fact that some of the possible candidates for minority status in Turkey actively reject that label.

Turkey is, at the time of writing, going through a striking assault on its democratic institutions. The failed coup attempt by sections of the Turkish military[1] on 15 July 2016 led to the imposition of a three-month state of emergency, endorsed by the Turkish Grand National Assembly on 21 July 2016 and extended several times since then. Turkish President Erdogan has used his broad emergency powers to amend hundreds of existing laws and decrees, "substantially modifying the legal and administrative structures of the State".[2] The Office of the United Nations High Commissioner for Human Rights (OHCHR) notes that the emergency powers have been used to "stifle any form of criticism or dissent vis-à-vis the

[1] For details of the attempted coup, its aftermath, and President Erdogan's earlier authoritarianism, *see* J. Jongerden, 'Conquering the state and subordinating society under AKP rule: A Kurdish perspective on the development of a new autocracy in Turkey', *Journal of Balkan and Near Eastern Studies* (2018) p. 1.
[2] Office of the United Nations High Commissioner for Human Rights, 'Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East: January – December 2017', March 2018, <www.ohchr.org/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf>, visited on 23 April 2018, para. 39.

Government".[3] Vague anti-terror laws and emergency powers have been deployed to target journalists,[4] academics,[5] public sector workers,[6] NGOs[7] and dissenting voices in society at large.[8] Furthermore, a set of constitutional amendments passed in a flawed referendum[9] on 16 April 2017 set the stage for the transformation of Turkey from a parliamentary into a presidential system of government. According to the Council of Europe's Venice Commission, the new system will lead to "an excessive concentration of power in the hands of the President and the weakening of parliamentary control of that power"[10] and "curtails the independence of the judiciary vis-à-vis the president".[11] Although Turkey's state of emergency officially ended in July 2018, the constitutional amendments "in practice make permanent many of the emergency powers the president has already assumed", according to Human Rights Watch.[12]

The state of emergency, combined with the reignited war with the Kurdistan Workers Party (PKK), provided cover for a dramatic reversal of Turkey's recent gains in the field of minority rights.[13] For example, many Kurdish-language news agencies, newspapers, TV and radio stations have been closed down;[14] privately operated schools teaching in the Kurdish language have been shuttered;[15] the Kurdish Question-focused HDP political party has seen

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[3] *Ibid*., para. 42.
[4] Human Rights Watch, 'Silencing Turkey's Media: The Government's Deepening Assault on Critical Journalism', December 2016.
[5] B. Baser, S. Akgönül and A.E. Öztürk, '"Academics for Peace" in Turkey: a case of criminalising dissent and critical thought via counterterrorism policy', 10 *Critical Studies on Terrorism* (2017) p. 274.
[6] Amnesty International, 'No End in Sight: Purged Public Sector Workers Denied a Future in Turkey', May 2017.
[7] Amnesty International, 'Weathering the Storm: Defending human rights in Turkey's climate of fear', April 2018.
[8] F. O'Connor and B. Baser, 'Communal violence and ethnic polarisation before and after the 2015 elections in Turkey: attacks against the HDP and the Kurdish population', *Southeast European and Black Sea Studies* (2018) p. 1.
[9] The referendum was, according to the OSCE, conducted "on an unlevel playing field". OSCE, 'International Referendum Observation Mission: Statement of Preliminary Findings and Conclusions', <www.osce.org/odihr/elections/turkey/311721?download=true>, visited on 23 April 2018. Gunes notes that the referendum was conducted "[i]n a climate of widespread violence and intimidation, with abundant evidence of vote-rigging…". C. Gunes, 'Turkey's New Left', 107 *New Left Review* (2017) p. 29. For further details *see* B. Esen & S. Gümüşçü, 'A Small Yes for Presidentialism: The Turkish Constitutional Referendum of April 2017', 22 *South European Society and Politics* (2017) p. 303.
[10] European Commission for Democracy Through Law, 'Opinion on the amendments to the constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017', <www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)005-e>, visited on 23 April 2018, para. 47.
[11] *Ibid*., para. 113.
[12] Human Rights Watch, 'Turkey's Constitutional Referendum', <https://www.hrw.org/news/2017/04/04/questions-and-answers-turkeys-constitutional-referendum>, visited on 22 December 2018.
[13] For some examples of these gains *see* H. Kolçak, 'Unfinished Building: Kurdish Language Rights During the First AKP Ruling Period from November 2002 to June 2015', 15 *Journal on Ethnopolitics and Minority Issues in Europe* (2016) p. 26.
[14] Amnesty International, 'Journalism is Not a Crime: Crackdown on media freedom in Turkey', May 2017, <www.amnestyusa.org/wp-content/uploads/2017/05/freeturkeymedia_cd_web_u.pdf> visited on 23 April 2018, p. 13.
[15] Human Rights Association (IHD), 'Report on Recent Situation in the Kurdish Region of Turkey', November 2016, <www.ihd.org.tr/en/index.php/2016/11/01/report-on-recent-situation-in-the-kurdish-region-of-turkey/>, visited on 23 April 2018.

its members of parliament, including its co-chairs, arrested and imprisoned;[16] local municipalities in the predominantly Kurdish south-east have been seized by government appointed trustees;[17] bilingual Turkish-Kurdish street signs have been replaced with monolingual Turkish street signs;[18] and the violence inflicted upon the mostly Kurdish south-east has left the centres of some towns and cities resembling "empty moonscapes and vast parking lots".[19] Members of Turkey's long-oppressed, officially recognised non-Muslim minorities are increasingly seeking refuge abroad.[20]

It should also be noted that some Kurdish political actors reject the minority label and prefer to be recognised as a 'constitutive nation' of the Republic.[21] Their rejection of the minority label is informed by a Turkish political culture that relegates minorities to a secondary position and causes them to view the categorisation as a badge of humiliation.[22] Commonly held distinctions between international legal norms relating to sub-State ethnocultural groups might be another factor influencing the rejection of minority status. It is often suggested that the group-based right of self-determination includes extensive rights to territorial autonomy, federalism, or even a limited right of secession which applies to 'peoples' or nations. Minority rights, on the other hand, are commonly understood as more limited individual rights belonging to individual members of minority groups. The language of individual minority rights appears to speak to the diminutive status of the minority and the need for the State to *tolerate* its existence. The language of self-determination, on the other hand, speaks to the existence of a group *in charge of its own destiny*. Against that interpretation of the law, it is easy to see why a large and partly territorially concentrated ethnocultural group whose presence in a particular area stretches back into antiquity, such as Turkey's Kurds,[23] might reject minority status as a brake on its more substantial ambitions as a 'people' or 'constitutive nation'.

1. Turkey's Reservation to Article 27 of the ICCPR

[16] Human Rights Watch, 'World Report 2018', 2018, <www.hrw.org/sites/default/files/world_report_download/201801world_report_web.pdf>, viewed on 23 April 2018, p. 565. Strikingly, the European Court of Human Rights recently ruled that the long pre-trial detention of one former HDP co-chair pursued the "predominant ulterior purpose of stifling pluralism and limiting freedom of political debate": ECHR, *Case of Selahattin Demirtas* v. *Turkey (No. 2)* (2018) (Application No. 14305/17), para. 273.

[17] Parliamentary Assembly of the Council of Europe, 'Resolution 2156 (2017): The functioning of democratic institutions in Turkey', para. 12. *Also see* Council of Europe Venice Commission, 'Opinion on the Provisions of the Emergency Decree Law No 674 of 1 September 2016 Which Concern the Exercise of Local Democracy in Turkey', Opinion No. 888/2017.

[18] Ahval News, 'Kurdish language signs removed from Diyarbakir streets', 11 April 2018, <https://ahvalnews.com/turkey-kurds/kurdish-language-signs-removed-diyarbakir-streets>, viewed on 26 April 2018.

[19] OHCHR, 'Report on the human rights situation in South-East Turkey: July 2015 to December 2016', February 2017, para. 33.

[20] *See* F. Tastekin, 'Are Turkey's Christians as "fine" as they say?', August 2018, https://www.al-monitor.com/pulse/originals/2018/08/turkey-local-christians-after-detention-of-american-pastor.html, viewed on 12 August 2018.

[21] B. Ersanli and G. Göksu Özdogan, 'Obstacles and opportunities: recent Kurdish struggles for political representation and participation in Turkey', 35 *Southeastern Europe* (2011) p. 68.

[22] *Ibid.*, pp. 72-73

[23] According to International Crisis Group, "Turkish Kurds are estimated to be eleven to fifteen million of [Turkey's] 74 million people, about half living in the south east and half in western cities". *See* International Crisis Group, 'Turkey: Ending the PKK Insurgency', 20 September 2011, <https://d2071andvip0wj.cloudfront.net/213-turkey-ending-the-pkk-insurgency.pdf> viewed on 20 June 2018.

As is known, Article 27 of the ICCPR provides:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

Although the Article is couched in negative terms, Article 1 of the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic minorities – which is inspired by Article 27 - clearly requires States to take positive steps to protect and promote minority identities via legislative and other measures.[24] As the associated Commentary to the Declaration explains, the legal obligation to protect minorities allows States to integrate minority communities but requires respect for pluralism in the domains of culture, language and religion.[25]

In its reservation to Article 27 of the ICCPR, which was made upon its ratification of the ICCPR in September 2003, the Republic of Turkey:

> "reserves the right to interpret and apply the provisions of Article 27 of the [ICCPR] in accordance with the related provisions and rules of the Constitution of the Republic of Turkey and the Treaty of Lausanne of 24 July 1923 and its Appendixes."

Turkey's reservation to Article 27 therefore purports to subsume the interpretation of Article 27 ICCPR to the related provisions of an entire body of domestic law, namely the Turkish constitution, and also to the Treaty of Lausanne. The reference to the Treaty of Lausanne is further explained in Turkey's first report to the UN Human Rights Committee (HRC):

> "According to this Treaty, Turkish citizens belonging to non-Muslim minorities fall within the scope of the term 'minority'. Turkish legislation which is based on the Lausanne Peace Treaty contains the term 'non-Muslim minority' only."[26]

In order to unpack the reservation, it is necessary to take a brief detour into Turkish constitutional law and the Treaty of Lausanne.

The 1923 Treaty of Lausanne superseded the 1920 Treaty of Sevres. One of the distinguishing features of the former for present purposes is its curtailed provisions on minority rights *vis-à-vis* the latter. Whereas the Treaty of Sevres protected the rights of racial, religious and linguistic minorities including, under Article 148, a limited right to State resources for educational purposes, the latter only made rights pertaining to non-Muslim minorities a matter of international concern (Article 44) even as it granted some limited rights to "Turkish nationals of non-Turkish speech",[27] such as the right to use their own languages before the courts (Article 39). Section III of the Treaty of Lausanne carefully attaches the minority label to non-Muslim minorities only.

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[24] The UN Human Rights Committee notes that "positive measures may also be necessary to protect the identity of a minority". UNHRC, 'General Comment 23', UN Doc. HRI/GEN/1/Rev.1, para. 6.2.

[25] UN Economic and Social Council, 'Commentary of the working group on minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities', UN Doc. E/CN.4/Sub.2/AC.5/2005/2, paras. 21-22.

[26] UNHRC, 'Initial Reports of States Parties: Turkey', April 2011, UN Doc. CCPR/C/TUR/1, para. 409.

[27] The Treaty of Lausanne refers to linguistic minorities as "Turkish nationals of non-Turkish speech". Given that the Treaty of Sevres referred to "racial, religious or linguistic minorities" (Article 147), the decision to drop the minorities label is meaningful.

The Turkish constitution of 1982 has been described as authoritarian and tutelary in character.[28] The military elites responsible for its drafting sought to establish strong institutions loyal to a shared ideology in order to protect the State against its citizens and political elites.[29] That shared ideology is encapsulated in the first three unamendable articles of the constitution, which entrench secularism and loyalty to the nationalism of Atatürk (Article 2), the indivisibility of the State with its territory and nation, and a single State language (Article 3). Although Atatürk nationalism, as the official State ideology, can be divided into several nationalist "languages"[30] with distinct features, it has historically served as the ideological force behind Turkey's transition into a modern, centralised nation-State that attempts to "freeze the Other, such as the Islamic identity, the Kurdish identity, and the Ottoman past, into history".[31]

The Turkish judiciary was one of the tutelary institutions responsible for keeping citizens and political elites in line with the official ideology[32] and judgments of the Constitutional Court of Turkey (AYM) relating to minority rights illustrate the official ideology in practice. Bayir notes that the AYM conceptualises the nation and minorities as mutually exclusive.[33] The nation is conceptualised as a homogeneous entity without internal differentiation.[34] As Bayir explains, "non-Turkish Muslim groups are swallowed into the nation, but without any of their ethno-cultural characteristics, since the nation is constituted by criteria drawn from the Turkish *ethnie*".[35] Minorities are conceptualised as "something outside of the nation and national unity"[36] and are limited to the minorities mentioned in the Treaty of Lausanne and the Turkey-Bulgaria Friendship Treaty.[37] According to the AYM, minority status cannot be granted by domestic law alone,[38] which effectively freezes in time the categories established in those treaties.

The AYM deploys the principle of equality in order to police the boundary between minority and nation, arguing that minority rights are "privileges" and "special rights" that contradict the principle of equality.[39] The AYM also deploys its particular understanding of the concepts of democracy, unity, and progress in order to crowd-out claims for the expansion of minority rights. According to the AYM, "a real democracy is that which produces only

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[28] E. Özbudun, *The Constitutional System of Turkey: 1876 to the Present* (Palgrave Macmillan, 2011), p. 19.
[29] *Ibid.*, pp. 19-20.
[30] T. Bora, 'Nationalist Discourses in Turkey', 102 *The South Atlantic Quarterly* (2003) p. 433.
[31] E. Fuat Keyman and S. Gumuscu, *Democracy, Identity, and Foreign Policy in Turkey: Hegemony Through Transformation* (Palgrave, 2014) p. 99.
[32] Özbudun characterised Turkey as an "extreme example of 'juristocracy'": Özbudun, *supra* note 28, p. 32. Belge notes that the AYM was established in 1961 to guard Atatürk's legacy, and Republican elite interests, from elected officials: C. Belge, 'Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey', 40 *Law & Society Review* (2006) p. 653. Kogacioglu notes that the AYM was not in the business of taking orders from the military, rather "members of the Constitutional Court share the discursive framework of secular statist nationalism with the [National Security Council]". D. Kogacioglu, 'Progress, Unity, and Democracy: Dissolving Political Parties in Turkey', 38 *Law & Society Review* (2004) p. 441.
[33] D. Bayir, *Minorities and Nationalism in Turkish Law* (Ashgate, Oxford, 2013) pp. 192-193.
[34] *Ibid.*, p. 194.
[35] *Ibid.*, p. 195.
[36] *Ibid.*, p. 202.
[37] *Ibid.*, p. 203.
[38] *Ibid.*
[39] *Ibid.*, p. 205. Confusingly, the AYM has also described minority rights as *inferior* to the rights derived from membership in the homogeneous nation, *see* E. Özbudun, 'Party prohibition cases: different approaches by the Turkish constitutional court and the European Court of Human Rights', 17 *Democratization* (2010) p. 130.

progress and unity"[40] where *progress* means the progression of a single homogeneous nation along a unilinear path and *unity* means the overarching similarity of the population,[41] the almost uninterrupted feeling of agreement between the State and the people,[42] and the indivisibility of the State's territorial sovereignty.[43] This tight conceptual and legal framework leaves little space for more substantive understandings of democracy that emphasise the value of pluralism, and it serves to legitimise in the name of democracy anti-democratic actions such as political party closures. The AYM has even gone so far as to suggest that politicising ethnic, cultural, and linguistic differences is a form of racism[44] and that arguments in favour of recognising minorities based on language amount to "unwarranted foreign influences intensified by the rhetoric of human rights and freedoms".[45]

Although much has been done in recent years to unfasten the grip of secular Kemalist elites and tutelary institutions on Turkish political life[46] and to discard certain aspects of Atatürk nationalism, such as the Turkish variant of secularism,[47] it remains the case that Turkish constitutional law distinguishes between what the Treaty of Lausanne states (i.e. it refers to non-Muslim minorities) and what Turkish constitutional law states (i.e. it is non-Muslim minorities, and non-Muslim minorities *only*, that count as minorities). Although the Turkish judiciary, which has gradually come under the control of President Erdogan,[48] is now much more willing to accommodate right-wing Islamist parties like the ruling AKP, it is still reluctant to accept political, cultural and legal pluralism. As Celep explains:

> "The new high judicial structure of the AKP government is different from the old judicial structure only in terms of its ideological makeup, not its extent of openness for difference or political pluralism. In fact, one type of ideological autocracy, Kemalist-Jacobin ideology, is succeeded by another, that is, Conservative-Jacobin ideology. What changes is the ideology, but Jacobinism persists."[49]

The reference to the Turkish constitution must therefore be understood as an indication of Turkey's particular interpretation of the Treaty of Lausanne. To put it differently, the Treaty of Lausanne *positively* identifies non-Muslims as minorities, whereas Turkish constitutional

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[40] Kogacioglu, *supra* note 32, p. 457.
[41] *Ibid.*, p. 452.
[42] *Ibid.*
[43] *Ibid.*, p. 453. In practice the latter meaning of 'unity' even prevents political parties from advocating forms of autonomy that are, in principle, compatible with a unitary State structure, *see* Özbudun, *supra* note 39, p. 128. This restriction is based on Article 80 of Turkey's Law on Political Parties.
[44] Bayir, *supra* note 33, p. 207.
[45] Kogacioglu, *supra* note 32, p. 447.
[46] *See* S.A. Waldman and E. Caliskan, *The New Turkey and its Discontents* (Hurst, 2016) pp. 15-48. *Also see* H. Tas, 'Turkey – from tutelary to delegative democracy', 36 *Third World Quarterly* (2015) p. 776. *Also see* B. Eksen and S. Gumuscu, 'Rising competitive authoritarianism in Turkey', 37 *Third World Quarterly* (2016) p. 1581. *Also see* Z. Kaya & M. Whiting, 'The HDP, the AKP and the Battle for Turkish Democracy', 18 *Ethnopolitics* (2019) p. 92.
[47] *See* S. Cagaptay, *The New Sultan: Erdogan and the Crisis of Modern Turkey* (I.B. Tauris, 2017) pp. 7-8. Recent scholarship highlights an important shift in Turkey's political regime from Kemalism to 'Erdoganism', with the latter combining an authoritarian electoral system, a neopatrimonial economic system, a populist political strategy and an Islamist official ideology. *See* I. Yilmaz & G. Bashirov, 'The AKP after 15 years: emergence of Erdoganism in Turkey' *Third World Quarterly* (2018).
[48] *See* J. Jongerden, *supra* note 1. Recent comments by Amnesty International indicate that the Turkish judiciary "lacks the most basic independence", *see* Amnesty International, 'Turkey: Lifting of state of emergency must pave road back to justice', July 2018. *Also see* E. Özbudun, 'Turkey's Judiciary and the Drift Toward Competitive Authoritarianism' 50 *The International Spectator* (2015), p. 42.
[49] Ödül Celep, 'The Political Causes of Party Closures in Turkey', 67 *Parliamentary Affairs* (2014), p. 388.

law *negatively* excludes all other candidates for minority status, and claims to do so for all time.

The fact that Turkish constitutional law takes an even more restrictive approach to minority rights than required under the Treaty of Lausanne was recognised by the UN Committee on the Elimination of All Forms of Racial Discrimination (CERD) in its concluding observations on the combined fourth to sixth periodic reports of Turkey. The CERD noted that "the treaty of Lausanne does not explicitly prohibit the recognition of other groups as minorities" and that Turkey should consider recognising the minority status of other groups, such as Kurds.[50] In practice, this means that Turkey grants minority rights to "Greek, Armenian and Jewish minority communities while denying their possible impact for unrecognized minority groups (e.g. Kurds, Alevis, Arabs, Syriacs, Protestants, Roma etc.)".[51] Thus, the Turkish reservation purports to grant Turkey the freedom to limit a right intended for *all* persons belonging to ethnic, religious, or linguistic minorities – in other words, a right which "establishes and recognises a right which is conferred on individuals belonging to minority groups"[52] – to just *one* elevated subset of *one* category of minorities, namely particular non-Muslims. Furthermore, Turkey has issued the same reservation to other important international instruments, such as the Convention on the Rights of the Child. In that connection, Turkey purports to exempt itself from the obligation to respect the rights of children belonging to minority groups other than the Greek, Armenian and Jewish communities. This includes the obligation, contained in Article 29(c), to ensure that the education of the child shall be directed to, *inter alia,* the development of respect for the child's cultural identity and language.

One must avoid euphemism and confront squarely the meaning of the reservation: it purports to grant Turkey the freedom to discriminate against minorities other than particular non-Muslims by excluding them from the scope of application of Article 27. The important rights embodied in Article 27 of the ICCPR are available (at least in theory) to some minorities but not to others.

2. On the Validity of Turkey's Reservation

The subject of treaty reservations is a particularly contentious topic in international law. As Hersch Lauterpacht put it, "The subject of reservations to multilateral treaties is one of unusual – in fact baffling – complexity…".[53] Indeed, it took the International Law Commission (ILC), with all of its combined resources and brain power, 18 years to come up with a non-binding 630 page *Guide to Practice on Reservations to Treaties* with associated commentary. Even now, the indeterminacy of this area of law makes it difficult to assess whether a particular treaty reservation is or is not valid. Apart from the indeterminacy of the relevant secondary rules, these difficulties arise from a number of facts, including the general lack of authoritative courts able to develop a clear line of jurisprudence on treaty reservations

[50] UNCERD, 'Concluding observations on the combined fourth to sixth periodic reports of Turkey', 2016, UN Doc. CERD/C/TUR/CO/4-6, para. 14.
[51] D. Bayir, 'Turkey, the Kurds, and the legal contours of the right to self-determination', 1 *Kurdish Studies* (2013) p. 14.
[52] UNHRC, 'General Comment No. 23', UN Doc. HRI/GEN/1/Rev.1.
[53] H. Lauterpacht, 'Report on the Law of Treaties', 2 *Yearbook of the International Law Commission* (1953) p. 124. *Also see* M. Milanovic and L.A. Sicilianos, 'Reservations to Treaties: An Introduction', 24 *European Journal of International Law* (2013) p. 1054.

and, in the context of human rights treaties, the need to balance the objective of universal ratification[54] (which requires some room for States to lodge reservations) with the preservation of the so-called "community interest"[55] embodied in the treaty (which requires the range of permissible reservations to be delimited).

The starting point for any discussion of reservations under international law is the Vienna Convention on the Law of Treaties (VCLT). Articles 19 to 23 of the VCLT deal with reservations to treaties and generally codify the key elements of the ICJ's 1951 Advisory Opinion in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.[56] In that case, which concerned a multilateral treaty, the ICJ recognised that the need to ensure extensive participation in the treaty regime had led to greater flexibility in the international practice concerning reservations. The traditional bilateralist framework of treaty reservations, whereby the validity of a particular reservation was determined on the basis of whether or not the other State party objected to the reservation, was not suited to the Genocide Convention because "[i]n such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention".[57] There was a need, the Court said, to balance the twin goals of wide participation in the treaty regime and the preservation of the important object and purpose of the treaty. The ICJ therefore concluded that "[t]he object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them."[58]

That judgment is reflected in Article 19 of the VCLT. States are free to formulate reservations unless the reservation is prohibited by the treaty; or the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or if the reservation is incompatible with the object and purpose of the treaty. Pellet argues that the VCLT regime is "well balanced, flexible, and adaptable. It strikes the right balance between the need for universality and preservation of the integrity of the treaty…".[59]

The VCLT does, however, obtain flexibility and adaptability at the cost of legal clarity. The object and purpose test has been described as an enigma,[60] and no clear method of distilling the object and purpose of a particular treaty emerges from a study of international courts and treaty bodies. Few, if any, consistent guiding principles can be drawn from State practice.[61] Furthermore, the object and purpose test appears to be tautological because determining the object and purpose of a treaty is a matter of interpretation, and yet, according to Article 31 of the VCLT, interpretation is a matter *inter alia* of determining the object and purpose of the

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[54] United Nations International Human Rights Instruments, 'Report of the Meeting of the Working Group on Reservations', February 2007, UN Doc. HRI/MC/2007/5, p. 7.
[55] B. Simma, 'Community Interest and International Treaties: Part One', 250 *Collected Courses of The Hague Academy of International Law* (1994).
[56] ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951, Advisory Opinion).
[57] *Ibid.*, p. 23.
[58] *Ibid.*, p. 24.
[59] A. Pellet, 'The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur', 24 *European Journal of International Law* (2013) p. 1078.
[60] I. Buffard & K. Zemanek, 'The "Object and Purpose" of a Treaty: An Enigma?', 3 *Austrian Review of International and European Law* (1998) p. 311.
[61] *See* J. Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties', 8 *Finnish Yearbook of International Law* (1997) pp. 139-144.

treaty.[62] The problem is even more acute in the case of the ICCPR, which contains numerous interdependent rights. As the ILC points out in its *Guide to Practice* "it is especially difficult to determine at what point that interdependence, which is the *raison d'être* of the treaty, is threatened by a reservation relating to one of its elements".[63] There is a temptation, as a human rights lawyer, to use this indeterminacy as a springboard for a kind of "intellectual terrorism"[64] whereby all or most reservations to human rights treaties can be considered invalid.[65] At the same time, States can undoubtedly use the indeterminacy to carve out exceptions to important provisions while claiming the legitimacy that comes with ratifying the treaty as a whole.

In the drafting of its *Guide to Practice* the ILC attempted to fill in some of these gaps. A crucial starting point for present purposes is to distinguish between reservations and declarations. The definition of reservations adopted by the ILC is: "a unilateral statement, howsoever phrased or named, made by a State… when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty… whereby the State… purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State…".[66] Interpretative declaration, on the other hand, "means a unilateral statement, howsoever phrased or named, made by a State… whereby that State… purports to specify or clarify the meaning or scope of a treaty or certain of its provisions".[67] The distinction between reservations and declarations is therefore "determined by the legal effect that its author purports to produce".[68] Declarations are non-binding, but may be taken into account when interpreting a treaty, whereas reservations have the legal effect of formally modifying treaty obligations.[69]

The ILC Guidelines note that treaty monitoring bodies, dispute settlement bodies, and contracting States or organisations may, within their respective competences, assess the permissibility of reservations to a treaty.[70] Although the task of identifying the object and purpose of the ICCPR is a difficult one, the ILC guidelines on reservations to human rights treaties at least provide a useful framework.

Before assessing the compatibility of Turkey's reservation with the object and purpose of the ICCPR, it is important to take a step back and consider the fact that the reservation refers to an entire body of Turkey's domestic law. Two of the States which have formally objected to Turkey's reservation (namely Finland and Sweden) note that in doing so it fails to clearly specify the content of the reservation. The problem is not so much the reference to the Turkish constitution *per se* - because such references do not *necessarily* invalidate treaty reservations provided they are compatible with the object and purpose of the treaty[71] - rather

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[62] W. Schabas, 'Reservations to Human Rights Treaties: Time for Innovation and Reform', 32 *Canadian Yearbook of International Law* (1995) p. 39.
[63] International Law Commission, 'Guide to Practice on Reservations to Treaties', UN Doc. A/66/10/Add.1, Guideline 3.1.5.6, Commentary para. 1.
[64] Pellet, *supra* note 59, p. 1079.
[65] *Also see* A. Pellet, '"Human Rightism" and International Law', 10 *Italian Yearbook of International Law* (2000) p. 3.
[66] ILC, *supra* note 63, Guideline 1.1.
[67] *Ibid.*, Guideline 1.2.
[68] *Ibid.*, Guideline 1.3.
[69] O. Dör and K. Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012), p. 240.
[70] ILC, *supra* note 63, Guideline 3.2.
[71] *Ibid.*, Guideline 3.1.5.5; Commentary para. 7.

the potential problem is with the vague or general nature of the reservation. Guideline 3.1.5.2 of the ILC's report affirms that a reservation "shall be worded in such a way as to allow its meaning to be understood, in order to assess in particular its compatibility with the object and purpose of the treaty".[72] Reservations that fail to meet this requirement are not invalid *ipso jure*, rather they are problematic because it is impossible to assess whether they are or are not invalid.[73]

One cannot deny that Turkey's reservation contains a significant degree of vagueness. The provisions of domestic law to which it refers are dynamic and complex, and one cannot establish the full extent of the Article 27 obligations accepted by Turkey by reading the text of its reservation alone. As the ILC highlights, this situation is detrimental to the consensual nature of the law of treaties because the uncertain meaning of the reservation makes it difficult (or impossible) for other parties to the treaty to accept or object to it on its own terms.[74] However, it is argued here that Turkey's reservation contains a core meaning, which is relatively clear and readily understood by States as well as treaty monitoring bodies; and on the basis of this relatively clear core meaning one can construct an argument that the reservation is invalid. This core meaning was described in the previous section, and pertains to the very limited number of minorities recognised by Turkey, and the arbitrary way in which they are identified.

As explained above, the thrust of Turkey's reservation is to grant it the freedom to discriminate against minorities other than particular non-Muslim minorities by excluding all other minorities from the scope of application of Article 27. According to the ILC Guidelines, assessing the compatibility of a reservation with the object and purpose of a treaty containing numerous interdependent rights requires one to take into account three elements: the interdependence of the rights and obligations, the importance that the provision has within the general tenor of the treaty, and the extent of the impact that the reservation has on the treaty.[75]

The goal of the first element, according to the ILC, is to ensure that the treaty does not disintegrate into bundles of obligations, "the individual, separate realisation of which would not achieve the realisation of the object of the treaty as a whole".[76] The object and purpose of the ICCPR, according to the HRC, is "to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify …".[77] One might also refer to the ICCPR's preamble, which notes the importance of recognising the "equal and inalienable rights of all members of the human family …". Given that minority rights, as expressed in Article 27, are aimed at allowing minority groups to maintain and develop their very existence as minority groups (i.e. to protect them from unwanted assimilation), it could be argued that serious reservations to that Article undermine the interdependence of ICCPR rights and obligations, in that without access to those rights there can be no substantial relationship of equality between the minority group and the majority of the population. Without access to minority rights, these groups are viewed as human beings divorced from their concrete cultural backgrounds, which in practice deprives them of the kind of rights and

[72] *Ibid.*, Guideline 3.1.5.2.
[73] *Ibid,*, Guideline 3.1.5.2; Commentary para. 11.
[74] *Ibid.*, Guideline 3.1.5.2; Commentary para. 3.
[75] *Ibid.*, Guideline 3.1.5.6.
[76] *Ibid.*, Commentary para. 7.
[77] UNHRC, General Comment 24, para. 7.

freedoms enjoyed by the dominant cultural majority of the population. As Kymlicka explains, some minority groups are "unfairly disadvantaged in the cultural market-place".[78] Minority rights aimed at preventing unwanted assimilation can help to tackle this unfair disadvantage and further the object and purpose of recognising rights on the basis of more substantive equality.

The *importance* of minority rights lies in the fact that certain rights protected by multilateral human rights treaties are less essential than others (in particular, than the non-derogable ones).[79] The importance of the provision must be assessed in the light of the "general tenor" of the treaty, which the ILC describes as the "balance of rights and obligations which constitute its substance or the general concept underlying the treaty".[80] The importance of minority rights is clearly expressed in regional and international instruments. One might highlight, for example, the *Charter of Paris for a New Europe*, which was the outcome of a meeting between the participating States of the CSCE (including Turkey). The Charter reaffirms the "deep conviction" that crucial goals, such as friendly relations, peace, justice, stability and democracy require "that the ethnic, cultural, linguistic and religious identity of national minorities be protected and conditions for the promotion of that identity be created".[81] It is difficult to square this strong statement of the importance of minority rights with Turkey's reservation limiting those rights to a subset of religious minorities. Furthermore, in General Comment No. 24, the HRC highlighted the particular importance of non-derogable ICCPR rights, and opined that "a State has a heavy onus to justify such a reservation".[82] Crucially, the HRC added that although Article 27 is not a non-derogable right,[83] it is nonetheless "of profound importance".[84]

Finally, the ILC's reference to the *impact* of the reservation "allows for the inference that, even in the case of essential rights, reservations are possible if they do not preclude protection of the rights in question and do not have the effect of excessively modifying their legal regime".[85] Turkey's reservation to Article 27 does, in fact, preclude protection of the right for whole categories of people and does, for that very reason, excessively modify the legal regime.

Thus it is possible to construct a plausible argument that Turkey's reservation to Article 27 is incompatible with the object and purpose of the treaty.

In addition to (and in conjunction with) the foregoing argument that the reservation is incompatible with the object and purpose of the ICCPR, it is important to consider the possibility that Article 27 reflects both a norm of a customary law and a peremptory norm (*jus cogens*). In brief, the ILC's Guidelines have a number of things to say about reservations to treaty provisions which reflect customary law or a peremptory norm. First, there is no automatic rule against the permissibility of reservations to treaty provisions which reflect rules of customary international law.[86] Second, there is no automatic rule against the

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[78] W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (OUP, 1996) p. 109.
[79] ILC, *supra* note 63, Guideline 3.1.5.6; Commentary, para. 8.
[80] *Ibid.*, Guideline 3.1.5, Commentary para. 14(ii).
[81] OSCE, 'Charter of Paris for a New Europe' (1990) p. 7.
[82] UNHRC, *supra* note 77, para. 10.
[83] The HRC is, however, of the opinion that "elements" of minority rights are non-derogable. *See* UNHRC, 'General Comment No. 29', UN Doc. CCPR/C/21/Rev.1/Add.11, para. 13(c).
[84] UNHRC, *supra* note 77, para. 10.
[85] ILC, *supra* note 63, Guideline 3.1.5.6, Commentary para. 9.
[86] *Ibid.*, Guideline 3.1.5.3.

permissibility of reservations to treaty provisions which reflect peremptory norms.[87] Third, although such reservations might be perfectly valid, they do not affect the rights and obligations arising under the customary law rule[88] or the peremptory norm.[89] Fourth, although there is no *automatic* rule that reservations to treaty provisions which reflect customary law norms or peremptory norms will be invalid, it is, in the ILC's judgment, "quite likely" that such reservations will not be compatible with the object and purpose of the treaty.[90] In the case of peremptory norms, it appears that such reservations will be invalid unless the treaty refers only "marginally" to the norm without it being part of the object and purpose of the treaty.[91] Fifth, it is possible that the effect of a reservation would be to apply the treaty in a manner conflicting with a peremptory norm. According to the ILC's Guidelines, a reservation cannot have this effect.[92] The remainder of this section will build an argument that the possibly customary, and even peremptory, nature of the Article 27 obligation adds weight to the argument that Turkey's reservation is incompatible with the object and purpose of the ICCPR. It will also argue that the combined effect of the treaty and Turkey's reservation is to apply the ICCPR in a manner conflicting with the (possibly) peremptory norm of non-discrimination.

To begin with the possibility that Article 27 reflects a norm of customary international law, in its General Comment No. 24 the HRC expressed its opinion that the minority rights provision does indeed reflect such a norm.[93] Furthermore, scholars have pointed to the large number of States bound by Article 27 as parties to the ICCPR, the connection between minority rights and non-discrimination, the reaffirmation of elements of Article 27 in other widely ratified treaties, and widening State support for cultural pluralism and stability as further evidence that at least some elements of Article 27 represent customary international law.[94] If these opinions are accurate, then they *add weight* to the argument that Turkey's reservation is incompatible with the object and purpose of the treaty. That is to say, if it is true that Article 27 reflects a norm of customary international law then it is, in the ILC's terms, "quite likely" that the reservation is incompatible with the object and purpose of the ICCPR.

As for the possibility that Article 27 reflects a peremptory norm, according to the first and second Opinions of the Badinter Arbitration Committee – which was established by the European Community, in the context of the collapse of Yugoslavia, for the purpose of issuing opinions and rulings on various issues arising from that dissolution - the rights of minorities are peremptory norms of general international law.[95] Whether this is an accurate opinion is open to discussion. Beyond the more obvious peremptory norms such as the prohibition of torture, the right to life, and the right of self-determination, there is much room for debate. For example, Knop has argued that there is no support for elevating minority rights to the level of *jus cogens*[96] and Craven has argued that although minority rights might be developing into rules of customary international law, "it is undoubtedly too early to suggest

[87] *Ibid.*, Guideline 3.1.5.3; Commentary para. 17.
[88] *Ibid.*, Guideline 4.4.2.
[89] *Ibid.*, Guideline 4.4.3.
[90] *Ibid.*, Guideline 3.1.5.3; Commentary para. 9.
[91] *Ibid.*, Guideline 3.1.5.3; Commentary para. 17.
[92] *Ibid.*, Guideline 4.4.3(2).
[93] UNHRC, *supra* note 77, para. 8.
[94] *See* G. Pentassuglia, *Minorities in International Law* (Council of Europe Publishing, 2002) pp. 110-111.
[95] Conference on Yugoslavia Arbitration Committee, 'Opinion No. 1', 31 *International Legal Materials* (1992) p. 1496; Conference on Yugoslavia Arbitration Committee, 'Opinion No. 2', 31 *International Legal Materials* (1992) p. 1498.
[96] K. Knop, *Diversity and Self-Determination in International Law* (CUP, 2002) p. 177.

that they are now *jus cogens* norms".[97] Thus, the *possibility* that Article 27 reflects a peremptory norm *adds weight* to the argument that the reservation is incompatible with the object and purpose of the ICCPR. Indeed, Article 27 cannot accurately be described as "marginal" to the object and purpose of the ICCPR, which would make it "quite likely" (in the ILC's terms) that the reservation is invalid.

The final facet of the law of treaty reservations that adds weight to the argument for the invalidity of Turkey's reservation comes not from the fact that the reservation directly pertains to a treaty provision which reflects a peremptory norm, but from the possibility that the overall effect of the reservation *leads to* the violation of a peremptory norm, namely the right to non-discrimination. In paragraph 5 of its Commentary on Guideline 4.4.3, which states that "[a] reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law", the ILC notes:

> "Guideline 4.4.3 also covers the case in which, although no rule of *jus cogens* is reflected in the treaty, a reservation would entail the treaty being applied in a manner conflicting with *jus cogens*. It is conceivable, for instance, that a reservation could be intended to exclude a category of persons from benefiting from certain rights granted under a treaty, on the basis of a form of discrimination that would be contrary to *jus cogens*; the reservation in question could produce such an effect."

This Guideline is a reflection of the fact that Article 53 of the VCLT does not allow a treaty to conflict with a peremptory norm of general international law. If it was permissible for a State to bypass or violate a peremptory norm via a treaty reservation, then there would be a serious lacuna in the law: the treaty provision, combined with the reservation, would effectively produce a legal rule that is incompatible with a *jus cogens* norm.

In its 2003 Advisory Opinion on the *Juridical Condition and Rights of Undocumented Migrants*, the Inter-American Court of Human Rights distinguished between admissible forms of differential treatment (which are "reasonable, proportionate and objective"),[98] which it preferred to call "distinction" rather than discrimination; and other forms of differential treatment that violate human rights, which amount to discrimination. This important distinction is also reflected in the jurisprudence of the European Court of Human Rights[99] and the opinions of treaty bodies[100], as well as in binding international covenants.[101] This clarification of the difference between 'distinction' and 'discrimination' is important because some distinctions are actually aimed at eliminating discrimination. The general rule is that differential treatment will amount to discrimination unless it pursues a legitimate aim in a proportionate manner.

As for discrimination, the Inter-American Court expressed its opinion, in forceful language, that there is an "inseparable connection between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination".[102] The Court regarded non-discrimination as "fundamental for the safeguard of human rights in both international

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[97] M.C.R. Craven, 'The European Community Arbitration Commission on Yugoslavia', 66 *British Yearbook of International Law* (1996) p. 391.
[98] Inter-American Court of Human Rights, *Juridical Condition and Rights of the Undocumented Migrants*, (Advisory Opinion, 2003), Opinion No. OC-18/03, para. 84.
[99] ECHR, *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium"* v. *Belgium* (1968) (Application No. 1474/62), para. 10.
[100] UNCERD, 'General Recommendation No. 32', (2009), para. 8.
[101] International Convention on the Elimination of All Forms of Racial Discrimination, Article 1. *Also see* Convention on the Rights of Persons with Disabilities, Article 5(4).
[102] Inter-American Court of Human Rights, *supra* note 98, para. 84.

and domestic law"[103] and, in another case, explained that it "springs directly from the oneness of the human family and is linked to the essential dignity of the individual".[104] For these reasons, among others, the Court concluded that "the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws."[105] This builds upon the very first paragraph of the Universal Declaration of Human Rights, which notes *inter alia* that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". As the OSCE puts it, "the ultimate object of all human rights is the full and free development of the individual human personality in conditions of equality".[106] Furthermore, the African Commission on Human and Peoples' Rights describes the principle of non-discrimination as "the foundation for the enjoyment of all human rights".[107]

The Turkish reservation to Article 27 is intended to exclude whole categories of persons from benefitting from the content of that provision. This is recognised by the CERD, which noted the following in its 2009 Concluding Observations on Turkey:

> "[T]he application of restrictive criteria to determine the existence of ethnic groups, official recognition of some and refusal to recognise others, may give rise to differing treatment for various ethnic and other groups which may, in turn, lead to de facto discrimination in the enjoyment of the rights and freedoms referred to in article 5 of the Convention (articles 2 and 5)."[108]

Turkey's refusal to grant minority rights to anybody except members of particular non-Muslim minority groups has no clear justification, hence the CERD's conclusion that it may lead to *de facto* discrimination.

There is, however, some ambiguity in the normative status of non-discrimination under international law. Commenting on the Inter-American Court's reasoning in *Undocumented Migrants*, Bianchi notes that one of the major threats posed to the concept of *jus cogens* is "the tendency by some of its more fervent supporters to see it everywhere".[109] Bianchi describes the Court's reasoning as "axiomatic" and "linked with vague notions of natural law", and suggests that the decision to classify the norm of non-discrimination as a peremptory norm "may have been instrumental in reaching out to the United States, not a party to the American Convention on Human Rights".[110]

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[103] *Ibid*., para. 88.
[104] Inter-American Court of Human Rights, *Legal Status and Human Rights of the Child* (2002, Advisory Opinion) Opinion No. OC-17/02, para. 45.
[105] Inter-American Court of Human Rights, *supra* note 98, para. 101.
[106] OSCE, 'The Hague Recommendations Regarding the Education Rights of National Minorities & Explanatory Note' (1996), <www.osce.org/hcnm/32180?download=true>, viewed on 24 April 2018.
[107] African Commission on Human and Peoples' Rights, *Zimbabwe NGO Human Rights Forum* v. *Zimbabwe* (May 2006), Communication Number 245/2002, para. 169.
[108] UNCERD, 'Concluding Observations on Turkey', (2009), UN Doc. CERD/C/TUR/CO/3, para. 12. Note that the Committee's comments are made in the context of a general observation about Turkey's definition of the term 'minority'.
[109] Andrea Bianchi, 'Human Rights and the Magic of *Jus Cogens*', 19 *European Journal of International Law* (2008) p. 506.
[110] *Ibid.*

Thus, the *possibility* that Turkey's reservation excludes or modifies the legal effect of the ICCPR in a manner contrary to the peremptory norm of non-discrimination adds further weight to the argument for the invalidity of Turkey's reservation to Article 27.

3. Possible Consequences of Invalidity

Another major area of ambiguity in the VCLT concerns the consequences of an invalid treaty reservation. Three broad schools of thought exist on this issue. The 'surgical doctrine' involves acceptance of the State's ratification of the treaty whilst excluding the provisions to which the reservation pertains.[111] In other words, the "infected" provision is surgically excised from the body of the treaty.[112] The 'backlash doctrine' holds that an invalid reservation results in the complete negation of the State's consent to be bound by the treaty as a whole.[113] And the 'severability doctrine' holds that the invalid reservation must be severed from the State's instrument of ratification.[114] In other words, the State will remain bound by the treaty without the benefit of its reservation.

The 'surgical doctrine' is rarely defended by scholars or international bodies because it would effectively give full force to a reservation deemed incompatible with the object and purpose of the treaty.[115] The 'backlash doctrine' and 'severability doctrine' produce radically different outcomes, but are united by a common concern to uphold State consent to be bound by the treaty. The 'backlash doctrine' holds that one cannot sever an invalid reservation from a State's instrument of ratification because to do so would involve violating an important condition of the State's consent to be bound by the treaty.[116] The severability doctrine holds that one can sever an invalid reservation from a State's instrument of ratification if it is not an essential condition of the State's consent to be bound.[117]

The ILC Guidelines come down in favour of a rebuttable presumption of severability. Guideline 4.5.3 notes that the author of an invalid reservation will remain a contracting State without the benefit of the reservation "[u]nless the author of the invalid reservation has expressed a contrary intention or such an intention is otherwise established …". The ILC's Commentary to Guideline 4.5.3 notes "the key to the problem is simply the will of the author of the reservation: does the author intend to be bound by the treaty even if the reservation is invalid – without benefit of the reservation – or is its reservation a *sine qua non* for its commitment to be bound by the treaty?"[118] The State's reservation, notes the ILC, plays an important role in the process of consenting to be bound by a treaty but is not necessarily decisive.[119] As Simma and Hernandez put it, "the author of a reservation has by definition wished to become a contracting party to the relevant treaty; reservations thereto, whilst playing an important part in a State's consent, do not necessarily reflect the essential

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[111] R. Moloney, 'Incompatible Reservations to the Human Rights Treaties: Severability and the Problem of State Consent', 5 *Melbourne Journal of International Law* (2004) p. 158.
[112] *Ibid.*
[113] *Ibid.*
[114] *Ibid.*
[115] *Ibid.*, p. 159.
[116] *Ibid.*
[117] *Ibid.*, p. 160.
[118] ILC, *supra* note 63, Guideline 4.5.3, Commentary para. 22.
[119] *Ibid.*, Guideline 4.5.3, Commentary para. 37.

conditions for a State to consent to be bound".[120] The parties to a treaty consent to both the text of the treaty *and* to the common intention expressed through the text.[121] A reservation to a part of the text does not necessarily imply a lack of consent to the common intention of the treaty. The rebuttable presumption of severability in Guideline 4.5.3 is further softened by paragraph 3 of the same Guideline, which notes "the author of the invalid reservation may express at any time its intention not to be bound by the treaty without the benefit of the reservation".

Thus, in the absence of evidence to the contrary, it is to be assumed that Turkey will remain bound by the ICCPR even if its reservation is null and void. But how does one rebut the presumption of severability? Given the centrality of State consent in treaty law, the key to answering this question lies in Turkey's intention: is its reservation to Article 27 a *sine qua non* for its commitment to be bound by the treaty?[122] In its Commentary to Guideline 4.5.3, the ILC admits that "[i]n practice, determining the intention of the author of an invalid reservation may be difficult".[123] One has to consider whether Turkey would have knowingly ratified the ICCPR without the reservation.[124] According to the ILC, one can also take into consideration the reserving State's subsequent conduct with respect to the treaty.[125]

Limited space precludes a full exploration of evidence regarding the importance Turkey attaches to its reservation to Article 27, and the nature of its intent to be bound by the ICCPR. The following reflections, however, establish a few lines of argument that might be more fully developed in future research.

It must first of all be underlined that Turkey's understanding of nation and minority has deep roots in the State's history. Ziya Gökalp (1876-1924), perhaps the most important intellect behind the development of Turkish State ideology and nationalism, saw the nation as a community with a shared culture and identified religion as the root of that culture. As fellow Sunni Muslims, Kurds were to be assimilated into the dominant Turkish culture, which was in turn to be the basis of Turkish nationalism. Non-Muslims and non-Sunnis, on the other hand, were external to the nation.[126] Mustafa Kemal Atatürk, who was influenced by French revolutionary ideals,[127] sought to replace religion with Turkish nationalism as "substitute foci for popular allegiance".[128] But Kemalism ended up tacitly delimiting the nation according to Sunni Islam in order to bind together Turks and Kurds.[129] As fellow Sunni-Muslims, the latter were expected to assimilate into the former in order to produce a single Turkish nation, harnessed to a homogeneous Turkish language and culture, ready to reach and eventually surpass European standards of civilisation.[130] For Atatürk, the very survival of the Turkish

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[120] B. Simma & G. Hernandez, 'Legal Consequences of an Impermissible Reservation to a Human Rights Treaty: Where do we Stand?', in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (OUP, 2011) p. 81.
[121] L. Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff, The Hague, 1995) p. 59.
[122] ILC, *supra* note 63, Guideline 4.5.3, Commentary para. 22.
[123] *Ibid.*, Guideline 4.5.3, Commentary para. 43.
[124] *Ibid.*
[125] *Ibid*., Guideline 4.5.3, Commentary para. 46.
[126] T. Salim Nefes, 'The Sociological Foundations of Turkish Nationalism' 20 *Journal of Balkan and Near Eastern Studies* (2018) p. 15.
[127] *See* A. Mango, *Atatürk*, (John Murray, 1999).
[128] M. Sükrü Hanioglu, *Atatürk: An Intellectual Biography*, (Princeton, 2011) p. 161.
[129] P. Anderson, *The New Old World* (Verso, 2009) p. 419.
[130] It has been convincingly argued that Kemalism had much in common with orientalist Western civilising missions. *See* W. Zeydanlioglu, '"The White Turkish Man's Burden": Orientalism, Kemalism and the Kurds in

Republic depended on it.[131] Thus, Turkey's legal position that only particular religious minorities count as minorities is tightly woven into the Republic of Turkey's foundations. In fact, it has been argued that the refusal to recognise Muslim minorities is actually "a hangover from the Ottoman concept"[132] whereby the Empire's religious groups were organised into *millets.*[133]

In an explanatory note on its reservation submitted in 2004 to the Council of Europe's Committee of Legal Advisers on Public International Law (CAHDI), Turkey argued that its reservation is compatible with the object and purpose of the ICCPR, noted that one other State (France) completely excludes Article 27, and pointed out that there is no universally accepted definition of 'minority' in international law.[134] Nothing in Turkey's explanation indicates the level of importance that it attaches to the reservation. However, in its combined second and third periodic reports to the UN Committee on the Rights of the Child, Turkey highlights that the state's "supreme interests" require minority rights to be used "as a sign of respect for ethnic, linguistic and religious diversity" rather than "as a tool for separatism and secessionism".[135] To that end, Turkey reports that "it is essential that current practices are sustained".[136] The report indicates that Turkey considers its current practices relating to minority rights *essential* to the avoidance of separatism and secessionism, and that its current practice is part of its *supreme* interests. This demonstrates that Turkey attaches a very great deal of importance to its reservation to Article 27. Whether or not Turkey's arguments are persuasive in this regard is not relevant to an inquiry about its subjective intention *vis-à-vis* the conditions for its consent to be bound by the ICCPR.

At the same time as Turkey elevates its particular approach to minority rights to the level of a supreme interest, it also elevates international agreements concerning fundamental rights and freedoms to the level of constitutional law and, to an extent, elevates those agreements over conflicting domestic law. During the ruling AKP government's first term in office, a set of constitutional amendments was passed which influenced the European Commission's decision to open formal EU accession talks with Turkey.[137] One of those amendments altered Article 90 of the constitution, which concerns the place of treaty law in the domestic legal framework. According to Article 90(5) of the Turkish constitution, conflicts between international agreements concerning rights and freedoms and conflicting domestic laws shall be resolved in favour of the former. On its surface, Article 90(5) enshrines a monist approach, with international law (insofar as it concerns agreements on fundamental rights and freedoms) hierarchically superior to conflicting domestic law. Whatever the immediate motivation for inserting Article 90(5), this suggests that Turkey attaches supreme importance to the object and purpose of international human rights treaties, which might in turn indicate

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Turkey', in G. Rings and A. Ife, *Neo-colonial Mentalities in Contemporary Europe? Language and Discourse in the Construction of Identities* (Cambridge Scholars Publishing, 2008).

[131] Mango, *supra* note 127, p. 438.

[132] H. Barkey and G. Fuller, *Turkey's Kurdish Question* (Rowman & Littlefield, 1998) p. 202.

[133] *See* K. Barkey and G. Gavrilis, 'The Ottoman Millet System: Non-Territorial Autonomy and its Contemporary Legacy', 15 *Ethnopolitics* (2016) p. 24.

[134] CAHDI, 'Explanatory Note on Declarations and Reservations by Turkey to the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights' (9 September 2004), CAHDI (2004) 24, para. 2.3.

[135] UNCRC, 'Combined second and third periodic reports of States parties due in 2007: Turkey' (18 July 2011), UN Doc. CRC/C/TUR/2-3, para. 9.

[136] *Ibid.*

[137] F. Cengiz and L. Hoffmann, 'Rethinking Conditionality: Turkey's European Union Accession and the Kurdish Question', 51 *Journal of Common Market Studies* (2013) p. 422.

its consent to be bound by those treaties even without the benefit of its reservation to Article 27. However, the argument here is clouded by the practice of the AYM, which demonstrates that it continues to accord priority to the unamendable articles of the constitution. According to Qoraboyev and Turkut:

> "these so-called peculiar principles form the *fundamentum* of the Turkish constitutional order and thus cannot be debated or questioned even if it carries potential conflict *vis-à-vis* international standards. . . The [AYM], therefore, seems to be particularly reluctant to apply international law when the case touches upon linguistic, religious, and minority rights … In such cases the [AYM] relies on domestic law to contest international norms."[138]

Turkey's practice relating to international human rights treaties therefore produces a complicated picture of the nature of its consent to be bound by the ICCPR. On one hand, the ICCPR is purportedly so important that it is elevated over domestic law. On the other hand, Turkish courts are not, in practice, willing to elevate the ICCPR over domestic law if it perceives conflict between the ICCPR and the unamendable articles of the Turkish constitution.

It therefore appears to be the case that Turkey attaches fundamental importance to the values embodied in the ICCPR (at least in theory) *and* attaches fundamental importance to its ideological system that strictly limits the scope of minority rights. The question is: does this indicate that Turkey's reservation to Article 27 is a *sine qua non* of its consent to be bound by the ICCPR? Would Turkey say that its attachment to its ideological system is such an important condition of its consent to be bound by the ICCPR that it would rather have its name removed from the long list of ratifying States than continue to be a State party without the benefit of its reservation? Note that this question is different from the question of whether Turkey, in practice, fails to live up to the values expressed in the ICCPR for ideological reasons. Many States fall very far short of ICCPR values, often for ideological reasons, but would not deny their ongoing consent to be bound by it - for reasons of international legitimacy if nothing else.

Perhaps the best that one can say in answer to the present question is: there is insufficient evidence to rebut the presumption that Turkey would remain bound by the ICCPR without the benefit of its reservation. However, it should be borne in mind that an authoritative finding to the effect that the reservation is null and void could result in Turkey expressing its intention not to be bound by the treaty.

Conclusion

Although one should be very cautious in advancing conclusions on the validity of particular treaty reservations, there are plausible grounds for concluding, first, that Turkey's reservation to Article 27 of the ICCPR is null and void because it contradicts the object and purpose of the treaty and, second, it cannot exclude or modify Article 27 in the way that it does because to do so would lead to the violation of a *jus cogens* norm.

It could be argued, quite plausibly, that the reservation undermines the object and purpose of the ICCPR. The object and purpose is to create legally binding standards for human rights by

[138] I. Qoraboyev and E. Turkut, 'International Law in the Turkish Legal Order: Transnational Judicial Dialogue and the Turkish Constitutional Court', 26 *The Italian Yearbook of International Law* (2017) pp. 56-57.

defining certain civil and political rights and placing them in a framework of obligations, and to recognise those rights on the basis of equality. By limiting the scope of Article 27, a very large number of minority groups are subjected to a range of individual rights as abstract individuals or, as seems more likely, as misidentified members of the majority ethnic group. This undermines the *interdependence* of the rights contained in the ICCPR and thereby undermines the object and purpose of recognising those rights on the basis of equality. The *importance* of minority rights to peace, justice, democracy and friendly relations has been quite widely recognised by the HRC, among others. Finally, the overall *impact* of the reservation is not minimal. It could even involve Turkey violating the *jus cogens* norm of non-discrimination in its application of Article 27, even if Article 27 itself does not reflect a peremptory norm. Thus, under the VCLT and associated ILC Guidelines, one can construct a plausible argument that the reservation is null and void.

There is a rebuttable presumption that Turkey will remain a party to the ICCPR without the benefit of its reservation. The presumption can be rebutted by evidence indicating that Turkey considers its reservation to Article 27 a *sine qua non* of its consent to be bound by the Covenant. It can also be rebutted by a clear indication from Turkey that it does not consent to be bound by the Covenant without the benefit of its reservation. The evidence examined in this article paints an ambiguous picture of the nature of Turkey's consent to be bound by the ICCPR. On one hand, Turkey considers its reservation to Article 27 to be of supreme importance. On the other hand, Turkey's constitution purports to elevate international law (insofar as it concerns agreements on fundamental rights and freedoms) above conflicting domestic law. The evidence, it was submitted, is insufficient to rebut the presumption of severability. One can therefore advance a plausible argument that Turkey's reservation to Article 27 of the ICCPR is invalid and that, if it is invalid, Turkey would remain bound by the ICCPR without the benefit of its reservation.

In closing, it is important to consider what practical repercussions might follow if the reservation were found to be invalid. In this author's view, Turkey's recent behaviour strongly suggests that its increasingly authoritarian trajectory will not be directly halted or reversed by legal arguments. To take a particularly strong example, in the recent case of *Selahattin Demirtas* v. *Turkey (No. 2)* the European Court of Human Rights ruled, *inter alia*, that Selahattin Demirtas, a former co-chair of the HDP political party, was under extended pre-trial detention for "the predominant ulterior purpose of stifling pluralism and limiting freedom of political debate"[139] and that any continuation of his pre-trial detention would prolong Turkey's violation of his Convention rights.[140] President Erdogan responded with the legally false assertion that "[t]he decisions delivered by the ECHR do not bind us"[141]. Mr. Erdogan's strategy seems to be to strengthen his grip on Turkey and to remake it in his own image by tolerating no dissent,[142] which requires a strong assertion of Turkish sovereignty with very little room for the fetters of international law.[143] As one HDP parliamentary deputy

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[139] ECHR, *Case of Selahattin Demirtas* v. *Turkey (No. 2)* (2018) (Application No. 14305/17), para. 273.
[140] *Ibid.*, para. 282.
[141] Hürriyet Daily News, 'Erdogan rejects European court's "non-binding" decision over Demirtas', 20 November 2018, <http://www.hurriyetdailynews.com/european-court-urges-turkey-to-free-demirtas-139022> , viewed on 23 December 2018.
[142] Cagaptay has aptly observed that Erdogan is, in this respect, a kind of "anti-Ataturk Ataturk": S. Cagaptay, *supra* note 47, p. 8.
[143] This anti-international law outlook is obviously not a purely Turkish phenomenon. It is, in fact, a broader trend among today's right-wing authoritarian 'populists'. *See* C. Schwöbel-Patel, 'Populism, International Law and the End of *Keep Calm and Carry on Lawyering*', *Netherlands Yearbook of International Law* (2019,

expressed it to this author, Mr. Erdogan is constructing a Republic of Fear, similar in some important respects to the one constructed by Saddam Hussein in Iraq.[144]

But this is not to suggest that a clear decision to the effect that Turkey's reservation is invalid would be completely inconsequential. Insofar as international law has ideological force[145] it can serve to legitimise struggles for emancipation,[146] and the legal identification of certain groups in Turkey as minorities can ground claims for certain important rights. For Kurds, these might include such mainstays of the Kurdish Question as education in their mother tongue. The point is that by elevating these claims to the level of international law one can argue that Turkey *must* address them because international law *requires* it. A failure to meet these legitimate demands is no longer just a matter of bad politics or of immorality, rather it is a matter of *breaking the law*. Given the hold that law and human rights have over the popular imagination, this could legitimise and strengthen claims for minority rights in Turkey to a significant extent. As O'Connell puts it, "the assertion of human rights will not bring about fundamental transformation in and of itself, but they can play an important role in broader struggles to do that".[147]

The best that one could hope for is therefore a small addition to the ideological, justificatory, and argumentative armory of groups and individuals in Turkey who are struggling every day against severe oppression for a more democratic, free, and pluralist future.

forthcoming). *Also see* P. Alston, 'The Populist Challenge to Human Rights', 9 *Journal of Human Rights Practice* (2017) p. 1.

[144] *See* K. Makiya, *Republic of Fear: The Politics of Modern Iraq* (University of California, 1989).

[145] For a useful critique of international legal ideology, *see* S. Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (OUP, 2013) ch. 1.

[146] It is crucial to bear in mind that law can also legitimise and reify oppressive practices. For an important contemporary example *see* R. Knox, 'Against Law-sterity' *Salvage,* 13 December 2018, <http://salvage.zone/in-print/against-law-sterity/>, viewed on 23 December 2018.

[147] P. O'Connell, 'On the Human Rights Question', 40 *Human Rights Quarterly* (2018) p. 988.