Comments on the legal status of Cyprus

Issues of conflict and their causes

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I. Preliminary remark

Cyprus is probably the most outstanding test case for international law and constitutional law[1]. The accession of Cyprus to the EU brought about no changes at all with regard to this. On the contrary, the accession of the (Greek part of) Cyprus to the EU on the 1st May 2004 produced yet another new arrangement of international and constitutional law, which will give plenty of reason for jurisprudence and the courts having jurisdiction – and from now on these will also include the European Court of Justice – to study it. This will even apply if attempts to establish a constitution to cover the whole of Cyprus, as intended in the 31 March 2004 version of the Annan-Plan, should yet turn out to be successful. With regard to the period of time up until the end of April 2004, it will, in future too, be regarded as a didactic show-piece of the mistakes and confusion that can occur in international and constitutional law, which have plagued the island since decolonisation in 1960. The objective of this article is not to go into all the details with basically fruitless discussion not always based on well-founded legal reasoning, in which it has become clear how much the implementation and interpretation of international law are dominated by political events and arrangements and the unstable equilibrium of the big political picture. Not even the executive bodies of the European Human Rights Convention are, and have been, unable to avoid this, and the objective of this treatise to hand is not to deal in detail with the approach they have adopted[2] – just as it is not to deal with the criticism levelled at it by the author [3].

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[1] Cf. Helmut *Rumpf*, Zypern als internationaler Modell-Konflikt. Außenpolitik 1981, P. 174 et seq.; Zur Verfassungslage und völkerrechtlichen Lage Zyperns mit Stand 1998 cf. *Rumpf*, Verfassung und Recht. Südosteuropa-HandbuchVolume . VIII "Zypern", published by *Grothusen/Steffani/Zervakis*, Göttingen 1998, P. 155 et seq.

[2] *Commission:* Zulässigkeitsentscheidung im Fall Chrysostomos u.a. gegen Türkei, EuGRZ 1991, P. 254 et seq; Report from the Human Rights Commission dated 4.10.1983 (Cyprus versus Turkey), European Basic Rights Journal 1992, P. 466 et seq.; Decision of the European Human Rights Commission dated 8.10.1991 (To inter alia versus Cyprus), European Constitutional rights Journal 1992, P. 470 et seq.; *Court of human rights*: Judgement of the European Court of Justice for human rights Loizidou versus Turkey, European Constitutional rights Journal 1997, P. 555 et seq..; Cyprus v. Turkey, Application No. 25781/94, judgement dated 10.5.2001, http://hudoc.echr.coe.int/hudoc/).

[3] See the articles by *Rumpf*: Türkei, EMRK und Zypernfrage: Der Fall Chrysostomos u.a./Anmerkung zur Zulässigkeitsentscheidung der Europäischen Kommission für Menschenrechte. European Constitutional rights Journal 1991, P. 199 et seq. ; Nochmals: Zypern und Türkei vor den Straßburger Menschenrechtsorganen European Constitutional rights Journal 1992, P. 457 et seq.; Türkei – Zypern – EMRK. Loizidou und seine Folgen, Zeitschrift für Türkeistudien 1998, P. 233 et seq.

II. History

The island has a long and eventful history. It first acquired independence and statehood in 1960. It was subject to the influence of various rulers who also left behind traces of their rule in the legal system. In 1572, the Ottomans broke the dominance of the Venetians, who were unloved by the Cypriots. By introducing the millet system, in which the independent legal status of the Greek-Orthodox church with its authority of self-government was recognised, the Ottomans ensured the survival of Byzantine and Greek-Orthodox legal structures. After the Ottomans, the British exercised an influence on the legal and social order of the island continuously from 1878 onwards. Their contribution was the introduction of a modern legal system, which came into force alongside religious jurisdiction and ensured that English law could be applied. Although the Cypriot legal system was still determined by *common law*[4], the influences of the „mother" countries, Greece especially, increasingly made themselves felt, in particular once the republic had been established. Greek law was in turn influenced by the legal systems in other European states. As a result, traces of French law can be identified in administrative law taken over from Greece. Naturally, the influence of the Turkish mainland can be identified in the northern sector of the island following the territorial division in 1974.

The transition from Ottoman rule to British Crown Colony to the independent Republic of Cyprus in 1960 and finally the division of the island as a result of Turkish intervention in 1974 have raised a large number of questions for which a satisfactory reply cannot be given by international law or by Cypriot constitutional law. First of all, it is the original text of the constitution of the Republic of Cyprus itself which is distinguished not only on account of its great length (199 articles), but also on account of the complicated, and in practice not successful, attempt to do justice to the two ethnic groups of Greek and Turkish Cypriots, ethnic groups which differ in size. Added to which is the fact that the text of the constitutional law has been tailored to an international law framework along the lines of the treaties of Zürich / London and Nicosia which is why the constitution of the Republic of Cyprus is occasionally also known as the „Zürich Constitution"[5] and the Republic itself has been qualified as a

[4] Again and again aspects of not only English law, but also of other countries of the Commonwealth such as New Zealand or India for example can be identified. The legal system in Cyprus is based on the *Court of Justice Law* dating from 1960, which instructs the application of common law in Article 29.

[5] *Polyviou*, Cyprus. In search of a constitution. Nicosia 1976, P.13. Cf. also the criticism of the Supreme Court of justice (*Attorney General of the Republic vs. Mustafa Ibrahim and others*, CLR 1964, P. 195, 221).

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„Quasi Protectorate“[6]. Since 1964 (and in the Supreme Court of Justice since 1966), contrary to the terms of the constitution, the Turks have no longer shared the power to rule; since 20 July 1974 the island has been divided and the northern sector, in which troops of the Republic of Turkey have been stationed to this day, has been completely subject to the rule of the Turkish ethnic group.

Following the split, the northern sector called itself the „Turkish Federate State of Cyprus“ (*Kıbrıs Türk Federe Devleti*) and since 8.6.1975 it has had a constitution in line with this concept[7]. Even then the idea underpinning the establishment of the constitution was not one of segregation but of establishing the structure of a federal state. However, at that time neither the Greek population of Cyprus, nor Greece, nor the international community were interested in this idea. Instead, this event was misunderstood as a decisive step towards *taksim – partition,* consolidation of the division into two separate states. That is why this finally resulted on 15.11.1983 in a formal secession not recognised by the vast majority of the international community. The constitution of Cyprus is (was) de facto repealed in the northern sector of the island. Instead of which the Turkish Republic of North Cyprus (TRNC) has its own constitution which is actually in force, even if concessions have to be made with regard to sovereignty when state authority is exercised by the executive bodies of the constitution. Since to date it has not been possible to provide protection with internal and external security forces as well as certain administrational functions such as for example the post office and telecommunications functions, without support from the Turkish mainland.

The highest law is the constitution of the Republic of Cyprus together with the treaties of establishment. At statute level, there are the acts passed by parliament and the ethnic chambers; in addition to this, a large number of acts from the pre-independence[8] era also apply and English common law as it stands at any one time. This also includes British laws, to the extent that they were regarded as applying to the colonies and the Commonwealth. Finally the law of the Orthodox Church also applies; this has increasingly been ousted by secular legislation. There are also the legal customs of the Turkish ethnic group. Following the division of the island, the constitution, laws and subordinate legislation of the TRNC were added alongside this legal framework.

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[6] *Grandi*, Profili Internazionali della Questione di Cipro. Milan 1983, P. 65.

[7] *Blaustein*/*Flanz*, Constitutions of the Countries of the World. Supplement Cyprus (Özdemir A. Özgür). New York 1978 (with UN documents as well as the constitution of the Turkish Federal State of Cyprus [Document 6]).

[8] These laws are included in the collection of the "Statute Laws of Cyprus, Revised Edition 1959". This collection is divided up into "Chapters", according to which these laws are also cited (CAP).

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III. The international framework for the Cypriot constitution of 1960

1. Introduction

The constitution of Cyprus was initially based on four sets of agreements. Cyprus itself and the people of Cyprus were not solely responsible for its establishment. They formed the basis for the former British Crown Colony becoming a state and created a system which attempted not only to take into account the interests of the Turkish minority in terms of being protected as an ethnic or religious minority within a state, but also recognised both the Greek-Cypriot majority and the Turkish minority as „ethnic groups". Together, Maronites and Armenians, who numbered significantly less than ten thousand citizens, were allocated a place within the new order as minorities with restricted rights[9].

Whether the Cyprus conflict persisting to this day result has its roots in the multi-ethnic state largely being established by outsiders appears doubtful, since it is not possible to identify whether, given the historical background, a constitution guaranteeing the Cypriot Turks minority status alone could have made a contribution to solving the underlying ethnic and political conflict[10], or indeed could have been created at all. Consequently, given the actual historical background, only the ethnic groups constitution appeared to be – theoretically – capable of holding in check the centripetal power of the Greek unification movement (*Enosis*) and the Turkish movement of divide and rule (*Taksim*)[11] originally giving rise to the conflict.

It could hardly be disputed that – irrespective of the faux de mieux – whether it would work was questionable right from the outset. The objective of maintaining the unity of the republic and ensuring that both ethnic groups were kept together within a single nation was jeopardised from the very beginning by a lack of, or counter-productive,

[9] Cf. *Amelunxen*, Rechtsleben in Zypern – Juristischer Reisebericht, in: Deutsche Richterzeitung 1982, P. 215, 217.

[10] Now and again the Greek side ‚andthey alone, claim that as aresult of the difference in the size of the ethnic groups, the Turkish ethnic group ought to acquire nothing more than minority status (e.g. *Yiallourides C*. Minderheitenschutz und Volksgruppenrecht im 20. Jahrhundert unter besonderer Berücksichtigung der Verhältnisse auf Zypern. Diss. Bochum 1981 P 226). Such assertions do not howevber, have any support in international law seeking to defend minority rights against the normative power of the majority and moreover leave open the status in excess of a minimum of minority rights which can be afforded within a state to an ethnic group of whatever size

[11] That is why the assessment of *Yiallourides* (Note . 10) P. 247, who regards the ethnic group constitution as the consequence of the political opportunitism of the parties involved, and in particular the British, as the cause of the Cyprus conflict is incorrect.

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mechanisms. These defects included for example the rights expressly conceded to the mother countries in the sphere of education and the splitting up of the municipal administrations so that there was one Greek and one Turkish administration in each of the five largest towns.

2. Treaty of Zürich und London (1959)

The treaty on the basic structure of the Republic of Cyprus dated 11.2.1959 (Zürich) and 19.2.1959 (London)[12] prescribes the main outlines as well as the even various details as well for the constitution of the Republic of Cyprus. These were also observed and the principal features of them can even be seen in the constitution of the TRNC.

3. Treaty of establishment (1960)

The so-called treaty of establishment[13], to which the new republic itself was already a signatory, (Great Britain, Greece and Turkey on the one hand, Cyprus on the other) regulates issues of sovereignty in particular. Even the arrangement itself, which is similar to certain peace treaties such as those of Versailles and Lausanne, makes reference to the position of Cyprus.

The treaty of establishment of 1960 was an *octroi*[14], which served above all to limit the sovereign rights of Cyprus in favour of Great Britain and to a lesser extent also in favour of Greece and Turkey. Consequently, the sovereign rights of Great Britain are maintained in specific areas (Akrotiri and Dhekelia)[15]. Defence is essentially the responsibility of the signatories to the Treaty of establishment of Cyprus; the army provided for by the constitution would certainly not be able to defend the island from external aggression.

[12] Agreement on the Basic Structure of the Republic of Cyprus, London, 19 February 1959 (Zurich, 11 February 1959), State Papers 1959-60 (vol. 164), S. 219. Further details in *Besler*, Die völkerrechtliche Lage Zyperns unter besonderer Berücksichtigung des Selbstbestimmungsrechts. Diss. München 1973, P. 17.

[13] Treaty concerning the Establishment of the Republic of Cyprus, Nicosia, 16 August 1960, UNTS 382 (1960), 5476.

[14] Cf. *Tornaritis*, Cyprus and its Constitutional and Other Legal Problems. Nicosia 1977, P. 54.

[15] Cf. *Amelunxen* loco citato P. 219.

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4. Treaty of Guarantee (1960)

The Treaty of Guarantee[16] was concluded between the same parties to the contract and signed on the same day as the treaty of establishment. Further sovereign rights of Cyprus were primarily curtailed by it, such as for example, the prohibition of entering into a political or economic union with other states. The latter is chiefly of significance with regard to the application submitted by the Republic of Cyprus for admission to the EU and was regarded again and again as an obstruction to the accession of Cyprus to the EU. To enforce this prohibition, the objective of which, upon closer inspection, was to counteract the attempts at unification by many Greek Cypriots and mainland Greeks on the one hand and attempts to split the island by many Turkish Cypriots and mainland Turks on the other, the parties to the treaty of establishment for Cyprus became guarantors. In turn Greece, Cyprus and Turkey are to be the guarantors of the continuing sovereign rights of Great Britain for Akrotiri and Dhekelia.

Great Britain, Greece and Turkey were awarded the right of intervention in the event that the terms of the treaty of establishment were not observed and attempts to solve the matter through consultation should fail. The objective of such intervention was to safeguard the unity and constitution of the Republic in force. This provision not only incorporated features embodied in international law but also in constitutional law. Since this had not only been laid down in Article 4 of the Treaty of Guarantee, which formed the disputed legal basis for the intervention by the Republic of Turkey in 1974, rather this provision is also part of the constitution of the Republic of Cyprus, which should indeed still be in force according to Greek opinion. (Article 181 of the constitution; § 21 of the Treaty of Zürich); this is therefore of the greatest significance, since according to this, the problem of justifying Turkish intervention in 1974 is not simply to be discussed from the perspective of international law, but a constitutional law dimension should be observed as well.

5. Alliance contract (1960)

The alliance contract[17] was finally concluded between Greece, Cyprus and Turkey and concerned the setting up of a joint military headquarters on the island for the purposes

[16] Treaty of Guarantee, Nicosia, 16 August 1960, UNTS 382 (1960), 5475; *Blaustein*/*Flanz*, Constitutions of the Countries of the World. Cyprus (Stanley *Kyriakides*), New York 1972 (with the constitution of the Republic of Cyprus, Treaty of Guarantee and Alliance contract, Annex I; State Papers 1959-60 (vol.164), P. 388. Further details on the content and interpretation in *Besler loco citato P*. 24.

[17] Treaty of military Alliance, Nicosia, 16 August 1960, UNTS 397 (1961), 5712; *Blaustein/Flanz* (Note 16) Annex II; State Papers 1959-60 (vol.164), P.557. Further details on content and interpretation in *Besler* (Note 12) P. 67.

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of ensuring peace. This contract was likewise an integral element of the Republic of Cyprus. (Article 181; § 21 of the Treaty of Zürich). The unilateral notice of termination on the alliance contract by the Makarios government in 1964, which even at this point in time was acting without Turkish involvement, and which was therefore no longer legitimate as the government of the Republic of Cyprus, is one of the many reasons justifying Turkish intervention in 1974.

IV. Content of the constitution of 1960

1. The scope of validity

In spite of Cypriots being involved in the negotiations, the constitution of the Republic of Cyprus was not the product of a voluntary decision by the people of Cyprus or by its legitimate government, but the *octroi* of the former colonial power Great Britain and both the mother countries Greece and Turkey. These three states created the constitutional law and were also the legislators amending the important laws (Article 182 Section 1 in conjunction with Annex III). This means that the constitution is only the result of the Cypriot population exercising their right of self-determination to a limited extent, and this to a lesser extent since the constitution was designed to restrict considerably the ability of the Cypriot electorate and its representatives to bring about changes in the constitution whatever the size of their majority. As the constitution of the Republic of Cyprus shows here, it did not even last for three years. What is recognised by the international community, and acts, as the Republic of Cyprus consists internally – with regard to the overall constitution of the island – only of the Greek ethnic group, which avails itself not only of sections of the self governing arrangements set up for each of the ethnic groups, but also of sections of the central government, which are essentially one and the same as the self governing arrangements for the Greek ethnic group.

The constitution of the Republic of Cyprus therefore combines two opposite qualities: the Republic of Cyprus continues to live on with the approval of the international community, without however being able to enforce standard law throughout the whole of Cyprus. Basic aspects of enforcement of standard law prescribed by the constitution of the Republic of Cyprus have not applied in full to the Greek community since 1964 and to the southern part of the island since partition. The result of this is that all those elements of a constitution taking various ethnic groups into consideration have to be put to one side when trying to establish the sphere of validity for the constitution today. This applies to the institutions serving the ethnic groups as well as for the quotas and

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proportions of Turkish Cypriots in the crucial executive bodies. Since however the „ethnic groups component“ represents the basis of this constitution, the ethnic groups constitution of the Republic of Cyprus is dead. In so far as the constitution does apply in the southern part of the island, it could be said that a constitutional text does exist, the scope of its validity and degree of effectiveness is defined by constitutional custom.

2. Ethnic groups constitution

The concept of the ethnic groups constitution assumes and results in expressly foregoing a definition of a Cypriot nation, a nation which has never existed. Cyprus is a reflection of the former Ottoman diversity. This is a completely different way of looking at Cyprus from all other known ways of dividing a nation into two states such as Germany after the Second World War or Korea, for example. In the final analysis, Cyprus is a unique case in constitutional law. It is the only territory of the former Ottoman empire to retain its multi-cultural and multi-religious identity and has developed within the framework of this identity which is hardly on firm foundations under constitutional law.

The character of the ethnic groups constitution can be seen even as early as Article 2. There is a Cypriot people in that the island has a population, held together as citizens of the same state by its current geographical mixture of settlements and a common external border, inevitable given that Cyprus is an island as well as a common nationality. Article 2 includes the definition of both ethnic groups and the requirement and procedure for classifying such Cypriots to one of the ethnic groups which are neither of Greek or Turkish extraction (Armenians, Maronites, Latin, Arabs inter alia). Article 3 contains detailed provisions on both official languages and their use. Article 4 defines the flag and Article 5 the respective public holidays.

3. Nationality

A Cypriot is not a person belonging to the Cypriot nation, but those who are nationals of the Republic of Cyprus.

Cypriot nationality law is predominantly (but not completely) regulated in the nationality act dated 28 July 1967 and is based on the principle of *ius sanguinis*. This means that the primary reason for acquiring Cypriot nationality is birth, and secondly subsequent acquisition. It is, by way of exception also possible to acquire Cypriot

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nationality in accordance with the principle of *ius soli,* if the child born on Cypriot soil would be stateless. Marriage does not automatically lead to the acquisition of Cypriot nationality, but does, however, entitle the applicant to qualify through the simplified procedure.

4. Fundamental rights

The section on fundamental rights and freedoms begins in Article 6 on the prohibition of discrimination on the basis of belonging to an ethnic group. A comprehensive regulation on non-discrimination only follows in Article 28[18].

Article 6 of the Republic of Cyprus shows that the parties responsible for the constitution regard the prohibition of discrimination as necessary to break down the barriers existing between the ethnic groups.

Part of the fundamental rights and freedoms agree word for word with those of the European Convention on Human Rights. Although the Cypriot constitution is more detailed than the ECHR, the jurisdiction of the European court of human rights – and formerly the Commission too – in Strasbourg is also regarded as being the bodies which are instrumental in the interpretation of the Cypriot regulations of constitutional rights[19]. The detailed description of the fundamental rights section is not essential for the purposes of this article and has therefore been left out.

5. Dual state organisation

The constitution more or less shows the organisation of a state, which in practice has no longer existed since the mid 1960s, because the Turkish ethnic group has not been involved. It is characteristic of the attempt to solve the Cyprus problem and at the same time the reason for things going wrong in Cyprus.

a) Executive

In accordance with the concept of the Republic of Cyprus as „Presidential Republic“ (Article 1) the regulations on the state organisation begin with the President of the

[18] Cf. on this *Loucaides*, Guarantees against racial discrimination under the legal system of Cyprus, in: Cyprus Law Review vol.5 (1987), P. 2659-2668.

[19] Cf. *Loucaides*, Legal Protection of the Freedom of Trade Unionism in Cyprus, in: Cyprus Law Review vol.4 (1986), P. 2346-2359.

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Republic and the Council of Ministers. The constitution stipulates that the Greek Cypriot President of the Republic shall be supported by a Turkish Cypriot vice-president. He shall largely share the functions of the president and, as a result of his extensive rights of co-determination, shall have almost the same amount of power as the president. That is why the rules on the elections and the exercising of power shall apply in the same way for him as they do for the president. Article 46 provides for the president, who is to discharge the duties of head of government, to be supported by a Council of Ministers, for which the quota regulation regarding the representation of ethnic groups shall apply, as it does in other arrangements.

The power to act and authority of „both" presidents are (were) finely dovetailed with one another. For President Makarios this represented an intolerable curtailment of his freedom to act as „head of state" in all matters, from foreign policy to exerting an influence on legislation (destructive right of veto) to forming a government and chairing the work of the Council of Ministers.

b) Legislative

The House of Representatives is the central legislative body of the Republic (Article 61) and consists of fifty members. They represent the differing ethnic groups on a ratio of seven to three (Article 62). The parliament has the authority traditionally vested in a modern parliament. The Greek ethnic body felt that the weighting of the Turkish ethnic body was too great.

The Fifth section of the constitution contains the regulations so typical of the Cypriot republic on both the *communal chambers* as self governing bodies with specific legislative authority in the following spheres (Article 87): Religion, Education, Personal status and Culture, jurisdiction in issues concerning Religion and Personal status, co-operative societies and similar (subject to regulations issued by the central legislative authority). Added to which are other issues, some of which have not been stated in detail, and in particular matters concerning the ethnic groups and taxes and duties, in so far as these are necessary to fulfil the tasks of self-government. The latter are supplemented by an item in the budget of the House of Representatives prescribed by Article 88, including the distribution procedure.

The walk-out by the Turkish ethnic group from this system forced upon them resulted in isolation and impotence, and in the final analysis the almost complete exclusion of the Turkish Cypriots from all political co-determination.

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c) How the authorities are organised

The Sixth section deals with specific central authorities, amongst them the director of public prosecutions and his deputy (Articles 112 to 114), the „Auditor-General“ and his deputy (Articles 115, 116) as well as the president of the central bank and his deputy (Articles 118 to 121). Here too the ethnic group ratios apply. The same can be seen in the Seventh section on the public service (Ethnic groups ratio of seven to three, Article 123).

The Eighth section deals with the security forces. A ratio of six to four was provided for between the ethnic groups (Article 129), and seven to three for the police and the rural police (Article 130). According to Article 132 only members of the same ethnic group are to be stationed in areas having nearly one hundred percent of the population from one ethnic group.

d) Constitutional court[20]

The Ninth section deals with the Supreme constitutional court. Article 133 regulates in detail the status of the judge and the appointment to the court, which is to consist of one Turkish Cypriot and one Greek Cypriot as well as one non-Cypriot, who is not a citizen of any of the guarantor states. The extensive standard authority to exercise a check on standards was adapted inter alia to reflect the character of the constitution as an „ethnic group constitution“. Consequently each of the two presidents was able to take action against laws discriminating against one of the two ethnic groups by exercising the absolute check on standards.

e) Judiciary

The judiciary within the strict sense is the subject-matter of the Tenth section. It is dispensed by the *Supreme Court* as well as by the ordinary courts, which are organised by the Republic, apart from the courts to be set up by the ethnic groups for matters which have been described in Article 87 (Article 152). The arrangements for making appointments to the *Supreme Court* are largely the same as those in Article 133, only that there two judges have to come from the Greek ethnic group (Article 153). Following the resignation of the first president of the constitutional court, Ernst

[20] For this and the jurisdiction of the other courts within the framework of the jurisdiction of the constitutional court cf. *Blümel*, Die Verfassungsgerichtsbarkeit in der Republik Zypern, in: Verfassungsgerichtsbarkeit in der Gegenwart (International Colloquium of the Max Planck Institute of international public law, Heidelberg).Cologne/Berlin 1962, P. 643-726.

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Forsthoff in 1963, the constitutional court was merged with the *Supreme Court*. The *Supreme Court* is not only the highest court dealing with legal disputes of all types, but it is also the inspectorate for jurisdiction.

f) Miscellaneous

The Eleventh section deals with the rules governing public finances. The „various regulations" of the Twelfth section then are part of Article 169, which regulates the conclusion of treaties under international law subject to the provisions of Article 50 and 57, as well as Article 170, which guarantees preferential treatment to the guarantor powers in connection with this. Article 171 includes detailed regulations covering radio and television transmissions in one or the other ethnic group language. Article 173 provides for the establishment of five municipal councils by the Turkish ethnic group in the five largest towns of the Republic. Articles 174 to 178 attempt to get a grip with the consequences of this for the public relationship between citizens and municipal council as well as provide an effective council administration.

6. Attempt to consolidate the constitutional position

The final provisions of the Thirteenth section regulate rank, jurisdiction and references of the constitution to the treaties concluded with the guarantor powers. The regulation in Article 182, in which the basic regulations of the treaties and therefore the constitution was supposed to be recorded as being immutable consequently turned out to be a problem. At the same time, this provision introduces a framework of standards within the constitution and as a result amendments to the constitution can be not only formally illegal (breach against the rules of procedure), but also materially illegal[21]. Articles 183 and 184 deal with the preconditions and proceedings for declaring a state of emergency, which is made by the Council of Ministers with the consent of the House of Representatives, whereby not only the declaration of the Council of Ministers but also the consent of the House of Representatives is subject to the right of veto held by the president. A state of emergency may be declared for a period of two months with an extension option. It may be subject to specific fundamental rights being exercised. The Council of Ministers may decree statutory rules and orders backed up by the power of the law, which must be substantiated by the requirements of the state of emergency.

[21] Cf. *Soulioti*, Address of the Attorney-General of the Republic in Ref.No.1/86 before the Supreme Court of the Republic on 17.2.1986 (Summary), in: Cyprus Law Review vol.4 (1986), P. 2077/2078.

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V. The constitution of TRNC[22]

1. Basis of the constitution

The self-evident truth of the constitution of the TRNC is based on the one hand on an historical assessment of the constitutional establishment of Cyprus, which is of course completely different to the Greek one. Cyprus is a state which owes its existence to the partition of the island from the mother country, the Ottoman Empire, in 1878. On the other hand the legislator, the Turkish Cypriots are regarded as an „unseparable and integral element of the great Turkish nation". Therefore, the legislator is not a nation itself, but just the „people" (*halk*). These are the two important points for further development arising from the preamble. Further conceptual links to the „mother country" are created in various regulations by the reception of the principles of Atatürk. In spite of this reference to the mother country and its nation, neither the „Cypriot" people nor the Turkish nation, but the people of the TRNC, that is the adherents of the Turkish ethnic group on Cyprus or, according to Northern Cyprus – Turkish law – the citizens of the TRNC (Article 3 Section 1) are the legislator and the people constituting a nation. The constitution of the Turkish Republic of Northern Cyprus has a large number of structural similarities with the constitution of the Republic of Turkey dating from 1982, but nevertheless, it has also taken over elements of the Cypriot constitution from 1960. Overall, the constitution of the TRNC – in contrast to the Cypriot constitution from 1960 – is a parliamentary democracy and disassociates itself with a presidential system. In terms of the rule of law being maintained and its respect for constitutional rights, it is on a par with western European standards.

2. Constitutional rights

The constitution contains a detailed section on basic rights; the principle of equality takes precedence over this section (Article 8). Article 10 includes an instruction to the state to pave the way so that basic rights are afforded effective protection. The barrier system is similar to that of the constitution of Turkey, such as has been in force since 1999. There is an identity and content guarantee which in turn restricts the scope of restriction. In other respects too it shall suffice at this juncture to say that the basic

[22] KKTC Resmî Gazete (Official gazette of the TRNC) No.43 dated. 7.5.1985. The constitution of the Turkish Federal State dated 1976 will not be discussed at this point, although it would offer some lessons with regard to the latest developments which would nevertheless have an impact on a new federal state (Source reference see Note 7). On the origins of this constitution see *Nejatigil*, The Turkish Republic of Northern Cyprus in Perspective. Nicosia (Nord) 1985, P. 121. For greater detail on the constitution of TRNC cf. *Rumpf* (Note 1).

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rights system with its breakdown into rights of freedom, economic and social rights and political rights is similar to a large number of modern constitutions. The special feature of a right of petition controlled by judges has been taken over from the Cypriot constitution of 1960 (Article 76).

The rather complicated rule on nationality (Article 67) is also to be mentioned on account of its special historical and political circumstances. According to this the citizens of the TRNC are primarily those persons who were in it when it was established and those in the Turkish northern sector of Cyprus on 15.11.1983 with permanent residence. The same also applies for those who have become naturalized in the Turkish Federal State of Cyprus. Cypriots of Turkish extraction not fulfilling the above criteria are to be allowed preferential treatment when applying for naturalization. The expatriation of nationals of the TRNC by birth is not allowed.

3. Organisation of the state

a) Legislative

The parliament („Assembly of the Republic“[23]) consists of one chamber with fifty members (Article 77) and has the normal legislative tasks. In addition to this, the Assembly of the Republic has the right to grant amnesty and the final word prior to the death penalty handed down by a court being carried out (Article 78). Parliamentary elections are held every five years (Article 79). Detailed regulations about the modus operandi of the Assembly of the Republic (Articles 81 and 83) form the basis of procedure. The members of parliament enjoy immunity and indemnity (Article 84) and are not allowed to work for the state at the same time (Article 86). The Assembly of the Republic may dissolve itself at any time with an absolute majority. The Assembly may also be dissolved by the President of the Republic, if for example the election of a Prime Minister nominated by the president should fail repeatedly or if the Council of Ministers is brought down three times within a year. When doing so, the President of the Republic shall have to consult the president of the parliament. New elections are to be held following dissolution (Article 88).

The duties of the parliament includes the ratification of international treaties (Article 90), the decision to go to war and conclude peace (Article 91) and the budget. (Articles 92 et seq). The Council of Ministers and the members of parliament shall be entitled to take the initiative. The laws are to be pronounced by the President of the Republic, if

[23] Turkish: Cumhuriyet Meclisi.

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he does not exercise his right of veto which has a suspensory effect on a single occasion, whereby he may review its material constitutionality and appropriateness (Article 94). Irrespective of this, according to Article 146 the President of the Republic is to have the option of exercising preventative control of statute laws through the constitutional court.

The following exist as controls on the Assembly of the Republic: enquiry and plenary negotiation (Article 97), parliamentary investigation on a specific subject and parliamentary investigation proceedings against ministers or the Prime Minister (Article 98) as well as vote of confidence Article 109 Section 3 [vote of no confidence] and Section 4 [Question of confidence].

b) Executive

aa) The President of the Republic shall be elected for five years; he may stand for re-election. He must be at least 35 years old and a national of the TRNC and have lived in Cyprus for at least 5 years (Article 99). He may be a member of a political party but the president must not be the chairman of a political party. He is the head of state, head of the armed forces in the name of the Assembly of the Republic and he shall discharge the duties and responsibilities incumbent upon him in the constitution (Article 102). His term of office may end prematurely in the event of his death or as a result of his resignation, which must be tendered to the president of the Supreme Court of Justice, as well as if he is permanently unable to hold office as a result of poor health. In this case inability to hold office shall be confirmed by the constitutional court upon application by the Council of Ministers (Article 104).

bb) The Council of Ministers (Article 106 and following) shall be formed by a member of parliament proposed by the President of the Republic. It is true that the ministers proposed by the Prime Minister and nominated by the President of the Republic do not have to be a member of parliament, but they will however have to fulfil the criteria of being eligible for appointment as a member of parliament. The President of the Republic is entitled – without a right to vote – to take the chair of the Council of Ministers (Article 107). The number of ministries, which are stipulated by the Council of Ministers with the consent of the president and if necessary given a blessing with the following vote of confidence, must not exceed ten (Article 108). Once the list of ministers has been confirmed, it shall be submitted to the Assembly of the Republic and the government programme read out aloud. Then a vote of confidence will be held. A vote of confidence shall also be required if, within thirty days, more than one half of the ministers are replaced (Article 109). The ministers shall report to the Prime Minister (Article 110). Article 112 allows the Council of Ministers the option of

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issuing legal regulations with force of law, without the prior authorisation of the Assembly of the Republic but limited to issues concerning economic policy, which are to be submitted to the Assembly of the Republic for approval when they are announced in the official gazette. If the assembly also has to deal with them as a priority, it shall consequently have up to ninety days to reach a decision. These regulations backed by the force of the law must not however enter into new financial obligations placing a burden on the national treasury as a result and must not result in restrictions of basic rights.

cc) A Security Council of the Republic with the President of the Republic as chairman, the president of the parliament, the Prime Minister, the ministers for the interior, defence and foreign affairs, the commander of the armed forces and the police president shall advise the Council of Ministers and comment on issues of the internal and external security (Article 111).

c) Public Administration

The public administration covers not only central but also local self-governing units (Articles 113, 116, 119). It provides for an ombudsman, who is appointed by the President of the Republic with the consent of the Assembly of the Republic. He supervises public administration, provided that it does not concern foreign policy, defence or the administration of justice (Article 114). Article 117 makes express provision for the armed forces, Article 118 provides for the police. Statutory rules and orders[24] can only be decreed at the express instruction of an act or the constitution; moreover the implementation of laws is ensured by the administrative regulations (Article 122). Articles 124 – 128 include constitutional rules on the state of emergency.

d) Miscellaneous

The constitution also includes regulations on special executive bodies such as professional and trade associations (Article129), radio, television and news agencies (Article 130), the religious establishments and the department for religious matters (Article 131[25]) and finally, regulations governing the financial and economic system.

4. Judiciary

[24] Turkish: tüzük – not to be mistaken with statutory rules and orders backed up by the force of the law.

[25] This regulation only applies to Islam.

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The Fifth section (Article 136 et seq.) covers the basis for an independent judiciary. Particular attention is to be paid to a senior judicial counsellor as the highest supervisory body and head of the administration of justice as well as guarantor that the legal system operates independently and effectively. It consists of the president and the judges of the Supreme Court of Justice, the Attorney General of the Republic, and another 3 members, who are appointed by the bar association, the President of the Republic and by the Assembly of the Republic (Article 14). Interestingly, the provision of Article 142 expressly authorises the courts to impose a custodial sentence of up to twelve months for non-compliance with its decisions.

The Supreme Court of Justice combines the civil, administrative and constitutional judiciary. In addition to the preventative control of standards, the abstract control of standards and specific control of standards, as a constitutional court it also has the functions of a constitutional court. As the highest civil court, the Supreme Court of Justice is in many cases also the court of first instance (Article 151). As the highest (and only) administrative court, it has wide-ranging powers of cancellation and in cases in which claims have been asserted for the reimbursement of costs or damages, it also has the power of restitution against all administrational decisions; its decisions shall take effect *erga omnes*.

The constitution also provides for its own military jurisdiction.

The public prosecution authority (attorney general and public prosecutors) not only have the function of being a criminal prosecution authority, but also that of representative of the public interest in the administration system and that of official legal advisor to the highest state body apart from the judiciary. The Attorney General also represents the state in civil cases; as an *amicus curiae* he provides assessments on the issue of whether acts are constitutional. His duties also include, inter alia, reviewing draft acts to confirm that they are constitutional. This particular role is emphasised by the fact that the Attorney General enjoys the independent status of a judge of the Supreme Court of Justice.

VI. The constitutional status of the Republic of Cyprus and its status under international law on 30 April 2004

1. Development of the constitution of 1960

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Officially, the constitution of 1960 is still in force today as the constitution of the Republic of Cyprus[26]. Right from the start, however, it was considered by the Greek community as being too complicated, too inflexible, and in particular too advantageous to the Turkish ethnic group[27]. The Thirteen Points of the President of the Republic at that time, Archbishop Makarios, who intended to initiate discussion concerning the „improvement" of the constitution in 1963, resulted in the conflict between the ethnic groups accompanied by violence. Even at this stage it could be seen that the constitution of 1960 was in the process of failing. Threats of intervention by Turkey caused the United Nations to dispatch a contingent of troops to maintain the peace. It has been stationed there until this day[28]. The Turkish community backed an attempt to implement the existing constitution all down the line. Under pressure from the Greek Cypriot community, the Turkish ethnic group finally stopped co-operating with the Greek community on the relevant provisions in the constitution and gradually withdrew from the offices of central power. This removed the most important basis of the constitution, notably its essence as a constitution for the „Republic of Cyprus" as a state consisting of ethnic groups. Admittedly, in the famous decision in the case between the Attorney General vs. Mustafa Ibrahim[29], the Supreme Court of Justice did maintain the fantasy that the constitution was still working normally, by regarding adjustments which had become necessary as a result of the conflict as having been caused as a result of „exceptional circumstances" and therefore regarding them, by way of exception, as being justified. But the exception was consolidated by its existence, the constitution was transformed into a springboard for the sovereign acts of the Greek community. The Greeks drew the legal and political conclusions of this right at an early stage[30]. The Supreme Court of Justice was merged with the Constitutional Court which had become virtually unworkable following the demission of its German president Ernst *Forsthoff*[31] as long ago as 1964[32].

[26] For the developments of and discussions about the constitution cf. *Polyviou loco citato*.

[27] *Yiallourides loco citato*. P. 228; *Tornaritis* also follows this line of thought, Constitutional and legal problems in the Republic of Cyprus. Nicosia 2nd edition 1972, P. 9.

[28] *Theordorides*, The United Nations Peace Keeping Force in Cyprus (UNFICYP), in: International and Comparative Law Quarterly 31/4, P. 765-783.

[29] Judgement dated 10.11.1964, *Attorney General of the Republic vs. Mustafa Ibrahim and others*, CLR 1964, P.195. The judgement is distinguished by a very detailed description of the specific constitutional law situation at the end of 1964.

[30] Cf. *Salih*, Cyprus. The impact of diverse nationalism on a state. Alabama 1978, P. 75.

[31] He resigned after Makarios gave the international press to understand that he would not respect decisions passed by the constitutional court designed to thwart his plans.

[32] In the relevant Act No 33 about justice there was talk of "merging" the two courts (*Serghides*, Studies in Cyprus Law. An Introduction to the Series and to Study No.1. Nicosia 1985, P.100); this terminology can be explained with the attempt to maintain the fantasy that the act, which was manifestly illegal, was constitutional. Cf also the supreme court of justice loco citato. The merger did not result in structural changes in the court, but instead it also resulted in the lapse of the specific function of controlling standards.

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Encouraged by the decision named above by the Supreme Court of Justice, the Cypriot government took further adjustment measures to dismantle the organisation of the state embodied in the constitution. The Greek Cypriot ethnic group chamber was dissolved in 1965 and its powers transferred to the House of Representatives. In addition to this, the responsibility for making legal decisions in the Greek ethnic group courts was passed over to the district courts[33]. In July 1965 the three posts in the Council of Ministers previously held by Turkish ministers but then vacant were filled with Greek Cypriots. An act extended the term of office of Makarios and ended that of the Turkish vice president. In doing so, the Greek Cypriots consolidated their claim of identification with the sovereign Republic of Cyprus[34]; the fact that not all places reserved for the Turkish Cypriots in the constitution were actually filled with Greek Cypriots does not make any difference, as this did not constitute the process of constitutional amendment in line with customary law. In brief, the end of the constitution of the Republic of Cyprus as long ago as the mid 1960s was the result of constitution being dismantled systematically by the Greek ethnic group.

2. The continued validity of the treaties

Whether the treaties concluded in connection with the establishment of the Republic of Cyprus may be regarded as still being in force appears unclear[35]. Nevertheless, the Annan-Plan assumes that they are still in force, at least they are included in the sets of regulations „Treaty on matters related to the new state of affairs in Cyprus“ and the „Foundation Agreement“; this even applies for the Alliance treaty terminated by Makarios (Article 1 No 3 Foundation Agreement [Annan-Plan A]).

Although the Republic of Turkey justified its intervention in 1974 on this very set of treaties, nation-states in the international community do not share the Turkish way of looking at things. On the contrary, the resistance of the Greek Cypriots in association with the great powers and the UN bodies and the condemnation of Turkish intervention also questions the legitimacy of the set of treaties as a whole, because in doing so the requirement for sanctioning the persistent endeavours of the Greek community to effect

[33] *Serghides* P. 100 describes this step as the fulfilment of the demands of President Makarios in his "13 points".

[34] These important developments have been disregarded by *Polyviou* for example (Note 5) P. 50. *Leigh*, Opinion dated 20 July 1990 on the legal status in international law of the Turkish Cypriot and the Greek Cypriot communities in Cyprus, UN Doc. A/44/967 - S/21421 P.5 points out that the changes in the constitution of the ethnic groups carried out without the involvement of the Cypriot Turks made it imposssible to revert to the former set up and therefore confirmed the breach of constitution.

[35] Similarly *Lauterpacht*, Turkish Republic of Northern Cyprus. The status of the two communities in Cyprus, UN Doc. A/44/968 - S/21463, P.12.

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a fundamental change in the Cypriot constitution to the detriment of the Turkish community was denied and the Greek coup dated 15 July 1974 was recognised by tacit implication. In fact the changes in the constitution at statute level presented above were also effected without attracting perceptible international criticism[36]. Up until Turkish intervention in 1974 the international community was not interested in the question of whether the constitution of 1960 was still in force and should be enforced. That means that up until 20 July 1974 it was not contested internationally that the foundation treaties were still in existence.

But, the international community condemned the Turkish intervention for reasons based on the balance of power in the eastern Mediterranean and, together with both the guarantors, Great Britain and Greece, who were in fact also obliged to intervene, it refused to enforce the treaties. The international community therefore sealed the fate of the Republic of Cyprus in July 1974, as had been provided for by the constitution dated 1960 and the associated treaties.

The issue of how to classify the contradiction between the contractual arrangements on the international and constitutional status of Cyprus and the actual situation in correct legal terms remains unresolved to this day.

However, the good intention to maintain the unity of the island state does not suffice to justify the continued legal existence of the treaties, because the vital pre-condition for these treaties had lapsed: archbishop Makarios had changed the Republic of Cyprus from a state of ethnic groups into a state according the Turkish community minority status at best. In doing so, the frequent reference that the Turkish community „voluntarily“ relinquished its political representation is beside the point, all the more so since the return of the Turkish community to political participation as provided for by the constitution was made more difficult by the amendments made by the Greeks to the constitution and law. In fact, they made it impossible for the Turkish ethnic group to get back in. The coup dated 15 July 1974 triggered off and masterminded by the military junta of Greece prior to Turkish intervention had taken the next step to complete the exclusion of the Turkish community from political representation when the „Hellenic Republic of Cyprus“ was proclaimed by the EOKA leader Nicos Sampson. This putsch, denounced at the time by Makarios, as being an unconstitutional „Invasion“[37], was the reason for Turkish military intervention, which resulted in the final analysis in the division of the island. In the meanwhile the

[36] Only Great Britain and Turkey lodged a formal complaint about them (*Leigh* [Note 30] P.6).

[37] Cf. Cyprus: International Law and the Prospects for Settlement, in: Proceedings of the 78th Annual Meeting (American Society of International Law) 1984, P. 107, 109.

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international community condemned Turkish intervention, and in doing so also refused to accept that the original objective of the intervention as claimed by the Turks, notably to restore the state as consisting of ethnic groups and to reinstate constitutional rights to the Turkish community.

The pressure applied by the international community primarily against Turkey resulted in further amendments. The formation of a new state in the northern sector of the island meant that the situation veered further away from the legal basis provided for in the treaties dating from 1960. Since then fundamental provisions of the treaties have not been applied.

Doubts have been cast upon the validity of the treaties for other valid reasons already applicable when the treaties were signed. The arguments refer in part to the curtailment of sovereignty for the Republic of Cyprus (as provided for in the Zürich Agreement, Treaty of Guarantee); this curtailment is regarded as being illegal under international law or they refer to other breaches on account *ius cogens* such as for example the prohibition of violence in Article 2/4 of the United Nations charter (Article IV/2 Treaty of Guarantee). However, these arguments should not apply since the curtailment of sovereignty was a crucial condition underpinning the formation of the Republic of Cyprus. As regards Article IV/2 of the Treaty of Guarantee, an interpretation allowing military intervention could possibly be regarded as being incompatible with compulsory international law. At the present time, in which the united front rejecting the legality of humanitarian intervention by military means has long since cracked and crumbled, this question has become a live issue. On the other hand, it is to be noted that the very objective of the Treaty of Guarantee is to maintain Cyprus as a state of ethnic groups and that recourse to military intervention had been conceived as an option for establishing the republic and ensuring that it continued to exist, all the more so since the Republic of Cyprus had intentionally been kept short of the military capacity to maintain internal peace between the ethnic groups by force. Instead the military function was handed over to the guarantor states with the result that a special relationship of subordination existed between Cyprus and the guarantor states. The scope of the international prohibition of violence imposed on the Republic of Cyprus appears here in another light to that between sovereign states without such legal links. Without breaching the prohibition on violence, Article IV/2 of the Treaty of Guarantee can also be interpreted to the effect that it also made it possible to maintain constitutional order with coercion[38]. However, the particular circumstances under

[38] On the problem of an internationbal prohibition on intervention see *Doehring*, Intervention im Bürgerkrieg, in: Im Dienste Deutschlands und des Rechts (Festschrift für Wilhelm G. Grewe). Baden-Baden 1981, P. 445, 456.

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which the Republic of Cyprus was established contradict what is probably the prevailing opinion, that of interpreting Article IV/2 of the Treaty of Guarantee in such a way so that it provides for resort to military intervention as an interpretation constitutes a breach against the prohibition of violence in any case. Article IV/2 of the Treaty of Guarantee stipulated the right to defend another state from imminent attack, a right which is only created if the Republic of Cyprus and its fragile equilibrium and constitutional institutions are no longer in a position to ensure its own survival. This concerns the internal and external security of a state with a modern constitution, the defence of which is absolutely vital. The unconditional application of a prohibition of force in a situation in which the destabilisation of the political system would not only constitute an immediate threat for the survival of the state but also for the life and limb of its citizens would turn the raison d'être of the prohibition on violence on its head. This could be countered by saying that the UN charter does indeed make provision for exceptions too. This exception – Chapter VII of the UN charter – does however also assume that the political system will function again. But it is precisely the failure of this international system to guarantee peace which has been proven almost every day on Cyprus between 1963 and 1974. Against this background, the aim and objective, including its core humanitarian element, of Article IV/2 of the Treaty of Guarantee can be identified straight away: to ensure peace between the two ethnic groups. The fact that there was a failure with regard to this is attributable to the silence and refusal of the two other guarantor powers to react in July 1974, and not to the invasion by the Turkish army.

3. Secession[39]

a) The internal legal perspective

From an internal legal perspective neither the treaties nor the constitution of 1960 provide for the option of the secession of part of the island. Article 185 of the constitution assumes the „indivisible unity of the territory of the Republic" and expressly rules out „not only the unification of all or part of the island [and Republic] of Cyprus with another state as well as separatist independence". Article 181 refers once more to Article II of the Treaty of Guarantee, according to which the guarantor states have to guarantee the „integrity and independence" of the Republic. Given this, the secession of the northern part of the island in 1983 (or even in 1974 when the island was divided in practical terms) was unconstitutional from a formal perspective. The

[39] Cf hereto also *Lauterpacht* (Note 35) P. 15.

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fact that many writers and international bodies stressed the „unilateral nature“ of the 1976 proclamation serves in any case to emphasise the illegality of the proclamation. However, with regard to the constitutional position, this does not mean that secession would have been possible in those cases in which the other ethnic group had granted its consent.

The legality of this secession can however already be justified within the Republic of Cyprus under constitutional custom or the creation of a new constitutional situation by the time at which the secession took place. Admittedly, the Greek Cypriot community has constantly rejected the legality of the secession to this day and is supported in doing so by the international community. First of all, however, the support of the international community is irrelevant from a constitutional perspective; it may certainly be significant at the level of international law. Besides which, it is doubtful whether the permanent objection of the Greek Cypriot community has any legal relevance. Since this objection would only be substantiated on the basis of the 1960 constitution still being in force and in the event that the treaties were still valid. In other words, the question arises as to whether the constitutional prohibition of secession was still in force at the point in time at which secession took place anyway.

In fact, the constitution of 1960 was in essence repealed by precisely the Greek Cypriots, although this would not have been possible without the consent of the Turkish Cypriots[40]. The constitution of 1960 was in practice no longer applied at the point in time at which secession took place. From an objective view this constitution was solely a tool of the Greek Cypriots for exercising power even prior to secession. This means that the Greek Cypriots had their own constitutional law, which was not the same as the constitution dating from 1960 and which in practice prevented the Turkish Cypriots from exercising any power to rule. As such, the Turkish Cypriot community was consequently only still existing as a legal fantasy, moreover, it was just a „minority“ without minority status. The assumption could even be argued that the constitution no longer applied at all for the Turkish minority, and that the Turkish Cypriot community had been excluded from the constitution and was forced to adopt refuge in a federated state. The Greek ethnic group it was which excluded itself from this arrangement by claiming that the secession was illegal, after it had breached the constitution in a gross manner and excluded the Turkish ethnic group from exercising power to rule – by applying force. The internal political vacuum created by the derogation of the constitution based on the representation of ethnic groups was filled

[40] *Lauterpachts* conclusion P. 14, that this meant the end of the Republic of Cyprus, may well be taking things too far. Nevertheless, *Markides* begins his book "The Rise and Fall of the Cyprus Republic, New Haven/London 1977, with the remarkable sentence that the Republic "collapsed" on 15 July1974, that is with the putsch supported by Greece.

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with a new constitutional arrangement following the invention of the Republic of Turkey with the express consent of the Turkish community in the northern part of the island. The fact that there was a new constitutional arrangement was underlined as long ago as the 30 July 1974 by the guarantor powers in their declaration of Geneva that there were now two administrations on the island[41]. Against this background the assumption that the secession was „illegal" from an internal perspective can no longer be accepted. At least from a constitutional point of view the Greek community is excluded on the basis of their own previous conduct in claiming that the secession was illegal.

b) The external legal perspective

On the other hand, another issue is whether there is anything preventing secession from the perspective of international law[42]. To date there has not been an international prohibition on secession; and the opposite cannot be claimed either on the basis that there is no law regulating secession. Instead, secession is one of the widespread reasons for a state coming into existence from an international perspective, the right to secede is even conceivable[43]. The compulsory international protection of the integrity of sovereign states is directed against external attacks, but not however against an internal secession movement.[44] The resolutions of the UN Security Council[45], which assume that secession is illegal, are not binding retrospectively. Given this, they can not seek reference to any binding law or become binding for the future. First of all they are simply an expression of the efforts to prevent the consequences typical of secession. They constitute the application of subjectivity under international law for political reasons in favour of the maintenance of the existing Republic of Cyprus without taking into consideration the constitutional position which has come into being in the meantime, by refusing to acknowledge the new entity and its government and in practice making it impossible for this government to enter into and sign international treaties. In addition to this, they are against the intervention in 1974 by the Republic of Turkey, which has been classified as illegal under international law because justification by means of a Treaty of Guarantee is not regarded as being possible and the setting of a precedence should be prevented. With regard to the secession itself however, compliance by the resolution with international law is only to be assumed in

[41] Cf. also the subsequent practice of talking about the "Turkish Cypriot Authorities" (Proceedings [Note 37] P. 111).

[42] This is not an annexation here. Given this, the comparison by *Herdegen*, Völkerrecht, 3rd Edition 2004, § 24 Note 10 in the margin can be understood but not agreed with,

[43] Cf. *Verdross/Simma*, Universelles Völkerrecht. 3rd Edition Berlin 1984, §§ 509 et seq.

[44] For other considerations coming to the same result see *Lauterpacht* (Note 35) P. 15.

[45] The most important resolution is No.541, UN-Doc.P/16149 (18.11.1983).

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those cases in which the act of secession is attributed to the Republic of Turkey. Since without intervention and the subsequent stationing of Turkish troops on Cyprus, secession would hardly have been possible, all the more so since it assumed the (subsequent) geographical segregation of the population and that the Turkish ethnic group were not settled in one area lending itself to separation from the rest of the island. If, given these conditions, one assumes that intervention by Turkey or at least the subsequent presence of Turkish troops on Cyprus are illegal under international law, the protection of the sovereignty of states can consequently require that secession as a result of an intervention illegal under international law will result in international prohibition on confirming the new situation by recognising it. Nevertheless, this line of reasoning should not mislead one to conclude that the illegality of Turkish intervention in 1974 under international law should inevitably have to be applied to secession in 1983. Since the Turkish intervention in 1974 is not the sole criteria for responding to the question of whether secession is illegal under international law. And finally, the legal validity of such a prohibition on recognition is subject to considerable doubts. Above and beyond this, Resolution No 541 for example, suffers from the problems of the overall position of global politics, which have made it exceptionally difficult to assess the legal situation objectively – in particular taking into account not only constitutional law, but also international law. Because there was not an altruistic interest in re-establishing the status quo of 1960 underlying the responses of the international community, including the UN Security Council; such responses were dictated instead by the requirement to balance the political power of two super powers to the detriment of humanity. In reality the condemnation was directed at Turkey as a NATO state, which disrupted the balance of power – the fragile equilibrium between East and West – at the eastern end of the Mediterranean by its intervention in Cyprus, which at that time was neutral.

However, Article II of the Treaty of Guarantee, to which Article 181 of the constitution refers, could contradict a right to secession under international law. The latter is important since only the Turkish ethnic group is bound by such a prohibition of it. Since the treaty only places the guarantor powers under a commitment. This means that we are back at the level of constitutional law again, at which – see above – the existence of a prohibition of secession was to be denied at the point in time of the secession. At this juncture it is to be added that taking on the guarantee for the integrity of the Republic of Cyprus only places the parties to the treaty under an obligation and not the international community.

In addition to this, a prohibition on secession agreed between the parties to the treaty could even be in breach of compulsory international law. This would be the case in

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those circumstances in which it was in breach of the right of self-determination under international law. Nevertheless in practice, the United Nations still assume that exercising the right of self-determination is closely associated with decolonisation[46]. According to this – and irrespective of the question of whether the right of self-determination constitutes „ius cogens“ under international law – ethnic minorities or communities of a member state of the United Nations are not entitled to the right of self-determination. This is even less the case for a state created out in the course of the decolonisation process[47]; the prohibition on secession agreed in the treaty therefore, given this, is probably not in breach of international law. But in connection with this too, Cyprus represents a particularly difficult special case. It is indeed correct that Cyprus came into being in the course of decolonisation and therefore there can no longer be any talk of the Cypriots as a whole having exercised the right of self-determination against other states. The question does however arise as to whether the other part of the statement applies, that minorities in states which have become independent and members of the United Nations in the course of decolonisation should not under any circumstances be entitled to a right of self-determination. But here too, the particular circumstances concerning the creation of the Republic of Cyprus, which established itself as a state consisting of a number of ethnic groups must not be ignored. The Turkish Cypriots were not simply a minority in a new state, but one of two ethnic groups with their own obligations and duties under constitutional law[48], which go far beyond those substantiating the legal status of a minority under international law today. If such an ethnic group is expelled from political participation by the other ethnic group committing a breach of the constitution, this situation is reminiscent of colonisation. Admittedly not from the perspective of all of Cyprus, but from the view of the Turkish Cypriots however, the Greek Cypriot ethnic group have replaced a colonial power. However, one important difference is to be stressed, and that is that the Turkish Cypriots have remained full citizens of the Republic of Cyprus and therefore they can hardly be compared with a colonised people. Moreover, if the preconditions and conditions for the right of self-determination under international law were to be taken

[46] *Palmer*, The Turkish Republic of Northern Cyprus: should the United States recognize it as an independent state?, in: Boston University International Law Journal 4/2 (1986), P. 423, 444. Extensively on the right to self-determination: *Thürer*, Das Selbstbestimmungsrecht der Völker, Bern 1976; *Thürer.*, Self-Determination, in: Encyclopedia of Public International Law, Amsterdam 1985, P. 440; *Murswiek*, Offensives und Defensives Selbstbestimmungsrecht, in: Der Staat 1984/4, P. 523 et seq. Cf. also *Henkin*, General Course on Public International Law, in: Recueil des Cours (collected courses of The Hague Academy of International Law) Vol.216 (1989 IV), P. 150; *Demetriadou*, To what extent is the principle of self-determination a right under international law? How strictly its framework has been or should be defined?, in: Cyprus Law Review vol.6 (1988), P. 3324-3332.

[47] *Palmer* (Note 45) P. 445.

[48] On the difference between "Minority" and " Ethnic group" cf. *Pernthaler*, Volksgruppe und Minderheit als Rechtsbegriffe, in: *Wittmann/Bethlen* (Publisher.), Volksgruppenrecht - Ein Beitrag zur Friedenssicherung (Berichte und Studien der Hanns-Seidel-Stiftung Bd. 15), Munich 1980, P. 9.

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as a basis, a Turkish Cypriot right of self determination per se would probably not be conceivable if its aims were to go further than justifying the mere restitution of its status as an ethnic group in accordance with the constitution of 1960 by demanding its own state and in doing so legitimising all the actions taken in furtherance of this aim.

As much as the secession may not, in the final analysis, have been „illegal" under constitutional and international law, nevertheless under international law it is still difficult to justify the act of secession by the Turkish Cypriot ethnic group exercising the right of self-determination.

4. Is the TRNC a state?

The most important problem created by the partition of the island is which states exist there today. When dealing with the admission of Cyprus, the EU has made it very easy for itself here by continuing to assert the fantasy that Cyprus is a single state, although the facts do tend to opine that there are two states. This problem can not be solved here. It should however be made clear that the opinion frequently argued according to which the TRNC is not a state, does not withstand scrutiny based on existing international law.

The classification as „state", not only in terms of constitutional law, but also in terms of international law, does not depend on who describes the structure concerned as state. The „Three element theory" still applied today in the theory and practice of international law as well as in most national legal systems is governed by three objective criteria constituting the state: these are a definable state territory, an effective government and the people constituting a consistent population[49]. In this context „effective" means that the government concerned (In a power-sharing democracy this includes all three powers) being in a position to enforce the laws it sets without being subjected to the diktat of an external power. Moreover, the state has to be legally independent. The application of these criteria shows that both parts of the island are „states"; the fact that that one state has formed itself by means of secession is immaterial under constitutional law. The TRNC is indeed economically dependent upon Turkey, but not legally dependent however. It is not subject to the will of the Republic of Turkey either, even if Turkey – and by no means successfully on all occasions – attempts to exert an influence on the internal politics in North Cyprus. The

[49] Cf. *Delbrück* in *Dahm*/*Delbrück*/*Wolfrum*, Völkerrecht, Bd.I/1, Die Grundlagen. Die Völkerrechtssubjekte, 2nd Edition Berlin/New York 1989, P. 129; *Oppenheims'*, in *Jennings*/ *Watts*, International Law, Vol. 1, Peace, 9. London/New York 1992 (Reprint1996), P. 120 et seq.

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fact that such attempts are often unsuccessful can be seen in the divergent foreign policies of the Republic of Turkey and that of the TRNC. In a legal sense the latter is neither a province nor a protectorate nor a puppet republic. Even the fact that the TRNC has not been „recognised" is simply immaterial in terms of its capacity as a state. Since it is debatable whether recognition has a declaratory or constitutional effect for a state under international law[50]. According to what is probably the prevailing theory of international law, recognition is declaratory (theory of declaration) and only has an impact on the capacity to act under international law, since a state which is not recognised can not, as a rule, maintain any legal relationships with other states in the international community.

Another different issue is whether the recognition of North Cyprus – and this means the establishment of its capacity to act under international law – is consequently illegal and can therefore the international community be forbidden from recognising North Cyprus, because it could be regarded as intervention against the state from which the new state had seceded.

On principle, it can certainly be held that we are dealing with two states on the island, of which – as a result of the practice of international law – only one, that is the southern part, has the capacity to act under international law as the Republic of Cyprus, and is identical or partly identical with the Republic of Cyprus founded in 1960 or has become its legal successor.

The government of the Greek Cypriot ethnic group is at the same time recognised by international law as being the government of the Republic of Cyprus[51]. Moreover, from this it follows that diplomatic protection for members of both ethnic groups may only be granted by the government of the Republic of Cyprus, that is the government of the Greek Cypriot ethnic group. On the other hand, it can be argued that the TRNC should be regarded as a state[52]. Acts concerning the nationality of its citizens passed by the

[50] Dealt with in detail by *Laffert*, in Die völkerrechtliche Lage des geteilten Zypern und Fragen seiner staatlichen Reorganisation. Frankfurt 1995, P. 128, who in the final analysis, attributes the key function of the question of the description of a state to recognition.

[51] *Leigh* (Note 30) puts forward the opinion P. 7, that the Greek Cypriot ethnic group "usurped" the power of the state of the Republic of Cyprus, and that it is not the government of the "Republic of Cyprus", the state recognised by the international community. With a correct distinction between "constitutional law within a state" and "international law with another state" one is however forced to say that it is accepted that the Greek Cypriot government represents the Republic of Cyprus to the international community. As a result, it is legitimate under international law. From the perspective of constitutional law within a state, it is legal subject to the conditions of the derogation of the ethnic group constitution. Since each state is at liberty under interational law to decide its own constitution, and to amend this as it likes – subject to a few rudimentary principles of international law – it is unimportant whether the current government of the southern part of the island is to be regarded as the government of the "Republic of Cyprus" as provided for by the constition of 1960 or not.

[52] According to the logical and correct conclusion of *Leigh* P. 8.

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government of the TRNC for example, are only valid under its own constitutional law but not under international law however.

Irrespective of whether TRNC is to be classified as a state or not, it is in any case an undisputable fact that it does at least have its own „administration", which implements laws on the strength of its own constitution and these are decreed by its democratic and legitimised parliament[53].

VII. The outlook for the future

1. Entry to the EU and its consequences

The Act of Accession dated 16 April 2003 provided for the accession of the „Republic of Cyprus". At the same time the view that for the time being only the Greek section of the island could be considered for accession was reflected in the 10th protocol of the Act of Accession. This variation was then enacted in spite of considerable efforts by all those parties involved to unify Cyprus beforehand on the basis of the version of the Annan-Plan dated 31 March 2004. Therefore the piquant as well as little-wished result occurred that the demarcation line between the north and south part of the island became the actual external EU border at the same time. If the intention is to maintain the fantasy that the old Republic of Cyprus in terms of the Cyprus recognised up to this time by the international community still exists, the territory of the EU will consequently cover for the first time in its history an area in which neither EU law, or the law of an EU member state applies and in which not only the liberties of the EU do not apply, but which are even subject to an international embargo. The sole alternative remaining to this state of affairs is to now recognise the *status quo* as being binding under international law as well, i.e. that the demarcation line should also become the external border of the EU with the result that secession has also been completed from the perspective of international law.

Consequently, by the time this treatise was completed, there are in fact indicators that the TRNC could be recognised under international law. At the same time, the EU is however attempting to mitigate the fact of the new „external border" in that the TRNC, whose population voted with a large majority to accept the Annan-Plan, is also being considered by the economic policy of the EU, which is also to bring the north to the EU.

[53] Cf. Proceedings (Note 37) P. 112.

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Consequently, there is still an opportunity being kept open that further negotiations will be staged on the basis of the last version of the Annan-Plan and that a solution to the Cyprus problem could still be found after all, resulting in the whole island joining the EU.

2. The Foundation Agreement

In its Part A – Foundation Agreement – the Annan-Plan provides for the outlines of a new constitutional arrangement for a Cyprus by the name of „United Cyprus Republic". The Foundation Agreement is to be concluded between the two ethnic groups, but will however be integrated under the „Treaty on matters related to the new state of affairs in Cyprus", also provided for in the Annan-Plan, and this is also to be ratified by the guarantor powers and integrated into an instrument under international law.

This means that the Annan-Plan is not designed to turn the wheel back to 1960 or to 1974. The interesting feature is that direct reference is even made to a system on which the new order is to be based, notably the system of confederation applied in Switzerland in which the cantons are largely independent. This means that – had the international community not adopted an essentially anti-Turkish attitude prematurely straight away in 1974 – this will give rise to what could have been managed as long ago as 1976, that is a state arranged not by having the failed arrangements of a constitution representing the ethnic groups, but along the lines of a federal state. The principle of having two zones is now one of the most important structural principles of the new Republic of Cyprus. The ethnic groups are no longer distributed evenly throughout the island, which at that time brought considerable difficulties in its wake, for the Turkish community in particular, but are now largely separated from one another. In 1976 the belief however, that that the situation of territorial segregation artificially created in 1974 should be embodied under constitutional law would have been simply intolerable for the Greek Cypriots. But even today as well, especially in view of the background of the politically unfortunate judgement in the Loizidou case at the European Court of Human Rights, the principle of having two zones represents the greatest hurdle for obtaining the consent of the Greek Cypriots to the Annan-Plan.

Although the principle of having two zones proposed in the Annan-Plan for a new federal state constitution, on the one hand takes into account the interests of the ethnic groups involved in a pragmatic manner, on 24 April 2004 the Greek Cypriots spoke out against the accession of the whole island into the EU for the time being. Even in the

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mid-term it will be difficult to secure the support of the Greek Cypriots for this solution, since they do not wish to recognise the Turkish ethnic group as an equal partner, but as a minority in a state of Cyprus covering the whole island. Nevertheless, this solution, coupled with territorial concessions by the Turkish Cypriots and with the prospect of a solution to the property ownership issues, is the solution offering the greatest potential for peace.

According to Article 10 of the Foundation Agreement, the principle of having two zones even takes precedence over the restitution of property. In fact the systematic implementation of a federal state structure means that the state of affairs existing prior to 20 July 1974, when the Turkish community was spread throughout the island in scattered villages and towns can not, and must not, be enforced again. Nevertheless, the provisions of Article 10 No 3 of the Foundation Agreement are really extensive. They provide for property owners turned out of their homes with an opportunity to have their property restored to them or to receive compensation. At the same time, the current owners of the expropriated property shall be protected. They shall be entitled to file a claim for compensation.

Article 12 of the Foundation Agreement is also particularly important. According to this, all the acts of an authority on the island of Cyprus (with the exception of the extra-territorial military bases) which were issued prior to the Foundation Agreement coming into force and which are not in breach of international law shall continue to be in force. This shall apply for both sides. It is accepted that both sides have created a legal framework which constitutes a valid set of laws for their respective population which have established themselves. For the TRNC this in itself would admittedly certainly not be enough to warrant international recognition as a state, for the time being the Foundation Agreement shall simply apply inter partes and shall of course not be binding upon the international community – but the solution would be an indication that the TRNC was, and is, more than a puppet state or protectorate of the Republic of Turkey and certainly has been in a position to make its own laws, laws which have been implemented by an effective administration. Accordingly the question of whether Greek Cypriot acts are constitutional should no longer be raised if the current legal arrangements are accepted. Consequently, the Foundation Agreement would be a set of laws which only interferes with the conditions currently existing as is necessary for achieving the objective of a United Republic of Cyprus. This will ensure a smooth transition with as little conflict as possible. But here too, it will above all be the Greek community which will have the greatest problems in coming to terms, accepting, and collaborating in the proposals. Since the acknowledgement of the legal acts of the

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TRNC can at the same time be understood as a belated denial of the legitimacy of the Greek Cypriot government.

The greatest problem of the Foundation Agreement is the political and emotional state of the Cypriots, and chiefly of the Greek Cypriots. A look at the past and the claim exercised for thirty years by the Greek Cypriots to represent all of Cyprus, a claim backed up by the international community with its systematic exclusion of the Turkish Republic of North Cyprus and recognition only of the Greek Cypriot government in Nicosia as the government of Cyprus will now, as well as in the future, question the implementation of the Foundation Agreement as a basis for living together in peace on the island of Cyprus.

Given this, the Reconciliation Commission to be appointed in accordance with Article 11 of the Foundation Agreement will have an important as well as difficult task ahead of it.

3. A new constitution for Cyprus

The basic principles of the Foundation Agreement are also reflected in the draft for a new constitution of the United Republic of Cyprus. The basic difference between it and the constitution of 1960 is that it is no longer a constitution for ethnic groups, but a constitution for a federal state. It will also be difficult to accept for the Greek ethnic group, whose leaders came to power in 1963 on the strength of an agenda designed to shoehorn the Turkish ethnic group into minority status. Because the Greek Cypriots had little sympathy for even the rights granted to the Turkish community in the ethnic groups constitution. Added to which, there is now territorial segregation, which no doubt affords the Turkish community better protection.

The principle of having two zones in the draft of the new constitution for Cyprus could give rise to similar problems created by the principle of having two communities in the 1960 constitution.

Given this background, another new element is attributed a special function. According to Article 19 of the constitution, the United Republic of Cyprus is a member of the EU. For the first time in the history of European integration the creation of a new constitution for a member state is directly associated with joining the European Union. Joining the EU is a requirement of the constitution. The legislation includes subordinate regulations on the liability of the government of Cyprus or one of its two states for breaches against EU law. In addition to this, it regulates precedence of EU

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law over constitutional law and includes instructions on taking over *acquis communautaire*.

Accession to the EU and the precedence of EU law over Cypriot constitutional law are requirements of the constitution.

Article 9 Section 4 of the constitution is also worth mentioning. This provision requires each Cypriot to learn both official languages – Greek and Turkish. This regulation ought to be at least as important for ensuring peace on the island over the medium and long term as a system *checks and balances* thought up in which even the 1960 constitution can be recognised in part of it.

The fundamental rights section is not included in the constitution itself, but in an annex. It complies with the standards normal in Europe today. There is no need to delve in detail at this juncture.

There is also no need to deal with the details of the structure, legislative, executive and judiciary just at this point. Only this much is to be said: the top echelon of the executive is to be found in a presidential council. This is no other than the government. The term is however justified in that the president and vice-president no longer hold two positions at the top of the government as they did under the constitution of 1960. Instead the presidential office and government are combined in this office. President and vice-president are the chairmen of this council and hold office on a rotating basis. As members of the presidential council and therefore government, they are only figureheads, a function which they discharge in tandem as two heads of state (Article 26 et seq of the constitution).

VIII. Conclusion

The Cypriot constitutional situation is vague. In the final analysis the assumption can be made that we are at present not only dealing with two administrations, but with two constitutional arrangements on the island which are not the same as the constitution set up in 1960. In the meantime the latter is „dead"; the treaties concluded to establish the Republic of Cyprus are now worth no more than the paper they were written on.

As far as the admission of Cyprus to the EU is concerned, this means that it must be clear that by assuming the name „The Republic of Cyprus" the southern part of the island has taken on another identity and is not the state christened in 1960. Since the Act of Accession was ratified on 16 April 2003, any debate of whether the „right

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republic“ was or is to be, accepted into the EU is purely and simply an academic exercise. However, it is to be hoped that should an agreement not be reached on the Cyprus problem soon, the international community will, for the benefit of all concerned, have the insight to acknowledge the northern part of Cyprus, The Turkish Republic of Cyprus, as a state having the capacity to act under international law, in the interests of a lasting peace and in the final analysis. This would not exacerbate the conflict, but defuse it and help the Turkish population in northern Cyprus to a existence worthy of human dignity.

And finally, it appears fitting to stress once more that the objective here must not be to exempt Turkey and the Turkish ethnic group on Cyprus from all responsibility for the present situation. However, the EU was and is also responsible for the unfortunate state of affairs in Cyprus. Since up until recently the EU has failed to take responsibility for solving the Cyprus problem. This responsibility came into being no later that the point in time at which guarantor powers became full members of the EU and have been able to exercise vital influence on the entry of the third guarantor power, Turkey, into the EU with their respective rights of veto. As a member of the EU, Greece has long made keen use of its right of veto and in doing so made a crucial contribution to the continual breach of the treaties of Zürich and London and to their worthlessness as well as to the ongoing breach of contract by the Greek ethnic group on the island. From the perspective of the EU, the correct thing to have done would not, for example, have been to make the acceptance of Turkey into the EU dependent upon the Cyprus problem being solved, (Both the other two guarantor powers also responsible for the impasse on Cyprus have already become members of the EU, and both were accepted into the EU after Turkish intervention, for which they must both bear some of the blame), but on the acceptance of Cyprus itself into the EU. If Turkey had been accepted into the EU before the Republic of Cyprus, the discussion about the Annan-Plan would possibly have been rendered superfluous and a final solution facilitated.

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