SOME CRITICAL ASPECTS REGARDING THE UN SECRETARY GENERAL'S PROPOSAL FOR A COMPREHENSIVE SETTLEMENT OF THE CYPRUS PROBLEM

Univ.-Prof. Dr. Peter Pernthaler
University of Innsbruck, Austria

I. The Legal Position of the Peoples of Cyprus

The two populations of Cyprus are two clearly distinct ethnic groups, which means that there is no homogeneous "nation" or "people" of Cyprus that could exercise a "national" right of self-determination for the entire island.[1] Therefore, both the Greek Cypriot and Turkish Cypriot community are subjects of the right of self-determination in Cyprus.[2] Neither of the two ethnic groups (peoples) possesses the de iure or the de fac-

---

* The author would like to thank Dr. Anna Gamper for her assistance with this article.

1 Cf also Art 2 of the Constitution of 1960, which does not mention a „Cypriot nation", but only the Greek and Turkish „ Communities".

2 Cf the famous statement of the British Colonial Secretary, Mr. Lennox-Boyd: "(It) will be the purpose of Her Majesty's Government to ensure that any exercise of self-determination should be effected in such a manner that the Turkish Cypriot community ... shall ... be given freedom to decide for themselves their future status ... (The) exercise of self-determination in such a mixed population must include partition among the eventual options." (House of Commons, 1956). See also Oberling, Negotiating for Survival. The Turkish Cypriot Quest for a Solution to the Cyprus Problem (1991) 37 f; Leigh, The Legal Status in International Law of the Turkish Cypriot

to power to deny or overrule the right of self-determination of the other group.[3]

The sovereignty of the historically "semi-federal"[4] state of Cyprus was clearly defined and restricted by international law (London and Zurich Agreements of 1959) in order to protect the Turkish Cypriot community. The illegal amendments of the constitution and the violation of the civil rights of the Turkish population during the early sixties therefore surpassed the legal scope of Cyprus's sovereignty (ultra vires acts).[5] These acts immediately caused a civil war between the two populations. The

---

and the Greek Cypriot Communities in Cyprus, in Ertekün (ed), The Status of the Two Peoples in Cyprus: Legal Opinions2 (1997) 54; Lauterpacht/Leigh, On Sovereignty in Cyprus and its Relationship to Proposals for a Solution of the Cyprus Problem along Federal Lines, in Ertekün (ed), The Status of the Two Peoples in Cyprus: Legal Opinions2 (1997) 69 ff; Blumenwitz, The Legal Status of Greek Cypriots and Turkish Cypriots as Parties of a Future Agreement for Cyprus, in Ertekün (ed), The Status of the Two Peoples in Cyprus: Legal Opinions2 (1997) 85, 88 and Heinze, On the Question of the Compatibility of the Admission of Cyprus into the European Union with International Law, the Law of the EU and the Cyprus Treaties of 1959/60, in Ertekün (ed), The Status of the Two Peoples in Cyprus: Legal Opinions2 (1997) 181, 199. Heinze, Zum Stand des Zypern-Konflikts unter besonderer Berücksichtigung des Grundsatzes der Selbstbestimmung der Völker, ZfP 1991, 406, 425 f points out that the establishment of the Republic of Cyprus in 1960 was not an act based on the self-determination of a homogenous „Cyprus nation", but on the congruent self-determination belonging to each of the two communities.

3 Cf Bouony, The Status of the Turkish Republic of Northern Cyprus and its Adherence to the Organization of the Islamic Conference, in Ertekün (ed), The Status of the Two Peoples in Cyprus: Legal Opinions2 (1997) 112, 113: „The equality of status is the fundamental notion recognized and accepted by the founders of the new state and also by the guarantor states of the status of the island ... (which) leads to the free exercise of the right of self-determination particular to each of the communities and to the insubordination of one to the other."

4 The qualification as a "semi-federal" system seems to be justified considering those provisions in the Constitution of 1960 which established institutions of "functional federalism": Namely, one could mention Art 46 et seq, which provided for a Turkish Vice-President (vested with the right to final veto in certain cases) and a Council of Ministers composed of seven Greek Ministers and three Turkish Ministers. Moreover, according to Art 86 et seq, the Greek and the Turkish Communities respectively were entitled to elect from amongst their own members their own Communal Chambers which were responsible for certain matters of legislation.

5 Cf Lauterpacht, The Right of Self-determination of the Turkish Cypriots, in Ertekün (ed), The Status of the Two Peoples in Cyprus: Legal Opinions2 (1997) 9, 12: "(Not) only did the Greek Cypriot community ... break the Constitution and violate its pledged

constitutional amendments certainly cannot be supposed to have created "one Cypriot nation", because they could not be accepted by the Turkish population, whose share in the constitutional power had been granted by international treaties. Nor could these acts create a new type of unitary state dominated by the Greek Cypriots, because this was not within the de iure or the de facto power of the Greek authorities. Thus, the "new state" was a de facto Greek Cypriot national regime.[6]

In principle, the Treaties of 1959 and 1960 still exist legally[7], although practically, on account of the constitutional changes and the new political situation in Cyprus they are more or less inapplicable.[8] Both existing states - i.e. the so-called "Republic of Cyprus" and the Turkish Republic of Northern Cyprus (TRNC) - are illegitimate regarding the provisions of the treaties of 1959 and 1960 as well as the constitution of 1960. The division of both the island and the ethnic groups, which is based on a complex pattern of clearly illegal acts, makes the reinstatement of the former constitution (1960) and the application of the larger part of the Treaties impossible. Therefore, the Treaties should be rephrased in order to create a new international guarantee for a Cypriot confederation.

Until 1963, the Turkish population of Cyprus had been a national community that shared territory and lived intermingled with the Greek majority. Since the illegal destruction of its constitutional status the Turkish population has developed to a separate and independent political entity which has no connection to the Greek Cypriot national regime. Since the illegal ethnic dividing of the population and the establishment of two

---

word in an absolutely fundamental way; it also repudiated a solemnly assumed treaty undertaking which formed an indispensable element in any legal assessment of its position."

6 Cf Lauterpacht (fn 5): „But that de facto acceptance (of the Greek Cypriot regime) by the international community could not, and did not, in any way expunge the international illegality or ... deprive the Turkish Cypriot community of its entitlement, possessed in common with the Greek community, to the enjoyment of its right of self-determination." See also Leigh (fn 2) 61, 63.

7 Cf Panico et al, Joint Opinion on the Legal Status of the Turkish Republic of Northern Cyprus, in Ertekün (ed), The Status of the Two Peoples in Cyprus: Legal Opinions2 (1997) 101.

8 Cf Mani, Resolving the Cyprus Conflict: A Framework for Self-Determination, in Sharma/Epaminondas (eds), Cyprus: In Search of Peace and Justice (1997) 195 ff.

separate territories caused by the Turkish military intervention one has not been able to speak of "national communities" any longer, but rather of two different peoples inhabiting the island.[9]

II. Statehood and Recognition

Although international law today clearly grants a right of self-determination to all peoples, it does not provide a mechanism for the unilateral secession from an existing state, because this would violate the principles of the integrity and sovereignty of a state. The foundation of the TRNC, however, was no secession from a semi-federal state of Cyprus, but rather a reaction to the foundation of the national Greek Cypriot de facto regime leading to 10 years of civil war.[10]

Both de facto regimes in the north and in the south of Cyprus have now developed into national states, simply because they possess all essential elements of independent states that are required by international law, i.e. they exercise stable and effective constitutional power on a clearly defined territory and over permanent population without foreign control.[11]

The disavowal of the TRNC by all states except Turkey is a severe practical problem, which, however, has no legal effect on its quality of being an independent state according to the prevailing declaratory theory.[12] The resolutions of the UN Security Council 541/1983 and 550/1984 not to recognize the TRNC as a state are merely political advice and not legally binding.[13] Moreover, they are legally self-contradictory, because they do not consider the illegal acts that were first performed by the Greek Cypri-

9 Accordingly, the UN Security Council as well as the Secretary-General have always emphasized that negotiations between the two communities should be on an „equal footing".

10 See Rumpf, Die staats- und völkerrechtliche Lage Zyperns, EuGRZ 1997, 533, 544 f; Necatigil, The Cyprus Conflict in International Law, in Dodd (ed), The Political, Social and Economic Development of Northern Cyprus (1993) 46 ff and Panico et al (fn 7) 107.

11 See Necatigil (fn 10) 66 ff; Leigh (fn 2) 65 f and Heinze (fn 2) ZfP 1991, 417.

12 See Rumpf (fn 10) 546; idem, Verfassung und Recht, in Grothusen et al (eds), Cyprus - Handbook on South Eastern Europe VIII (1998) 155, 175; Panico et al (fn 7) 105 and 108; Leigh (fn 2) 64 f; Blumenwitz (fn 2) 88 ff and Necatigil, The Cyprus Question and the Turkish Position in International Law2 (1998) 310 ff.

13 Similarly Rumpf (fn 10) 544.

ots as being the main reason for the establishment of a separate Turkish Cypriot state.[14] The de facto existence of two national states in Cyprus legally and practically impedes the application of those parts of the Treaties of 1959 and 1960 that were the legal basis of the constitution of the semi-federal "Republic of Cyprus".

Both the new Turkish Cypriot and Greek Cypriot state represent the former "Republic of Cyprus" within their respective territories. Although the TRNC is protected by the strong presence of Turkish troops, it cannot be dismissed as a "puppet-state" that lacks real sovereignty, because it represents the national self-determination of the Turkish Cypriot population. The TRNC government is neither legally nor practically dependent on or represented by Turkish authorities.[15]

Since there are two legally independent political entities presently, both of them partly representing the "Republic of Cyprus", the Greek Cypriot state cannot claim to be its sole successor. Within its particular territory, each state represents the continuity of the former "Republic of Cyprus". Therefore, the "part-states" can legally provide two separate citizenships, because each "part state" has the legal power over its own citizens and thus controls the conditions of obtaining citizenship.[16] Therefore, it

14 See Stephen, The Cyprus Question (1997) 1: „The Greek Cypriots claim that the Cyprus problem was caused by the landing of Turkish troops in 1974 and that if only they would withdraw, the problem would be solved. This is a serious misconception, for the modern Cyprus question began in 1960 and the landing of the Turkish troops was the consequence, not the cause of the problem." Cf also Lauterpacht (fn 5) 32: "(The Security Council) should not have found that the TRNC Declaration was 'incompatible' with the 1960 Treaty of Establishment without also having found that the conduct of the Greek Cypriot Community had for the previous 20 years been 'incompatible' with the 1960 settlement and ... that it was that conduct of the Greek Cypriot community that had led directly to the reaction of the Turkish Cypriot community. There can be no legal basis for holding one party to the terms of an agreement without predicating the requirement of an equal degree of compliance by the other ... (As a) Cyprus that is not regulated by the Basic Articles of its Constitution is not 'the Republic of Cyprus' at all ... it follows that the assertion of the independence of the TRNC cannot be an unlawful secession." Similarly, Heinze (fn 2) in Ertekün (ed), The Status of the Two Peoples in Cyprus: Legal Opinions2 (1997) 188 and 198 even perceives a „Greek Cypriot secession" from the constitution of 1960, after which a „Turkish Cypriot secession was no longer possible as the object of a secession no longer existed" (cf also idem [fn 2] ZfP 1991, 418).

15 See Rumpf (fn 12) in Grothusen et al (eds), Cyprus - Handbook on South Eastern Europe VIII (1998) 175.

will not be illegal if the Turkish and the Greek Cypriot state naturalize persons originating from their respective ethnic group outside Cyprus. Since, however, according to international practice only the Greek Cypriot state is recognized as the successor of the former "Republic of Cyprus", it will be legal if the Greek Cypriot state assists and protects members of the Turkish ethnic group with respect to international concerns, because these subjects are no foreigners, but citizens of the former "Republic of Cyprus".[17]

III. The Foundation of a Federal State of "The United Cyprus Republic" in the Light of Constitutional and International Law

The foundation of a **federal state** implies that - beyond codified federal constitutional law - a whole body of unwritten determinants, derived from international and constitutional law and state theory, is co-adopted and embodied on a constitutional basis ("constitutional pre-understanding"). These determinants are inextricably connected to the term "federal state", which has been developed in constitutional and international practice since the foundation of the "model federal states" of the USA (1787) and Switzerland (1848). Further to that, the Foundation Agreement itself refers to the Swiss federal system as its underlying model (Art 2). It remains unclear which basic structures and unsaid principles of Swiss federalism, and to what extent, are to be inherited in this way. In doubt, it is to be assumed that, according to the wording of Art 2 of the Foundation Agreement, the essential structures (basic principles) of Swiss federalism are **fully** inherited.

In detail, this means most notably:

A. The constituent states' designation as "sovereign" is as irrelevant and misleading as the similar designation used for the Swiss cantons under Art 3 of the Swiss Federal Constitution of 1999. In truth, **only the federation** ("federal government") is sovereign under international and constitutional law.

1. This is due to international law and European law in so far as both of them are "federalism-blind", which means that, without explicit consti-

16 See Rumpf (fn 12) in Grothusen et al (eds), Cyprus - Handbook on South Eastern Europe VIII (1998) 175.

17 Similarly Blumenwitz (fn 2) 91.

will not be illegal if the Turkish and the Greek Cypriot state naturalize persons originating from their respective ethnic group outside Cyprus. Since, however, according to international practice only the Greek Cypriot state is recognized as the successor of the former "Republic of Cyprus", it will be legal if the Greek Cypriot state assists and protects members of the Turkish ethnic group with respect to international concerns, because these subjects are no foreigners, but citizens of the former "Republic of Cyprus".[17]

III. The Foundation of a Federal State of "The United Cyprus Republic" in the Light of Constitutional and International Law

The foundation of a **federal state** implies that - beyond codified federal constitutional law - a whole body of unwritten determinants, derived from international and constitutional law and state theory, is co-adopted and embodied on a constitutional basis ("constitutional pre-understanding"). These determinants are inextricably connected to the term "federal state", which has been developed in constitutional and international practice since the foundation of the "model federal states" of the USA (1787) and Switzerland (1848). Further to that, the Foundation Agreement itself refers to the Swiss federal system as its underlying model (Art 2). It remains unclear which basic structures and unsaid principles of Swiss federalism, and to what extent, are to be inherited in this way. In doubt, it is to be assumed that, according to the wording of Art 2 of the Foundation Agreement, the essential structures (basic principles) of Swiss federalism are **fully** inherited.

In detail, this means most notably:

A. The constituent states' designation as "sovereign" is as irrelevant and misleading as the similar designation used for the Swiss cantons under Art 3 of the Swiss Federal Constitution of 1999. In truth, **only the federation** ("federal government") is sovereign under international and constitutional law.

1. This is due to international law and European law in so far as both of them are "federalism-blind", which means that, without explicit consti-

16 See Rumpf (fn 12) in Grothusen et al (eds), Cyprus - Handbook on South Eastern Europe VIII (1998) 175.

17 Similarly Blumenwitz (fn 2) 91.

tutional authorisation, they only recognize the **state as a whole**, and its governmental organs, as international law subjects (monopoly of international and European legal personality enjoyed by federal organs). The proposed federal constitution and the Foundation Agreement do not only provide no exception in favour of the constituent states, but virtually confirm this structure (Art 2 of the Foundation Agreement; Art 1 of the Constitution). This is in conformity with the Swiss model, which provides the federation's monopoly regarding international law and foreign policy (Art 54 of the Federal Constitution), but only very limited and inferior exceptions in favour of the cantons who, however, need to co-operate with the Federal Government (Art 55 and 56 of the Federal Constitution).

2. Such a constitutional and international legal basis is unacceptable if a permanently peaceful and just settlement between the two ethnic groups is to be achieved: As a consequence, the Turkish community would lose its **right of self-determination** and, losing its legal personality, become incapable to act under international law. This is confirmed by the explicit exclusion of the constituent states' right of **secession** (Art 1 § 6 of the Foundation Agreement), which, in its absolute formulation, might even be invalid and in breach of international law.[18]

3. Any legal solution to the Cyprus problem must provide the constituent republics with a sufficiently **autonomous legal personality and capacity to act under international law** in order to allow them to enforce their indispensable interests and conditions of existence against the international community and, **in particular, against the EU**, freely and independently. The solution, as provided by the Foundation Agreement and the Constitution, presupposes a **unitary state of Cyprus** at the level of international law, which only recognizes a limited autonomy of the constituent states within its internal dimensions. This model, which follows the Swiss Federal Constitution, is not at all qualified for preserving the self-determination and independence of the Turkish ethnic group, as it would need a homogeneous nation of the state, which is very clearly expressed by the preamble to the Swiss Federal Constitution ("The Swiss people"...).

It follows from these reflections that Cyprus requires a multinational federal state shaped after the model of Belgian or Canadian federalism in principle, but adapted to the specific situation of the Turkish Community

18 Cf. the International Court's decision regarding East Timor and Hilpold, Der Osttimor-Fall (1996).

within the framework of a multi-national confederation of states. According to the model proposed by the Foundation Agreement, the Turkish Community would not have any chance to independently determine the EU accession treaty (which was lopsidedly negotiated by the Greek side), although this would be essential, or to enforce its rights autonomously before the courts. Neither are the regions (constituent states) yet entitled to sue before the European Court of Justice; nor has Turkey, as the Turkish Community's protection power, joined the EU, which makes it impossible for Turkey to represent a legal case relating to the Turkish Community within the EU organs. By contrast, the Greek Community would not only dispose of a majority within the proposed federal organs of Cyprus, but would also enjoy the protection of Greece, which is a EU member state. In case of conflict, the Greek Community could thus act independently - both legally and politically - at the level of the EU and that of the international community.

4. The **Foundation Agreement** does not even itself provide an independent mechanism of actions and legal review in favour of the Turkish Community or the Turkish constituent state, which would be indispensable in order to review subsequent constitutional amendments that diminished the Turkish Community's rights. Considering the negative experience which the Turkish Community suffered from the former Republic of Cyprus' constitutional reviewing mechanism, such an international protection mechanism would be indeed imperative. The Monitoring Committee, created by the proposed Treaty between Cyprus, Greece, Turkey and the United Kingdom on Matters Related to the New State of Affairs in Cyprus (Annex IX, Attachment 1), would provide a purely international law procedure, which would be open neither to the Turkish Community nor the Turkish constituent republic.

5. According to the Swiss model, the constituent states **neither are sovereign under constitutional law**, since they do not enjoy exclusive, supreme and independent state power within their territories. The constituent states are subordinate to the federal constitution and the federal constitutional jurisdiction, enjoying only those state functions which are allocated to them by the federal constitution. According to the proposed allocation of powers (Art 14 of the Constitution) essential competences would be reserved to the central government. Beyond that - as in all federal systems -, there would be an obligation as to **federal loyalty** (Art 2 §

2 and 3 of the Foundation Agreement), which, being not exhaustively determined, is usually made more concrete by the jurisdiction of a Federal Constitutional Court, which creates new obligations and reduces the constituent states' autonomy.

6. Above all, however, the constituent states are not sovereign, since they are legally and politically subordinate to the supranational power of the EC (EU), without being entitled to direct participation, as the member states are. EU law takes priority in the constituent states as well: They are obliged to enforce and implement it effectively, being subject to supranational and national measures of supervision (e.g. transfer of competences, cf. Art 19 § 5 of the Constitution). It is true that Art 2 § 2 of the Foundation Agreement provides the constituent states' right to take part in formulating and implementing European and international policies. This participation procedure, however, is limited to the constituent states' own competences and does not comprise their autonomous representation at the international and European level, which is reserved to the federation. Co-operation with the Federal Government thus becomes essential and needs to be practically determined by co-operation agreements.

7. The reference which is made to the "**Belgian model**" by the Foundation Agreement is misleading in this context, since the Belgian allocation of powers relies on a totally different system (cf. Art 167 of the Belgian Constitution). As Art 2 § 1b of the Foundation Agreement and Art 14 of the Constitution provide the **federal government** with an exclusive and uniform **competence** regarding international and European law, all rights of participation solely refer to the intra-national organisation of this exclusive federal power sub reservo the devise "**to speak with one voice**" within European and international organs. This means, that in case of conflict the federal government will be definitely competent to determine and represent a "uniform position" of the Republic of Cyprus, which results from its rights of representation within international and European organs.

B. The foundation of a federal state based on two equal constituent states, as proposed by the drafted constitution, neither solves the **question of the sovereignty** of the state as a whole and the constituent states in the sense of self-determination nor will it ensure sufficient protection if the Greek majority abuses the constitution.

1. Today, both federal theory and practice agree that not the constituent states, but the federation (federal government) are **sovereign** under in-

ternational and constitutional law. The allocation of powers and structural organisation of a federal state only provides the constituent states with constitutional rights of co-determination and participation in federal government according to standards laid down by federal constitutional law, which rely on confidence and co-operation between the federation and the constituent states ("**federal loyalty**"). Without this basic political requirement, a federal state will not be able to work and will be forced to solve future crises unilaterally by empowering the federation - either written or unwritten - to act with unlimited emergency powers. Due to the **federal government**'s sovereignty and emergency powers the regular federal system is incapable to protect nations or ethnic groups, which dispose of a majority in only one constituent state, unless there were - as in Canada or Belgium - an old tradition of peoples living peacefully together and being mutually loyal to each other, which is obviously lacking in Cyprus presently.

2. If, under such a federal solution, nationalities are to be protected effectively and permanently, the compliance with the federal constitutional framework will need to be supervised and enforced by **supra-state control** and a sanction mechanism. Such an external control on the federal system's functioning, however, is not explicitly provided by the UN Plan, if one abstains from the reference "that the Treaty of Establishment, the Treaty of Guarantee und the Treaty of Alliance shall remain in force and apply mutatis mutandis to the new state of affairs" (Art 1 § 3 of the Foundation Agreement). In practice, these treaties will have as little effect to the new federal system as to the Constitution of 1960 and would, moreover, need to be amended and completed by a new treaty between Cyprus and the guarantor powers. This concept is to be turned down in particular, as it would vest the new federal state (as a whole), being party to the agreement, with the sole international law guarantee, whereas, vice versa, the international sovereignty of the federal state would need to be **restricted** in order to protect the rights of the Turkish Community.

3. Thus, the sole acceptable solution would be a special **confederal** arrangement between the two existing Cypriot states, at any rate for a certain period of time. Only such a confederal solution could ensure a special international status and legal protection of the Turkish Community. Moreover, a confederal arrangement could gradually inspire political confidence in both ethnic groups, whose faith in a joint political and legal future would be indispensable for a successful federal system.

IV. Some Comments on the Consequences of EU Membership regarding the Protection of the Rights of the Turkish Population

1. In Case of Reunification and Commencement of the Legal Acts Related to the "Comprehensive Settlement":

A. The restrictions imposed on the freedom of establishment and the acquisition of land by the Foundation Agreement and the Constitution (in particular, Attachment 3: "Constitutional Law on Internal Constituent State Citizenship Status and Constituent State Residency Rights") are necessary in order to protect the Turkish Community from foreign infiltration, but contravene the EU's acquis communautaire as well as the European Convention on Human Rights. They would thus need to be embodied in EU primary law by the means of special provisions in the Accession Treaty. Beyond that, the Turkish constituent state will be likely to take additional measures of protection, which cannot be pinpointed at the moment, since they depend on the factual - particularly, economic and social - development in the aftermath of reunification. It may be possible as well that the measures provided by Annex VII: "Treatment of Property affected by Events since 1963" individually contravene EU law and the European Convention on Human Rights, although it is impossible to determine them more precisely at present.

B. The "Protocol requested to be attached to the Treaty of Accession of Cyprus to the European Union", which is provided by Annex IX, does neither suffice regarding its general conception nor its detailed provisions, if the aforementioned special provisions are to be guaranteed on the basis of European law. First of all, article IV of its preamble relativizes the whole dimension of protection as provided by the Protocol, as it is understood to achieve "Accommodation of the Foundation Agreement in line with the principles on which the European Union is founded". These "principles" - which mainly consist of the four fundamental freedoms, but also of other basic structures of European law - thus take priority over the rules laid down in the Protocol, which - being exemption clauses - have to be construed narrowly anyway. Moreover, as regards time and content, these proposed special provisions seem to be **too restrictive to guarantee** sufficient protection to the Turkish Community **for longer periods**. In particular, one cannot find any exemption clause regarding the European Convention on Human

Rights, regarding the property question (Annex VII) or in favour of necessary future protection measures taken by the Turkish constituent state. Whereas, in this respect, the Federal Government might at least negotiate with the EU (without any promising prospects of success), the Turkish constituent state is protected from doing so due to its lacking legal personality at the international and European level.

Finally, it should be pointed out in this context that the proposed protocol to the Accession Treaty does not at all approach the level of protection inherent in the "Protocol No 2 on the Åland islands" (Official Journal 1994 No C 241, of 29 August 1994) which was annexed to Finland's and Sweden's EU Accession Treaty in order to guarantee the comprehensive protection of the islands' autochthonous Swedish minority from EU primary law without any time limit.

2. In Case of Accession of the Greek de-facto regime of "Cyprus":

An accession of the divided island would meet several legal obstacles: According to Art 1 para 2 of the Treaty of Guarantee the „Republic of Cyprus ... undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever. It accordingly declares prohibited all activity likely to promote, directly or indirectly, either union with any other State or partition of the Island." The first question to be raised is therefore, whether the accession of the so-called „Republic of Cyprus" would be contrary to this treaty. Considering the fact that the first pillar of the European Union certainly establishes an economic union and that the intention to move towards a political union cannot be overseen, there may remain some difficulties with identifying the European Union or the European Communities as well with „any State whatsoever". It is true, of course, that neither the EU nor the EC are states in the strict meaning of that word. It has to be considered, however, that the EU is not a legal person under international law and that an applicant has to conclude the EC, ECSC, EURATOM and EU treaties with each of the 15 member states. Thus, it could be argued with good reasons that an accession would bring an at least economic union with „any state whatso-

ever", considering in particular that "whatsoever" clearly broadens the rigid meaning of "state".[19] Moreover, several authors[20] suppose an accession to be likely to promote, directly or indirectly, a union with Greece in the long term.

As pointed out by the Turkish Memorandum of 1990, „a membership of the European Communities would involve a degree of participation by the Communities in the life of their Members which is quite unworkable in the circumstances presently prevailing in Cyprus". The difficult situation was also realized by the European Commission[21] that particularly emphasized the importance of a „political settlement" prior to the accession, which, although it was not considered a "precondition" by the Helsinki European Council, clearly remains an essential political as well as legal target. Given the present situation, it seems to be obvious that the territorial application of the acquis communautaire would be limited to the southern part of the divided island. Thus, it may well be asked how a fundamental breach of EU principles could be avoided. It appears to be rather paradoxical that - not only by its name - the impression of the applicant being the legitimate successor of the formerly undivided Republic of Cyprus is given, whereas it has neither the de facto nor, in my view, the de iure authority necessary for implementing EC law on Cyprus as a whole.[22] If the current situation is not changed, the Greek Cypriot regime will have to restrict the free movement of persons, services, goods and capital within the very territory which it pretends to be its own.[23] It is quite obvious that both issues - a political settlement and an accession to the European Union - are inevitably

19 Cf Rumpf (fn 10) 535; Mendelson, The Application of „The Republic of Cyprus" to join the European Union, in Ertekün (ed), The Status of the Two Peoples in Cyprus: Legal Opinions2 (1997) 139, 177 f and Stephen (fn 14) 80.

20 Cf eg Mendelson (fn 19) 177.

21 COM 1993/313 final of 30. June 1993: "[The] Commission must envisage the possibility of the failure of the intercommunal talks to produce a political settlement of the Cyprus question ... [In this case] the situation should be reassessed ... and the question of Cyprus's accession to the Community should be reconsidered."

22 Cf Panico et al (fn 7) 108: "That the (Greek Cypriot) Government ... cannot implement its norms and policies on the territory under the competence of the ... TRNC is clearly evident."

23 Cf Necatigil (fn 12) 344.

linked together.[24] The question, however, remains, whether a political settlement will end up in a federation, which the Turkish Cypriots[25] have already strongly objected to, or in a confederation of two independent states on the island of Cyprus.

V. A Confederal Solution as a First Step towards Reunification

Regarding the political situation and the international legal status of the two states existing within the territory of the former "Republic of Cyprus", a reunification seems to be only possible on the basis of an accord between the two political systems about the future constitution of a unified bi-communal and bi-zonal state. Such a "constitutional compact" of a new federal system seems to be the essential precondition of transforming the two sovereignties into one new state without denying either ethnic group the right of self-determination.

Therefore, the first steps towards reunification must consist of international treaties embedded in a confederal system - and not in a federal state yet. This seems to be the only realistic and democratic way for the now strictly separated political entities to create a new homogeneous legal and political system during an extended transitional period that should be part of the reunification process. Attention must be particularly drawn on the fact that in a federal system the population must not be divided by allotting certain groups of people to certain parts of the territory and prohibiting them to settle in another part of the country. However, when seeking protection from the ethnic predominance, which might be caused by the unlimited "immigration" of persons belonging to one ethnic group, problems with EU law could only be avoided, if the Turkish Cypriot state, though connected with the Greek Cypriot state in a confederal system, acceded to the EU under the proviso that the free movement of persons might still be restricted by domestic law if necessary.

---

24 Apostolides, The European Acquis Communautaire and a Federal Cyprus, in Sharma/Epaminondas (eds), Cyprus: In Search of Peace and Justice (1997) 251 f objects to the notion that "a solution to the Cyprus problem is necessary for Cyprus to become an EU Member State", but the close connection between an accession and a general solution to the conflict cannot be denied (see Pabst, Zypern, UN, EU und Status quo, Vereinte Nationen 4/2001, 139 ff, 142).

25 See the "Proposal for a Lasting Solution in Cyprus" by President Denktas in Moran, Sovereignty Divided (1998) 206.

A finally reunified Cyprus should be a federal system based upon two constituent states of both ethnic groups.[26] These component states should have full autonomy in all important matters due to their specific interests. On the other hand, the organisation of federal powers must provide effective mechanisms to guarantee participation of both ethnic groups according to the principle of "ethnic partnership".[27]

Beyond all formal legal concerns about the way and individual steps towards reunification it seems to be clear that in a bi-communal and bi-zonal federal system accords between the two nations are a precondition of exercising constitution-making power ("pouvoir constituant"). The reason for this is that both nations equally share sovereignty of the new state, based upon their respective rights of self-determination.

Moreover, this basic constitutional agreement would have to define how the constitution-making power within the new federal system should be shared between the two constituent states and which guarantees or sanctions would be provided if these power-sharing mechanisms were violated.

International guarantees given by external states should be clearly defined and limited by special treaties between the two Cypriot states and the external powers at the beginning of the reunification process ("2+3 treaties"). These international treaties should also settle the complex problem of repatriation of refugees and compensatory payments, the withdrawal of the Turkish troops, international economic help to develop the northern part of Cyprus and the final territorial borders between the two constituent states within the future federal system of Cyprus.

VI. Conclusion

1. The Requirement of a Constitutional Compact

The precondition of a **constitutional** reunification under the auspices of a new federal system would be a **contractual agreement** between both ethnic groups. This binding agreement should contain all es-

---

26 Such a system would certainly not be compatible with the idea of "reducing the Turkish Cypriots ... to merely minority status", as Moran (fn 25) 149 points out rightly.

27 Cf Wippmann, International Law and Ethnic Conflict on Cyprus, Texas International Law Journal 31 (1996), 141, 172 ff.

sential elements of a future federal constitution and clarify the adherent legal questions. A system of contracts ("2 + 3 Treaties") between the constituent states and the guarantor powers should be established under **international law**. If such a system were prevented by political reasons, the constitutional compact would have to be enshrined in another legal form permitting judicial review in the future in accordance with the legal conditions required for the new federal constitution. Following the concept underlying the South African constitutional process, eventually all salient points of this agreement would have to be enshrined in the **constitutions** of both constituent states in order to allow the constitutional review of its correct legal implementation.

2. The Requirement to Embody the Key Elements of the Agreement in EU Primary Law

Considering the definitely bad Austrian experience with EU special provisions, extreme cautiousness concerning the **process of EU accession** must be advised. Since the EU is basically "blind" regarding the internal federal structures of its member states and accepts special provisions only as limited as possible, one must not oversee the risk that the measures, taken by the Turkish constituent state in order to protect itself against foreignization, and the full self-determination within its territory would be increasingly repelled **after EU accession** on account of the jurisdiction of the European Court of Justice and EC secondary law. Thus, the first and indispensable precondition of Cyprus's EU accession is the embodiment of all salient points of the constitutional compact mentioned above within **EU primary law**, e.g. in the form of a binding annex to the accession treaty, following the concept of the specific rules concerning the autonomy of the Aland Islands set up in the accession treaty of Finland and Sweden. Otherwise, even EU law as it is in force today (acquis communautaire) would contradict the key provisions intended for the protection of the Turkish group, since the latter would be incompatible with the fundamental freedoms of the EU, as they have been construed and developed by the jurisdiction of the European Court of Justice.

3. The Requirement of Ethnic Protective Provisions (Asymmetric Federalism)

In order to protect the Turkish group within a future state common to both ethnic groups, it is by no means sufficient to transfer the model of the **Swiss federal system** to the two national constituent states of the Greek and Turkish groups. Namely, the Swiss federation is based on a constitution which serves as a typical example of **homogeneous federalism**, as it does not permit any special provisions in favour of certain constituent states (cantons). Accordingly, the Swiss system makes it impossible to restrict certain parts of the population to live in certain parts of the territory or to vest them in their territories with different rights. Such a model of federalism - which presupposes a homogeneous nation (the "Swiss people") - is not acceptable to the Turkish group, since, in the end, it would restore Greek hegemony. As a consequence, only concepts of "asymmetric federalism" are suitable for Cyprus, as they allow effective ethnic protection and special provisions pertaining to the constituent states (e.g. Belgium or Canada). Unless the ethnic constituent states enjoy equality, the states, procedures and institutions of the whole state, the organisation of which must reflect the idea of partnership and must not enable the majority to outvote the minority, cannot be provided. Given the time required for setting confidence-inspiring measures, a real, homogeneous and comprehensive federal system can thus develop only on the basis of such a system of quasi-confederal organisation and of the equality of both constituent ethnic groups in their respective autonomous constituent republics.