

ILLEGALITY AND NON-RECOGNITION OF THE STATE AND ATTRIBUTION OF INTERNATIONAL RESPONSIBILITIES TO ANOTHER SUBJECT*

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INTRODUCTION: THE STRANGE IDEA OF 'ILLEGALITY' OF THE STATE

With the judgement of 10 May 2001, the European Court of Human Rights pronounced itself again on the situation of the Turkish Republic of Northern Cyprus, which in the text of the judgement is deliberately indicated in quotation marks, the non-recognition of which is often reiterated in a somewhat obsessive way. Thus, due to its 'illegality', the Turkish Republic of Northern Cyprus is deemed non-existent as a state subject of international law.

This introductory account, as well as the argumentative process in the judgement, emphasises beyond "all reasonable doubt" (according to a traditional expression in the jurisprudence of the Strasbourg Court, pointing to a criteria of evidence evaluation which is not always uniformly applied but which is often distorted, depending on the circumstances and expediencies, especially political ones) that the judgement, in some respects, is strongly inspired by political evaluations, and already "at the beginning" it shows how the judges have been able to draw hypothetical conclusions from the non-recognition of the Turkish Republic of Northern Cyprus and consequently have assumed the responsibility of Turkey in Northern Cyprus. Such an approach is contrary to the factual situation in Cyprus and to the principles relating to the formation and existence of an entity as a state. In the international juridical system, the existence of the state, as even the youngest students of a law faculty know, has to be parameterised in relation to specific conditions and circumstances – legally and not politically assessable – and cannot be attributed to an exclusively and subjectively politically-biased evaluation of 'legality'. Such 'legality' cannot be related to any other evaluation factor than the mere political evaluation of a state, a group of states, or of an international state organisation (I am referring to the United Nations and to the stances taken by the Security Council on the matter, although they occurred a long time ago; I am also referring to the stances taken by the Committee of the Ministers of the Council of Europe) or, finally, like in this case, of an important body of international 'jurisdiction', as it is called.

The judgement in question originates from an application the Greek-Cypriot Republic established in the South of the Island made against Turkey and it deals with a series of alleged violations of the 1950 Rome Convention – and almost entirely – on the protection of fundamental human rights and freedoms. The applicant state attributes such alleged violations to Turkey, notwithstanding the existence of the Turkish-Cypriot Republic as a state in the northern part of the island, which has evolved through the passage of time as a full-fledged state.

Already, as the judgement points out, the bodies of the Council of Europe (Commission and Committee of Ministers) had pronounced themselves on similar applications the Greek-Cypriot side has made. The judgement of 10 May 2001 is, however, the first Court of Strasbourg pronouncement in an interstate case, promoted by the Greek-Cypriot state against the Turkish state.

Formerly, the European Court of Human Rights had pronounced itself on the existing situation in Cyprus, particularly in the Turkish Republic of Northern Cyprus, but it had done so in deciding on an application a private Greek-Cypriot citizen had made. With this judgement of 18 December 1996 (pronounced in the *Loizidou* case), the Court of Strasbourg pronounced itself on the prejudicial question of responsibility of the Turkish Republic, not recognising the Turkish Republic of Northern Cyprus' existence as a state with autonomy and independence. With the judgement in question, the Court of Strasbourg puts forward the same arguments on this subject. According to a correct internationalist juridical evaluation, this evidently confirms that the decisions taken again on the same issue were based on exclusively and subjectively political grounds, which should be foreign to the argumentative process of those – like the judges of the Court – who claim to be performing a jurisdictional function.

The examination of this prejudicial aspect is essential since the competence of the pronouncement of the Court originates from it. It would not be possible and there would not be any point in dwelling on and evaluating the conclusions drawn by the Court with regard to each single alleged violation of the Convention had the Court not found that the acts forming the basis of the complaints of the Greek Cypriot administration were imputable to Turkey and raised its responsibility.

THE 1960 ENGLISH-GREEK-TURKISH GUARANTEE TREATY FOR CYPRUS. THE VIENNA AGREEMENT OF 2 AUGUST 1975 ON THE VOLUNTARY DISLOCATION OF PEOPLE IN CYPRUS

What strikes one most is the fact that the Court of Strasbourg does not rely at all on the tripartite Treaty of Guarantee signed in August 1960. This Treaty entrusted to the Guarantor Powers (Great Britain, Greece and Turkey) the right to intervene – even militarily – in

Cyprus to maintain the constitutional system on the Island, as the agreements for the establishment of the independent unitary state of Cyprus provided. They are not mentioned in the Court's judgement. Therefore, ignoring such agreements (or without referring to them), the Court of Strasbourg failed to evaluate the July and August 1974 Turkish military intervention in Cyprus in its proper context and failed to draw proper and correct conclusions from Turkey's so-called 'military presence' on the Island.

The Court did not even deem it necessary to express even briefly the reasons justifying the Turkish military intervention, which, as it has been historically ascertained,³ put an end to the illegal situation on the Island, which it would be euphemistic and hypocritical to define as constitutional disorder. The Turkish military intervention, which was not just the exercise of a right but also the fulfilment of an obligation, to put an end to a continuous series of massacres and oppression against the Turkish-Cypriot community since 1963, culminating in the coup in Cyprus aiming at enosis, union of the Island with Greece, which the Junta of the Colonels in Athens organised.⁴

This obvious omission points to the political motivations that unduly inspired the judges of the Court. The Court, which in the judgement took particular care to refer to the acts and international resolutions and documents that are contrary not only to Turkey but also to historical truth and an elementary sense of justice, did not even bother to remind itself that on 29 July 1974 the Parliamentary Assembly of the Council of Europe, within which is the Court of Strasbourg, recognised in a resolution, that the Turkish military intervention of 20 July 1974 was the exercise of a right emanating from an international treaty and the fulfilment of a legal and moral obligation.

Before examining further the above prejudicial question regarding Turkey's responsibility, according to the Court, which is the essential aspect of the judgement and of the present observations, one should be reminded of the Court judges' most obvious omission.

The judgement fails to mention or refer to the Vienna Agreement of 2 August 1975, published in the UN Secretary-General's press communiqué between the leader of the Greek-Cypriot Community, Glafcos Clerides, and the leader of the Turkish-Cypriot Community, Rauf Denktaş, who are the current presidents of their distinct and autonomous state entities on the island. This agreement set out the modalities of the voluntary regrouping of the peoples; the Greek-Cypriots to the South and the Turkish-Cypriots to the North. This was meant to relocate and keep the two ethnic communities separated, to eliminate as far as possible tension and conflicts between them.⁶

The Vienna Agreement contains two considerations that the Court should have taken into account, in order to:

1. Ascertain whether most of the alleged violations of the Convention put forth by the Greek-Cypriot state, are groundless or not, namely the alleged illegitimacy of the limitations to Greek-Cypriot movements to the North of the Island, and also the alleged limitations or obstacles for the Greek-Cypriots to dispose of their own properties in the North of the Island that they had abandoned through the voluntary application of the Vienna Agreement

2. Evaluate how already at that time an unequivocal capacity was attributed to the Turkish-Cypriot leader, together with an undoubted attribution of political autonomy to the Turkish-Cypriot community, enabling the Turkish Cypriot side to conclude an international agreement recognised by the United Nations and published by the UN Secretary-General.

There is no doubt that the Agreement essentially points to a positive acknowledgement of the state entity and the distinct and autonomous international juridical subjectivity of the Turkish Republic of Northern Cyprus as it exists today and which was formalised through a referendum on 15 November 1983.⁷

There are two alternatives: either the Court chose to ignore the Vienna Agreement of 2 August 1975, which means that the judges are singularly prejudiced and for this reason the decision is not credible from a juridical standpoint; or, the Court knew of it and the omitted reference to it was due to its need to eliminate any possible juridical obstacle to the development of the arguments and to the statement of conclusions that are politically motivated. The Court of Strasbourg might have opted to deny the existence of Turkish Cypriot entity in order to save its institutional credibility.

A SINGULAR DISTORTION OF FACTS

While examining the basic question of responsibility of the Republic of Turkey on the basis of which the conclusions in the judgement have been reached, we will have to ignore some particular aspects of the complex issue on which the Court of Strasbourg pronounced itself. This is because they are both irrelevant from a juridical standpoint and because their evaluation would have only been possible if the responsibility of Turkey in Northern Cyprus had been correctly ascertained. In this respect, the Court gives an unfounded reconstruction of historical events and an abusive and distorted evaluation of the evidence. It seems that Greek and Greek Cypriot propaganda have instilled such misconceived conclusions in the Court's judgement, as had already happened in the Loizidou case. Think about the statement, which can only be appreciated if deemed pure fantasy, according to which, "a Turkish naval battalion" is allegedly stationed in Gazi Magusa and Girne ports. Or, another statement,

according to which “the Turkish Air Force has bases in Lefkoniko, Krini and on other aviation camps”.

THE DOUBTFUL LEGAL STANDING OF THE ‘(GREEK-CYPRIO)
REPUBLIC OF CYPRUS’ IN THE JUDGEMENTS BEFORE
THE EUROPEAN COURT OF HUMAN RIGHTS IN STRASBOURG.
THE ‘REPUBLIC OF CYPRUS’ AS A “NEW STATE”

Two fundamental and relevant questions of international law come into the scene during the examination of the decision concerned. One has already been mentioned: the issue of responsibility of Turkey in Northern Cyprus, which is a question strictly linked to the existence of the Turkish Republic of Northern Cyprus as an autonomous, distinct and legitimate subject of international law.⁸ Considering what interests us now, it is possible to say that these are two aspects of the same problem. This question will be dealt with at a later stage.

The other fundamental question, which in some respects reflects the first one, is with regard to the questionable active legitimisation in the judgement of the so-called ‘Republic of Cyprus’, that is to say the Greek-Cypriot Republic (of the South).

This question too, was rightfully brought to the Court by the Turkish Government, as a preliminary issue, together with other ones.

As I need to provide a very coherent and logical presentation of the following considerations, I will deal first with the second question.

To put it simply, the problem is to ascertain whether the current ‘Republic of Cyprus’ (the Greek-Cypriot Republic) from a juridical standpoint can be considered a continuation of the unitary Republic of Cyprus created with the 1960 tripartite agreements which put an end to British colonial domination, rather than the only representative of the whole territorial reality of the Island and of the whole of its population.

In other words, is the current 'Republic of Cyprus' a new State compared with the 1960 Cypriot Republic or is it a political and juridical continuation? It is evident that the reply cannot be other than the following one: it is a new State. This is because there has been a radical and definitive break in the historical, political and juridical continuity of the former 1960 Republic of Cyprus. What has certainly changed is:

1. Its representative ability rather than its governmental form;
2. Its territorial consistency;
3. Its population (now it is only Greek-Cypriot);
4. Its structure as well as the composition of its constitutional bodies;
5. Its Constitution, which only concerns the Greek-Cypriot community and is no longer the one of 1960 regarding the unitary bi-communal state and does not (and cannot) concern the Turkish-Cypriot community.

One cannot deny the truthfulness of the above observations, otherwise it would be like saying for instance that the German Federal Republic, at the time of its existence as the distinct and autonomous German Democratic Republic, and until 1989, was, from an historical, political and juridical standpoint, the continuation of the Third German Reich! As compared with the no longer existing German Democratic Republic, the present 'Republic of Cyprus', as has been mentioned, has radically changed with regard to its population, which is exclusively Greek-Cypriot.

The consequence of this elementary statement, which demonstrates how the current 'Republic of Cyprus' is a new state in contrast to its former political reality, makes the participation of the present 'Republic of Cyprus' in the 1950 Rome Convention and in its 'jurisdictional' guarantee system and its system of Council of Europe membership, illegitimate.

It is important to remember that Cyprus' membership in the Council of Europe is the consequence of Cyprus' membership declaration of 24 May 1961, which came into force on the same day. Cyprus' membership of the 1950 Rome Convention and in its guarantees system bears the following dates: 16 December 1961 the signature; 6 October 1962 the ratification and its entry into force.

This certainly occurred before the evolution of the present Greek 'Republic of Cyprus', as it is a new state, originating a long time after the above mentioned dates concerning the decisions, provisions and obligations that only concern the former bi-communal Republic of Cyprus created on the basis of the 1960 agreements.

As this is a new state, such decisions and convention provisions can in no way apply to the present Greek 'Republic of Cyprus', or be internationally binding on it or on the contracting third states. The unavoidable and unique consequence of this is that the new Greek-Cypriot state's membership of the Council of Europe is illegitimate and it is, therefore, unlawfully being considered as a state that is party to the 1950 Rome Convention. The current 'Republic of Cyprus' signed (11 May 1994) and ratified (28 June 1995) Protocol No. 11. This entered into force on 1 November 1998 for the present 'Republic of Cyprus' and it radically changed the 'jurisdictional' guarantee system of the 1950 Rome Convention.⁹ Apart from the fact that the illegitimacy of the 'Republic of Cyprus' as a Council of Europe member state would remain, it should be underlined that signing and ratifying Protocol No. 11 presupposes, as evidence and the logic indicate, the pre-existing ratification of the 1950 Rome Convention. Yet in relation to the Convention, the 'Republic of Cyprus' cannot be deemed a state party simply because it signed and ratified a subsequent and distinct, albeit important, instrument that changed the former text of the Convention and the previous protocols that changed and integrated the former texts.

From these considerations stems the lack of comprehensive determination of the legal issues in the judgement relating to the 'Republic of Cyprus' and its locus standi. The Court of Strasbourg had the duty to point out the Greek Cypriot administration's lack of legal standing, but it did not so do. Nor can this preliminary objection, which concerns the whole judgement and vitiates the relevant decision as juridical nullity, be overcome by the argument that the international community (apart from Turkey) does not recognise the Turkish Republic of Northern Cyprus, the proclamation of which met disagreement from the UN Security Council (resolutions Nos. 541 of 1983 and 550 of 1984)¹⁰ and the Council of Europe's Committee of Ministers (Resolution of 27 November 1983), which condemned the event (thereby implying a political rather than juridical judgement).

The problem of the legal standing of the present 'Republic of Cyprus' can only refer to the previously mentioned problem of assessing whether this Republic is a continuation of the former, unitary, bi-communal Republic of Cyprus of 1960, or whether it is, as we think, a new state. (A completely different problem, which is not useful for the current examination, is that regarding the effects of recognition of the new state, in this case of the Turkish Republic of Northern Cyprus. This will be mentioned at a later stage. Likewise, the existence or not on Cyprus of a state reality that is autonomous and distinct from the Greek-Cypriot one is a different problem too.)

The Court of Strasbourg's statement that the 'Republic of Cyprus' remains the only legitimate government of Cyprus because "its locus standi of government of a High Contracting Party of the Convention is not doubted", is the kind of statement that one would not like to read in an international decisive act of an alleged 'jurisdictional' nature. This is not because the statement is wrong, but because it lacks reasonable purpose.

THE HYPOTHESIS OF 'SUCCESSION' OF THE CURRENT

'REPUBLIC OF CYRUS' IN THE TREATIES WHICH WERE PREVIOUSLY SIGNED BY THE FORMER AND PRE-EXISTING UNITARY

BI-COMMUNAL REPUBLIC OF CYRUS OF 1960

One could object to the above conclusions by stating that the present 'Republic of Cyprus' is a successor state in the treaties the pre-existing state (the unitary Republic of Cyprus created in 1960) signed and by the dissolution of which it was born. It is true that, since the new state has no right to succeed to the treaties made by the pre-existing state,¹¹ the will for succession has to be formally manifested and accepted by the contracting third states (and this has to be regulated by the constitutions of the states concerned, with regard to signing international treaties). But it is also true that the succession effect can be realised (if allowed by the constitutional articles concerning the drafting of international treaties) through concluding facts underlying an implicit and unequivocal willingness by the new state and by the pre-existing states or by international organisations that signed the treaty. And this could be the case for the present 'Republic of Cyprus' with regard to the international institutional agreement of the Council of Europe and also with regard to the 1950 Rome Convention. In this case, it is evident that the succession effect would have been only for the new Greek-Cypriot state entity since it could not interest the other, Turkish-Cypriot, state entity present on the Island. However, if the Turkish Cypriot state requested to be also enabled to succeed in international treaties the pre-existing unitary Cypriot State had signed, it could hardly have received a refusal supported by good intentions. This is so because, as I have already mentioned, the exclusively dogmatic statement that the only legitimate government of Cyprus (representing the whole territorial reality and the whole population of the Island) is that of the present 'Republic of Cyprus' cannot find an adequate juridical motivation. In fact no motivation conforming to international law has ever been provided, or even attempted, to explain this dogmatic statement, which is still being contested.

The view that the present 'Republic of Cyprus' is a new state is further supported by the fact that the Greek-Cypriot government's application to become a European Union (EU) member has been examined and processed. If the present 'Republic of Cyprus' had been effectively deemed the continuation of the former and unitary Cypriot State created by the 1960 agreements, its constitutional life and its international relations should still be regulated by the former 1960 Constitution which constituted, and constitutes, an integral part of the international agreements that were made in that year. If this was the case and should the on-going effectiveness of the 1960 Cypriot Constitution be assumed, the request for EU

membership could not have been processed because of the explicit impediment contained in Article 50 of the constitutional text preventing the unitary Republic of Cyprus from acceding to international organisations, even of an economic nature and scope, unless both Greece and Turkey were also members. Turkey is not a member of the EU. Therefore, the consequence can be but as follows: the community bodies have deemed the Greek-Cypriot application for EU membership admissible since it came for a new state authority and is disciplined by a new and different Constitution which allows for its request and its possible result.¹²

THE TURKEY'S SO-CALLED 'RESPONSIBILITY' IN NORTHERN CYPRUS IN THE JUDGEMENT OF THE EUROPEAN COURT OF STRASBOURG WHICH WAS DELIVERED ON 10 MAY 2001. THE EXPECTED EFFECTS FOLLOWING THE FAILED 'RECOGNITION' OF THE TURKISH REPUBLIC OF NORTHERN CYPRUS BY THE INTERNATIONAL COMMUNITY OF STATES

Now, we come to the second important question raised by the Court judgement – that is to say, the one regarding Turkey's responsibility in Northern Cyprus under the Convention. In its decision the Court of Strasbourg reiterates the arguments and conclusions it had previously made in the judgement of 18 December 1996, on a case the Greek-Cypriot administration referred to the Court on behalf of one of its citizens, Mrs Loizidou.¹³

In this respect it is necessary to assess whether the acts and facts relating to the Turkish Republic of Northern Cyprus, either those of public authorities or of private citizens with the approval of the authorities, can be:

1. Attributed to the Turkish Republic of Northern Cyprus as a state entity, autonomous and distinct from Turkey and, as such, a subject of international law; or
2. Attributed to Turkey as a state authority exercising effective governmental powers on that territory, thus denying any autonomous state existence or international personality to the Turkish Republic of Northern Cyprus.

The nature and effect of other states' recognition of the new state¹⁴ should be clarified if the existence (and legitimacy) of the new subject of international law is considered to stem from recognition.

The Court of Strasbourg does not regard the Turkish-Cypriot Republic as a 'state' in international law, on the basis of arguments (which will be dealt with later) saying Turkey exercises effective "overall control" in that territory. There the Court invokes Turkish

responsibility under the Convention for violations that occur in the northern part of Cyprus. Even though the Court has stated that it is not determining the legal status of the TRNC (Turkish Republic of Northern Cyprus), it has refused to attribute international personality to the TRNC.¹⁵

However, it is also true that the judges of Strasbourg have reiterated more than once that the proclamation of the TRNC was condemned as “legally invalid” by the international community of those states which, consequently do not recognise it.¹⁶ Therefore, according to the bizarre argumentative method of the Court of Strasbourg, the alleged juridical non-existence of the Turkish-Cypriot state due to other states’ lack of recognition adds support to the conclusion regarding legal capacity or responsibility under the 1950 Rome Convention of the Turkish authorities for the acts and facts occurring in the northern part of Cyprus. However, everyone can clearly see that these two aspects or problems are not necessarily interconnected.

Although this argument does not seem to be relevant, or anyway decisive, in the economy of the Court of Strasbourg’s decision, it is necessary to state again that recognition is an act that, as the generality of the internationalist doctrine accepts (but which apparently the Court has ignored), has only a political nature and effect. It is through recognition that other states show their political will to have normal international relations with the recognised state, whose existence as an autonomous subject of international law is undoubtedly not the consequence of recognition. Recognition is merely declaratory. The state exists independently of recognition. The act of recognition has no juridical relevance in the international juridical system, or any impact on the full and legitimate existence of the new state (unlike what an old and classical internationalist doctrine deemed to be the case, which the Court of Strasbourg seems to adhere to).¹⁷

It is now accepted that the legitimate existence of the new state has to be ascertained, by relating and parameterising the existence of the political entity in question to what is required by the relevant norms of general international law as the necessary criteria for integrating the international juridical personality under the specific aspect of the effective and full political capability of taking its part in the international community as a state. There are three criteria: territory, people and government. In other words, a politically organised human community, able to express an effective, exclusive and autonomous capacity for government in a defined area. This community would be a democratic one, according to an emerging orientation of collective juridical conscience in the international community of states.

All of that is undoubtedly present in the political reality created in the northern part of Cyprus: there is a territory, there are people and there is a democratic government which exclusively and autonomously exercises its full and legitimate administrative power. In consequence, other states’ non-recognition and the United Nations’, Council of Europe’s and other international organisations’ stances are meaningless for our purposes.¹⁸

TO FOLLOW: TURKEY'S SO-CALLED 'RESPONSIBILITY' AND

THE 'IMPERIALISTIC' PRETENSION OF TERRITORIAL COMPETENCE OF THE EUROPEAN COURT OF STRASBOURG

The question now arises as to whether Turkey actually exercises effective governmental powers in TRNC territory.

On this question, the Court of Strasbourg presented the same arguments it had accepted in the 1996 judgement of the Loizidou case.

In particular, the Court reiterated that the notion of 'jurisdiction', as in accordance with Article 1 of the Convention, could not necessarily be limited to the national territory of a state which is party to the 1950 Rome Convention. One cannot but agree with such an observation: state responsibility can be invoked, according to the Convention, for all those facts and acts occurring outside its territory where it effectively exercises, albeit temporarily, its jurisdiction, i.e. the exclusive exercise of governmental powers in their unlimited and unconditioned totality.¹⁹

However, the Court of Strasbourg has introduced a new and surprising argument as a basis for its thesis that Turkey is responsible for the acts and facts found to be in violation of fundamental rights and freedoms the 1950 Rome Convention guarantees and which occur in Northern Cyprus.

Through an increasingly illogical argumentative development, and through obviously strained interpretations, the Court of Strasbourg, by refusing to acknowledge the Turkish-Cypriot reality and state autonomy and deeming that in that territory the jurisdictional guarantee for protecting fundamental rights and freedoms guaranteed by the 1950 Rome Convention could not be effectively protected, came to the conclusion that Turkey is accountable for those acts and facts that allegedly violated the Convention.

This conclusion is based on two unfounded assumptions: one is the denial of the Turkish-Cypriot autonomous and independent state (which will be dealt with at a later stage), the other is the following illogical consideration: if the contested Turkish-Cypriot state's political autonomy and independence were recognised, since it is not a party to the 1950 Rome Convention, the result would be that the jurisdictional guarantee the 1950 Convention

provides for the protection of fundamental rights and freedoms would not apply within its territory (i.e. where the alleged violations occurred).

As it is evident, the Strasbourg Court's assumption not only becomes an almost imperialistic pretension of *ratione loci* competence but also a pretension of imposing state obligation on each state to adapt to the 1950 Convention's requirements.

In our opinion, the creation of a new state reality in a territory that the 1950 Convention previously regulated without the new state reality becoming a party to the Convention simply means that the Convention cannot be applied in this territory. The observation is very simple and the consideration cannot totally justify unfounded concerns and alarms that only point to an inadmissible pretension of territorial competence by the Court of Strasbourg. Also, it points to an even less admissible pretension of always imposing an imperative philosophy of fundamental human rights that, in this way, appear more as a dogmatic expression of an ideology than a normative discipline of a juridical rule. All this is to prevent what the Strasbourg Court defines as "a regrettable fault in the system of protection of human rights in this region".

Coming back to the second essential question underlying the attribution to Turkey of the acts or facts that occurred in the Turkish Republic of Northern Cyprus, the Court found that there was a violation of the 1950 Convention due to the limitation of free movement of the Greek-Cypriots from the South to the North and vice versa. In this, the Court disregarded the existence of a state political border that cannot be trespassed unless one receives the permission of the state. The Court also disregarded the Vienna Agreement of August 2, 1975, referred to above. The Court of Strasbourg has radically failed – *et pour cause* – to take into consideration realities on the Island, but based itself on certain assumptions.

THE CONTROL OF TERRITORY.

THE TURKISH-CYPRIOI STATE AS 'ADMISINTRATION LOCALE SUBORDONNEE (SUBORDINATE LOCAL ADMISTRATION)'.²⁰

CRITICISM, AGAIN ON THE 'RECOGNITION' OF THE STATE

The judgement draws its conclusion on the basis of two convergent arguments: Turkey's territorial control and therefore the jurisdiction it exercises directly "or through a subordinate local administration" and on the absence of state characteristics, and therefore of international juridical personality, of the Turkish Republic of Northern Cyprus. The latter, therefore, does not exist as a state but simply as a "subordinate local administration" of Turkey.²⁰

The two arguments are apparently convergent and only formally appear distinct. They represent two aspects of the same question and both are unsubstantiated since they are based on assumptions not facts and are, therefore, unacceptable.

The mere presence of a military contingent on the territory cannot justify effectiveness of territorial control. This criterion becomes more inconsistent when one considers that the so-called “effective control” is based on presumption rather than on an assessment of the existence and the exercise of full territorial jurisdiction.

On the other hand, one cannot a priori declare a state to exercise “effective control” on the territory of another merely because its military forces, having international and legitimate guarantee functions, are stationed on the latter’s territory. In fact, in my opinion, it is necessary to ascertain the validity of the title of legitimacy relating to that presence, as well as its tasks and its limits of action.²¹

The assertion that the old and inconsistent theories on recognition of states (to the effect that recognition has constitutive effect) are still valid, in order to base on this the existence of the international juridical personality of a State, reflects a surprising way of thinking based on political reasons.

On this matter, it has to be reiterated that with this argumentative criterion, one seems to be willing to overlook the fact (and this causes some concern if we consider the sensitivity of the subject directly involving the States’ interests and responsibilities) that the existence of the criteria of statehood in its essential connotations of independence and sovereignty, should be ascertained not in relation to a subjective judgement of a relational nature which can be presumed by the attitude of the other States, but in relation to the international juridical system. In other words, it is necessary, as we have already said, to see whether the above mentioned real entity possesses the criteria of statehood under general international law, which enables it to acquire juridical personality.

The recognition of the State by the other States is an exclusively political act, which produces exclusively political effects.

Therefore, the international juridical personality of the Turkish Republic of Northern Cyprus has not been examined by the Court, but has been excluded only from the standpoint of the attitude of third States towards it. Actually, its effective sovereignty and independence cannot be intrinsically excluded without examining the facts first and recognizing “the territorial control” and thus the effectiveness of jurisdiction exercised by the Turkish Cypriot authorities, separate from those of Turkey, with the consequent international responsibilities. The sovereignty and independence of the Turkish-Cypriot Republic cannot be denied merely

because there are Turkish military forces stationed in the northern part of the Island. The attitude of the Court on such rudimental issues²² are therefore open to strong criticism.

In the northern part of Cyprus, where the Turkish Republic of Northern Cyprus has been constituted, “The laws of the Turkish-Cypriot Republic, rather than the Turkish laws, are into force; the Constitution of the Republic, which was effectively applied in the area controlled by the Turkish-Cypriots, refers to legislative, administrative and judicial bodies that are operational. The economic dependence on the Republic of Turkey should also be viewed in relation to the non-recognition of the Turkish-Cypriot State by the International Community. The fact that some of the administrative functions are performed in Turkey and that this State takes care of the postal and telecommunication service, might not be enough to exclude the independence of the Turkish-Cypriot Republic, because these interventions are realized in conformity with the State laws”²³.

THE FOLLOW. THE CONTROL OF THE TERRITORY:

THE PROBLEM OF THE PRESENCE OF FOREIGN MILITARY FORCES

The unfairness of the criteria followed by the judgment regarding such a sensitive issue is becoming increasingly clear. To decide on this, it was necessary to make a more comprehensive ascertainment of the Turkish-Cypriot State’s sovereignty and independence in order to either attribute to it or not the possible and consequent responsibility on an international level regarding the acts and facts occurring in the territory²⁴. Too quickly has the European Court attributed this responsibility to Turkey on the basis of a generic and unmotivated assumption that the Turkish Authorities expected to have a global control on the territory?

The judgement basing its conclusions on merely alleged factual information that is irrelevant from a juridical standpoint and that has not been anyway verified, has failed to take into account other authoritative conclusions which the European Commission on Human Rights had reached in other cases, as well as, those reached by national courts dealing with the problem of the effectiveness and autonomy of the territorial powers of the Government of the Turkish Republic of Northern Cyprus²⁵.

Substantially, the Court of Strasbourg has deemed necessary, as it failed to make the required ascertainments, to consider the Turkish-Cypriot Republic as a body or a local administration which depends on the authority of the Turkish State, on the basis of merely of the presence of the Turkish military forces in the Turkish-Cypriot territory, which is an assertion not judicially justified. As it has already been mentioned, due to the unfairness of the assessing criteria, the preliminary assessment of the reason for the presence of these military forces has

not even been made, and consequently, the deep difference between the case of a military occupation (which should have been more strongly considered as the basis for the currently criticized conclusions) and the case of a military presence with guarantee and protection purposes (which is envisaged by the international agreements signed by Turkey, Greece and the United Kingdom of Great Britain and Northern Ireland, a presence based on the free and independent decision of the State Authority on the territory where the foreign military force performs its guarantee and protection tasks) has not been considered by the Court. This is the case for the Turkish military presence in the territory of the Turkish Republic of Northern Cyprus which is for security purposes, that is, for the protection of the borders which are the object of repeated and continuous aggressions by Greek-Cypriot military and civil individuals who are encouraged and supported by the Greek-Cypriot and Greek Governmental Authorities. The Turkish forces are not in any way involved in the government of the Turkish-Cypriot Republic.

As it has been previously emphasized, the alleged absence of sovereignty and independence of the Turkish-Cypriot Republic cannot be deemed to lead to a presumption of global control of the territory of the Turkish-Cypriot Republic by the Turkish State, which is deemed internationally responsible for the acts and facts of the Turkish-Cypriot agents and State bodies in that territory.

The basic points that I am making gain support from the attitude of the judges of the International Court on the matter of responsibility for the crimes committed in former Yugoslavia (that is to say in Croatia and in Bosnia-Herzegovina), where – even though they resorted to the territorial control criterion and control of the Croat-Bosnian and Serbian-Bosnian agents and bodies – no reference was made, with regards to international responsibility, to the Croatian State or to the Serbian State (more specifically the Serb-Montenegrin Federal Republic) as being responsible for the acts and facts made by the Croat-Bosnian and Serbian-Bosnian militia. The pieces of evidence needed to affirm an effective control and the real dependence of the Croat-Bosnian and Serbian-Bosnian agents and bodies on the governmental Authorities, of Croatia and of the Serb-Montenegrin Federal Republic, respectively, were not deemed sufficient. This was the result of a thorough analysis carried out not in a formal way but in a substantial way where relevant issues were rigorously determined.

There would not be any point in mentioning the equivocal concept of dominant State in the relationship between Turkey and the Turkish-Cypriot Republic²⁶. In this kind of relationship, the dominated State would not have its own sovereignty and independence because the dominant State would be the only one to have an effective decision-making power.

Certainly, this is not the case for the Turkish Republic of Northern Cyprus which effectively expresses its own autonomy and independent will through its legislative, jurisdictional and executive bodies. Turkey does not interfere with the affairs of the Turkish Republic of Northern Cyprus. Nor can the still important presence of military forces which is legitimate under international agreements and as it is allowed by the Turkish-Cypriot Government, be

considered as Turkey's interference. The Turkish-Cypriot Government, in this way, confirms its power to have an autonomous and exclusive governmental authority in its own territory.

THE INCONSISTENT HYPOTHESIS OF A 'JOINT' OR 'INDIRECT' RESPONSIBILITY OF TURKEY.

CONCLUSIONS

If we accept, as a fact, the existence of the sovereignty and independence of the Turkish-Cypriot Republic and thus its international juridical personality, with the effect that it can deem itself internationally responsible for the acts and facts emanating from its agents and bodies, then it would be necessary to deeply verify both the actual situation in the territory and the relationship between the Turkish-Cypriot State and the Turkish State, if one wishes to assume that Turkey is partly or indirectly responsible for the acts and facts of the bodies and agents of the Turkish-Cypriot State.

Reality, on the contrary, shows that the Turkish Republic of Northern Cyprus is independent from the Turkish State; therefore it is not possible to assume that the latter is partly or indirectly responsible for the above. In the Turkish-Cypriot State the executive and jurisdictional bodies apply only Turkish-Cypriot laws, which were freely approved by its Parliament; and no Turkish interference whatsoever has been found in the delicate and fundamental transformation phase of the Turkish-Cypriot political will into general and obligatory normative acts.

The fact that the evaluation of the degree of independence or the extension and effectiveness of the sovereignty of a State is made in relation to what extent the State – any State – needs the support and the consensus of other States to which it is politically and economically connected (and even more, today this can be seen in the present phase of international relations that are characterized by the growing phenomenon of globalization and economic interdependence, and it is not the case for the Turkish-Cypriot Republic) is a separate issue which cannot have an impact on the concepts of independence and sovereignty that are essential for the qualification of international juridical personality in relation to the existence and will of the international juridical system.

On the contrary, if the premise and assessment of the Court of Strasbourg on the nature of State and its essential aspects of independence and sovereignty were correct, such a conclusion would lead one to deny such characteristics not only to the Turkish Republic of Northern Cyprus but also to many other non-European States and also States from beyond the Atlantic²⁷.

The Court of Strasbourg might have not agreed with the above-mentioned considerations, but at least it could have taken them into account. But this did not happen, with the result that the decision of the European Court on Human Rights – having the same content as the previously mentioned one of 18 December 1996, which is referred to for the essential and preliminary questions that are the object of our study – confirms, on the one hand, the rudimentary methods used by the Court in its arguments and, on the other hand, the evident assumptions and political objectives of the decision published on 10 May 2001 which speaks for itself. It is a political act of an unusual damaging effect which is due to the Court not being able to find the strength and the power to pronounce on the true facts and realities in Cyprus on which proper conclusions should have been drawn, but preferred to lay down a spurious doctrine of blanket liability of Turkey for all alleged violations of human rights in northern Cyprus – despite the actors- simply because, unless Turkey is held to be accountable, no State would be accountable in North Cyprus, with the result that the system of the Convention would be inoperative in that area. This does not seem to be a convincing approach to the question of State responsibility.

1 See the text of the judgement in the Report of International Law, volume 81, 1998, pages 1131-1147. In a critical sense, especially with regard to the alleged overall control of the Turkish-Cypriot territory by Turkey, Cohen-Jonathan, “L’affaire Loizidou devant la Cour européenne des droits de l’homme”, in the “Revue generale de droit international public”, 1998, page 140.

2 The judgement of 10 May 2001 indicates a singular jurisprudential innovation of the Court of Strasbourg which, in putting forward the same conclusions on the matter as the ones of in the judgement of 18 December 1996, is taken almost unanimously with the exception of the Turkish judge Fuad. The judgement of 18 December 1996 was, however, taken by majority, judges forming the quorum of the Court put forward their dissenting opinions, contesting and doubting the decisions adopted. These dissenting opinions in relation to the decisions of 18 December 1996 of the Court of Strasbourg of the judges Bernhardt, Lopes Rocha, Baka, Jamberk, Pettiti and Gölcüklü are to be found in “The Cyprus Question – History and Law”, by A. Sinagra and C. Zanghi, Giuffrè, Milan, 1999, page 99.

3 For a thorough study of the Cyprus question from 1960 to 1974, see M. Stephen, “The Cyprus Question”, in “The Cyprus Question – History and Law”, page 1

4 For a thorough examination of the complex Turkish-Cypriot tragedy, see H. S. Gibbons “The Genocides Files”, Charles Bravos Publishers, London, 1997.

5 Resolution No. 578 of 29 July 1974.

6 On the Vienna Agreements of 2 August 1975, see Necatigil, “The Cyprus Question and the Turkish Position in International Law”, Oxford, 1996, page 39, and for a specific comment page 267.

7 On this matter see the considerations of Zanchi' "The right of self-determination of peoples and respect for territorial integrity of States" in "The Cyprus Question – History and Law", by A. Sinagra and C. Zanghi', page 149.

8 On the complex Cyprus problem, see Cabiája "Internationally Octroyed Constitution and Independence – Cyprus", Bologna, 1992.

9 See Sinagra "Problems and perspectives of the double degree of judgement in Protocol No. 11 in the Convention for the Protection of Human Rights and Fundamental Freedoms", in "Social Development and Law Adjustments" (Studies in honour of Francesco Capotorti), Volume I – International Law, Giuffrè, Milan, 1999, page 437.

10 The ensuing Resolutions of the UN Security Council, No. 1092 of 1996, 1117 and 1146 of 1997, and 1179 of 1998, contained less ultimate tones. However, the Security Council always is of the idea that in Cyprus only one state entity has to be recognized, despite a rooted and irreversible separation of the two Communities existing in the Island, which has been going on for 27 years. The Security Council, actually, does not explain the (political) reasons and the needs relating to this result they hope for.

11 With regard to the succession among States, see Quadri "Public International Law", Liguori, Naples, 1968, page 502. With regard to the succession of States in the treaties, see Quadri "International Law", page 139; Liuliano, Scovazzi, Treves "International Law, Volume I, Giuffrè", Milan, 1983, page 495.

12 See Sinagra "The request of the Greek-Cypriot Republic to become an EC member state: juridical, community and international problems", in "Magazine of the Forum", Lima, 1989, page 429. See the recent reflections of Bargiacchi "The request for EU membership made by the Greek-Cypriot government: juridical and political aspects", in "The Cyprus Question – History and Law", page 191.

13 With regard to the judgement given in the "Loizidou" case, see Sinagra "Criteria for evaluating State sovereignty and independence: the case of the Turkish Republic of Northern Cyprus", in "The Cyprus Question – History and Law", page 83. See also Necatigil, "The Loizidou Case: A Critical Examination" in Perceptions, Vol. IV, No.3 (1999) pp.149-178.

14 On the recognition of the States, see Villani "Recognition (International Law), in the Law Encyclopaedia", Giuffrè, Milan, Volume 60, page 633.

15 See Sinagra "Criteria for Evaluating Sovereignty", page 83.

16 See also Osman Ertekün "The Legitimacy of the Turkish Republic of Northern Cyprus", in "The Cyprus Question – History and Law", page 117.

17 The need for a political recognition is dealt with by Arshi Khan, "The reality existing in Cyprus needs recognition" in "The Cyprus Question – History and Law", page 125, with regards to the Turkish Republic of Northern Cyprus.

18 See Sinagra "Conditions for Evaluating Sovereignty", page 88; with regard to the origins of the idea of (either constitutional or declaratory) recognition in the Christian Republic, page 90; as for the Turkish Republic of Northern Cyprus, page 92.

19 On this matter, see Sinagra, “Conditions for Evaluating Sovereignty”, pp. 85-87. As for the problem in general, see Dipla “The Responsibility of the State for the Violation of Human Rights. Imputation Problems”, Paris, 1994.

20 With regard to the idea of “subordinate local administration:” see the judgement of the Court of Strasbourg of 18 December 1996, given in the “Loizidou” case and also, Sinagra “Conditions for Evaluating Sovereignty”, pp. 92-93 and 94-97.

21 The judges Bernhardt and Lopes Rocha, in their contrary opinions regarding the previous judgement of the Court of Strasbourg of 18 December 1996 (see pp. 99-101 of “The Cyprus Question – History and Law”) clearly stated “The presence of Turkish troops and Turkey’s support to TRNC are important factors in the existing situations; but I feel unable to base a judgement of the European Court on Human Rights exclusively on the assumption that the Turkish presence is illegal and that Turkey is therefore responsible for more or less everything that happens in northern Cyprus”.

22 See Sinagra “Conditions for Evaluating Sovereignty”, page 87.

23 This is uttered by Vitucci in “Acts of the Turkish Republic of Northern Cyprus and Turkey’s responsibilities; the Loizidou case”, in “Magazine of International Law”, 1998, volume 81, pp. 1069-1070. To the above mentioned observations, it could be added that the postal and telecommunications service is not essential for the state nature, from the viewpoint of sovereignty and independence, and the performance of such services by Turkey in the interest of the Turkish-Cypriot State is made necessary by the embargo and the isolation imposed on the Turkish Republic of Northern Cyprus at the instigation of the Greek and Greek-Cypriot Governments. See also Rumpf, who has been quoted by Vitucci “Die Staats und Volkerrechtliche Lage Zyperns” in “Europaische Grundrecht Zeitschrift”, 1977, page 533.

24 For the problem in general, see Condorelli “The attribution to the State of an internationally illicit fact: classical solutions and new tendencies”, in “Collection of Courts” La Haye, 1984, Volume 6.

25 See the Relations and the Decisions of the European Commission on Human Rights, with reference to the previous controversies between Cyprus and Turkey: Relations of the European Commission on Human Rights of 26 May 1975 (applications No. 6780/74 and No. 6959/75) and of 10 July 1978 (applications No. 8007/77), in “Commission’s Decisions and Reports”, volume 2, page 125 and 136, and volume 13, page 85 and 148, respectively.

See also the Commission’s Decision of 4 March 1991, taken in individual appeals made against Turkey by Chrysostomos, Papachrysostomou and Loizidou (No. 15299/89; 15300/89; 15318/89), in “Commission’s Decisions and Reports”, volume 68, page 216 and 244. The Commission, in order to attribute the respective responsibility, at least differentiated between acts and actions of the Turkish military Authorities and acts and actions of the Turkish-Cypriot civil and military Authorities, pointing out that only the Turkish-Cypriot laws had been applied.

It is also important to mention the decision taken by the London Court of Appeal in the controversy between Polly Peck International Plc. and Asil Nadir and others, in “All England Reports”, 1992, volume 2, page 238. See also the judgement given by the London Court of

Appeal in the case between Hesperides Hotels Ltd. and Aegean Turkish Holidays Ltd., regarding immovable estates (hotels) in Girne (Kyrenia): “There is an effective administration in Northern Cyprus which has made laws governing the day-to-day lives of the people” (in the Weekly Law Reports, 1977, 3, page 856. On this matter, see the note of Nedjati “Acts of unrecognized Governments”, in “International and Comparative Law Quarterly”, 1981, 1, page 387.

26 The assumption that the bodies of the Turkish-Cypriot State coincide with the ones of the Turkish State – which has not been expressed in the jurisprudence of either of the Commission or the European Court of Human Rights – would be even more problematic and difficult to be proven.

27 There are a lot of publications on the juridical qualification in the international law of the Turkish Republic of Northern Cyprus and on other problems relating to it. Apart from the previously mentioned authors in particular Necatigil, “The Cyprus Question” and Cabijsa “The Octroyed International Constitution”, see Sinagra “The Turkish Republic of Northern Cyprus in the International Law: Proposals for a Reasonable Solution to the Crisis” in “Quarterly Magazine of Public Law”, 1990, page 199; Palmer “The Turkish Republic of Northern Cyprus: Should the United States Recognize it as an Independent State?” in Boston University International Law Journal, 1986, page 423; Dodd, “Politics in the Turkish Republic of Northern Cyprus”, in “The Turkish Yearbook”, 1992, page 37. For future and different solutions of the Cyprus question see Dodd “The Cyprus Question: Confederation, Federation and Sovereignty” and Traut “The future of Cyprus from a federal standpoint” in “The Cyprus Question – History and Law”, page 169 and 183.