

**THE RIGHT OF SELF-DETERMINATION IN INTERNATIONAL LAW
TOWARDS
THE 40th ANNIVERSARY OF THE ADOPTION OF ICCPR AND
ICESCR**

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Abstract

The principle of self-determination of peoples has been subject to a conceptual evolution which began in post-Second World War era and accelerated in 1960's due to the decolonization process. This evolution pertains to the transformation of self-determination which was firstly conceived as a political principal to a peremptory legal norm, i.e. jus cogens. The adoptions of ICCPR and ICESCR constitute important milestones in this regard. In fact, the evolution of principle of self-determination does not have ended. As of today, the "internal" aspect of this norm is much more emphasized, and as such, goes beyond the classical/post-colonial context. Furthermore, it is argued by many leading scholars that, even the secession can be legitimate in case of lack of materialization of internal self-determination.

Keywords

Self-determination, ICCPR and ICESCR, "Uti possidetis", Secession, Internal Self-Determination, Territorial Integrity.

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I. Introduction

Self-determination, which is a controversial issue in public international law, has many characteristics formulated on different legal platforms. However, the International Covenant on Civil and Political Rights (hereinafter referred to as “ICCPR”) and the International Covenant of Economic, Social and Civil Rights (hereinafter referred to as “ICESCR”) constitute perhaps the most crucial phase in the evolution of this right. The implementation of self-determination has always been more controversial than its content which has been laid down by the Covenants.

This essay will firstly examine the developments on this issue that have taken place before 1966. Then, the legal framework envisaged by the Common Article 1 of Covenants, and the attempts to implement the said article will be analysed. Furthermore a brief review of the Turkish Constitution will be presented in order to set out the application of the self determination idea from a Turkish legal perspective. This work will refer to various court decisions, GA resolutions, and scholars’ arguments in this respect. Finally, a study on the exercise of the right of self determination by the Turkish Cypriots will be presented in comparison with classical and modern requirements for the exercise of the said right.

II. The Development of Self-Determination Prior to the ICCPR and ICESCR

A. The Concept of Self-Determination Before 1945

The initial appearance of the principle of self-determination was materialized after the First World War.¹ It is possible to state that; self-determination was “the touchstone for peacemakers at Versailles”. The President of United

¹ Malcolm N. Shaw, *International Law*, Fifth Edition (Cambridge: Cambridge University Press, 2003), p. 225 .

States of America (hereinafter referred to as “US”) Woodrow Wilson described the national self-determination as “an imperative principle of action”.²

However, Wilson’s attempt aiming to incorporate self-determination into the Covenant of the League of Nations in order to “universalize the principle applied in the postwar settlements” has failed³, and therefore this principle could not obtain the status of legal principle at that era.⁴ As a result, in Shaw’s words; “in the ten years before the Second World War, there was relatively little practice regarding self- determination in international law”.⁵

B. United Nations (UN) Charter

The Dumbarton Oaks proposals which originally constituted the basis of the UN Charter did not contain any article referring to self-determination. As Heather A. Wilson states; “it was not until the San Francisco consultations that the Soviet Union proposed an amendment which included in the text of [Article 1(2) and Article 55] the words ‘based on respect for the principle of equal rights and self- determination of peoples’”.⁶

Article 1(2), which is a part of the Chapter I dealing with the principles and purposes of the UN, refers to the concept of self-determination while laying down one of the four purposes of the body. In addition, in the Article 55, the self-determination of peoples is cited as a principle on which “peaceful and friendly relations among nations” are conceived to be based.⁷

² Henry J. Steiner and Philip Alston, *International Human Rights in Context* (New York: Oxford University Press, 2000), pp. 1252-1253.

³ The proposal made by President Wilson was challenged by a ‘powerful opposition, not least among some of Wilson’s own advisors, and was defeated’ (*ibid.*, p. 1254).

⁴ Shaw, p. 225.

⁵ *Ibid.*

⁶ Heather A. Wilson, *International Law and the Use of Force by National Liberation Movements* (New York: Oxford University Press, 1988), pp. 58-59.

⁷ *Ibid.*, p. 59.

Nevertheless, Shaw explains that;

It is disputed whether the reference to the principle in these very general terms was sufficient to entail its recognition as a binding right, but the majority view is against this. Not every statement of a political aim in the Charter can be regarded as automatically creative of legal obligations.⁸

Furthermore, H. Wilson points to the fact that the UN Charter does not refer to a right of self-determination and that it does not clarify “who the ‘self’ is that enjoys this principle which should be respected by nations”.⁹

To summarize, it is possible to state that the manner in which UN Charter conceives the right of self-determination is far from being directed to create a binding legal norm, but it rather constitutes the mere expression of a political principle.

C. UN General Assembly (GA) Resolution 1514

The Declaration on the Granting of Independence to Colonial Countries and Peoples¹⁰ adopted by the GA in 1960 by eighty-nine votes in favour, none against with nine abstentions¹¹, stated that; “all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.¹² The linkage of self-determination (which was conceived until 1960 as a political principle having a weak legal context) to the political status of peoples can be viewed as an important step towards its inclusion to the ICCPR afterwards. Similarly, the reference to the “economic, social and cultural development”

⁸ Shaw, p. 226.

⁹ Wilson, p. 59.

¹⁰ United Nations General Assembly Resolution 1514 (XV).

¹¹ Abstaining states were Australia, Belgium, the Dominican Republic, France, Portugal, Spain, South Africa, the UK, and the US (Wilson, p. 68).

¹² Shaw, p. 227.

of peoples can be interpreted as a sign of the inclusion of the right to self-determination to the Article 1 (common to ICCPR) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) six years later.

In the same respect, Joshua Castellino notes that Resolution 1514 links self-determination to “better standards of life and larger freedom”, and therefore this norm “was already accepted to a certain extent as being one that promoted better standards of life and freedom”.¹³ It is possible to argue that Castellino’s point indirectly implies that Resolution 1514 developed the concept of self-determination by defining it with certain notions referring to human rights.

Furthermore, Castellino points to the Resolution’s perception of self-determination which considers this norm as a fundamental human right by stating that;

One of the important results of the Declaration is that it included self-determination as a fundamental human right, bringing it within the scope of the Universal Declaration of Human Rights 1948.¹⁴

III. The Right of Self-Determination in ICCPR and ICESCR and its Implementation

A. The Right of Self-Determination in Common Article 1 of ICCPR and ICESCR

Before the adoption of ICCPR and ICESCR, another important development concerning self-determination took place soon after the adoption of Resolution 1514: the GA passed on 15 December 1960 its Resolution 1541

¹³ Joshua Castellino, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial ‘National’ Identity* (The Hague: Martinus Nijhoff Publishers, 2000), pp. 22-23.

¹⁴ *Ibid.*, p. 23.

which “arose as a direct result of the need to condemn Portuguese behaviour in refusing to report on its colonies...”.¹⁵ Before examining the ICCPR and the ICESCR, this work will briefly cite the most important contribution of Resolution 1541 to the self-determination discourse, which would be expanded later by the Resolution 2625 passed in 1970.

As Castellino states; “... the Resolution ... defines what constitutes ‘full measure of self government’ stating that it must result in a decision where the people concerned vote in free and fair elections to decide whether to: (a) Constitute themselves as a sovereign independent State; (b) Associate freely with an independent State or (c) Integrate with an independent State already in existence”.¹⁶

“In accordance with the wishes of the Assembly expressed in 1952”, both the ICCPR and the ICESCR (adopted by the GA in 1966) included the right of self-determination in their Common Article 1.¹⁷ This article stipulates in its first paragraph that;

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.¹⁸

According to H. Wilson, “widespread adoption of these Covenants would give the right to self-determination legal force established by treaty”.¹⁹ Indeed, the Covenants constituted at the year of their adoption the most important legal norm ever on the question of self-determination. Before the Covenants, only certain GA resolutions had material provisions regarding self-determination. Since the decisions of the GA are of recommendatory

¹⁵ *Ibid.*, p. 27.

¹⁶ *Ibid.*, p. 28.

¹⁷ Wilson, p. 75.

¹⁸ For examining the first paragraph, and also the two other paragraphs laying down the manner in which the right to self-determination will be materialized, see P.R. Gandhi, *Blackstone's International Human Rights Documents* (New York: Oxford University Press, 2004), p. 64.

¹⁹ Wilson, p. 75.

nature, and therefore deprived of any binding value; the inclusion of the right to self-determination to two multilateral covenants meant that from then on this right would enjoy a higher ranking in the hierarchy of legal norms.

In addition Castellino states that, in terms of the Covenants,

“... the right of self-determination is not restricted to a political or civil right but propounded as the gateway to economic, social and cultural rights”.²⁰

Another significant feature of the Covenants is that; “... [they] do not restrict the right of self- determination to colonised or oppressed peoples but include all peoples”. However, the term all peoples used in the Covenants is still “open to interpretation” despite the fact that many decades passed after the adoption of the Covenants. State practice is not sufficient to indicate what forms a people, and according to Jennings²¹; “... this is one of the biggest controversies surrounding the principle of self-determination”.²²

Other characteristics of the Common Article 1 worthy of highlighting are that; this article envisages the free determination of “political status” and “economic, social and cultural development” of all peoples that should also be able to “freely dispose of their natural wealth...”.²³

According to H. Wilson, although the Covenants haven’t got widespread ratification, they still prove that self-determination is a legal right besides being a political principle:

Widespread ratification of the Covenants has not occurred, although this is probably not because of Article 1. Without such ratification the Covenants remain a not insignificant piece of evidence suggesting that

²⁰ Castellino, p. 31.

²¹ Jennings’ opinions are cited by Castellino (*op.cit.*) (see the following footnote).

²² Castellino, p. 32.

²³ See *ibid.*, pp. 32-33.

self-determination is considered to be a legal right as well as a political principle.²⁴

Furthermore, it is a fact that these Covenants obtained many more ratification since 1988, the year of the publication of Wilson's book which contains the argument quoted above.

This being said, there have also been some countries supporting a "restricted interpretation" of self-determination; such as India, which posed the following reservation to the Article 1 at the time of its ratification:

... India declares that the words "the right of self-determination" appearing in those articles apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States...²⁵

During the discussions in the committees dealing with the preparation process of Covenants, some delegates opposed to the inclusion of Article 1 by arguing that the UN Charter referred to the principle of self-determination, but not to a right. On the other hand, the advocates of the right of self-determination "insisted that this right was essential for the enjoyment of human rights and should... appear in the forefront of the Covenants".²⁶ Finally, the Covenants were adopted as they have the provision that proponents of the right of self-determination wanted to be in the text. This was the major sign of development of the concept of self-determination which has evolved from a political principle to a legal norm associated with human rights.

B. The 1970 Declaration

The Resolution 2625 adopted in 1970 by the GA and bearing the

²⁴ Wilson, p. 76.

²⁵ Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1996), pp. 41-42.

²⁶ *Issues of Self-Determination*, ed. by William Twining (Aberdeen: Aberdeen University Press, 1991), p. 85.

name of “the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN” (henceforth called “1970 Declaration”) “was meant to be a clarification of the purposes and principles of the United Nations”.²⁷ This resolution, which stipulated that “by virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all people have the right freely to determine... their political status”, also imposed to all states the obligation to respect the right of self-determination in accordance with the UN Charter. As Shaw states; the 1970 Declaration “can be regarded as constituting an authoritative interpretation of the seven Charter provisions it expounds”.²⁸

Due to the fact that the 1970 Declaration passed with no vote against, and therefore it was adopted with a wide consensus, it is argued that this Resolution “can be considered as encompassing norms of jus cogens”. Although GA resolutions are ranked low in the hierarchy of sources of international law laid down by the Article 38 of the Statute of International Court of Justice (ICJ), in the event of the unanimous adoption of a resolution, it has been argued that it reflects international custom or state practice which enjoy higher ranking amongst the sources. In this respect, Castellino points out that “Brownlie himself, and others, notably Thornberry, argue that the entire 1970 Declaration can be said to contain norms of jus cogens since they were passed consensually by member states and are therefore evidence that custom exists in international practice to this effect”.²⁹

Despite the fact that this resolution “arguably looks at self-determination in a wider context than the domination of people by a ‘white’ power’, another more contentious discussion was ‘highlighted’ as well: ‘the debate between territorial integrity and self-determination’. One has to admit that the norm

²⁷ Castellino, p. 34.

²⁸ Shaw, p. 228.

²⁹ Castellino, pp. 34-35.

of territorial integrity once again prevailed to the gains of peoples due to the envisaged realization of self- determination.³⁰

C. The Declaration of 1970 from the Turkish perspective

Although the Declaration of 1970 appears as one of the mile stones in the evolution of the right of self determination, it is also marked, as many other documents on the issue, by the controversy between the territorial integrity and self determination. It is expressly stated in the Declaration of 1970 that “...Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in the compliance with the principle of equal rights and self determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other state or country.” This clear expression of priority given to territorial integrity over self determination not only demonstrates that member states value territorial integrity and national sovereignty over self determination. The very same sensitivity is reflected in the Constitution of the Republic of Turkey. Articles 3, 5, 10 and 11 of the Constitution put the emphasis in territorial integrity and political unity.

Pursuant to Article 3 of the Constitution, which is an unamendable article of the Turkish Constitution, the Turkish State forms an undividable unity with its people and land. This article clearly excludes all possibilities for self determination claims regardless of their classical or internal character.

³⁰ *Ibid.*, pp. 39-40.

This being said, conceiving the Turkish Constitution as a document of authoritarian regime would be a mistake, given the fact that many articles of the said constitution value and praise human rights, international obligations undertaken by the state with the sole restriction of harmful conduct against the republic, its territorial integrity and political unity. Article 5 of the Constitution is a clear expression of this constitutional conception.

Pursuant to the said article on duties and purposes of the state, the principal duty of the state is to preserve the independence and the integrity of the country as well as the republic and democracy in order to promote material and immaterial development of its citizen.

Such constitutional approach is to be considered normal, given the fact that Turkey was the pioneer of the national independence wars against colonial powers after the First World War and thus is extremely sensible with regards to its national and territorial integrity. Nonetheless, the state binds it self by the constitution to respect and promote human rights and adopt all measures available to increase the living standards of its citizen.

Another corner stone in the Turkish Constitution that can be related to the right of self determination is its Article 10 on the equality of its citizen. The said article renounces to all sorts of discrimination as to language, race, colour, sex, political opinion, philosophical or religious belief. The state is responsible to implement and promote such equality. More important is that no privileges to any community and social class can be granted.

Finally, Article 15 of the Constitution on the restriction of the use of basic rights and freedoms foresees that such restriction can only be implemented in times of war, national mobilisation and in such a way that would not violate the State's duties and obligations arising out of international law.

In the light of the abovementioned constitutional provisions and the actual political pressure being out in Turkey, one should objectively conclude that the structuring of the Turkish legal system as well as its application

excludes any and all claims of self determination, whether of classical or internal character, None of the criteria applicable to self determination claims exists in the Turkish case and thus any and all claims as to secession or autonomy remain not only illegal but also deprived of legal grounds in terms of international law.

D. The Implementation of Self-Determination in International Relations in 1960's and 70's

The ICCPR and the ICESCR entered into force in 1976. Article 40 of the ICCPR imposed on states the duty to submit periodic reports to the Human Rights Committee, “on their implementation of the rights guaranteed under the Covenant”.³¹

Although the process of implementation of self-determination in international relations gained acceleration after the adoption of ICCPR and ICESCR, the limits of this right also have been laid down in several occasions since then. In this respect, this essay will point to some examples in the following two paragraphs.

In two cases raising “the issue of whether Indian bands in Canada enjoy a right to self- determination” through the mechanism of individual application accepted in the Optional Protocol to the Covenant, the Human Rights Committee (HRC) decided that; “... the issue of an alleged violation of the right of a ‘people’ to self-determination under Article 1 could not be raised through the Optional Protocol procedure”.³²

In addition, during the debates surrounding the adoption of general comment³³ on Article 1, the HRC chairman stated that the right of self-determination is “one of the most awkward to define, since the abuse of

³¹ Hannum, p. 41.

³² *Ibid.*, p. 43.

³³ In Hannum’s words, the general comment of Human Rights Committee on Article 1 ‘... does nothing to clarify the meaning of “self-determination” or the scope of state obligations under article 1’ (*ibid.*). This fact can be viewed as a negative development in terms of the implementation of self-determination. Or in other words; the ambiguity of Committee’s comment was an example of non-implementation.

that right could jeopardize international peace and security in giving states the impression that their territorial integrity was threatened”. During the same discussions, although some HRC members “suggested that the concept of self-determination was not limited to the colonial context”, due to the lack of consent, it could not be possible to precisely describe the extent of the right.³⁴ As seen in this case, since its initial formulations, the right of self-determination has always been accompanied by member states’ sensibility regarding their territorial integrity.

There have also been numerous ICJ opinions which can be taken into consideration while studying the implementation of self-determination.

As H. Wilson notes; the ICJ acknowledged the right to self-determination in its Namibia opinion (1971) as “a principle in international law as enshrined in the Charter and its further development in the Declaration on Colonialism (1514(XV)), which refers to a right to selfdetermination”.³⁵ Moreover, the ICJ considered the principle of self-determination in the Western Sahara case as “a legal one in the context of such territories”. As Shaw points out; “the Court moved one step further in the East Timor (Portugal v. Australia) case” by stating that Portugal’s allegation that the self-determination has an erga omnes nature, is “irreproachable”. The Court also defined the right of self-determination as “one of the essential principles of contemporary international law”.³⁶

Finally, it is worthy to note that the Additional Protocol I to the Geneva Conventions of 1949 (1977) clearly recognized the self-determination in its Article 1(4) as “a right in international law”.³⁷

E. A Conceptual Analysis on the Contemporary Context of the Right of Self-Determination In this sub-section, the essay will concisely analyse

³⁴ *Ibid.*, pp. 43-44.

³⁵ Wilson, p. 76.

³⁶ Shaw, p. 229.

³⁷ See Wilson pp. 77-78.

three vital elements fulfilling the contemporary concept of self-determination: The principle of *uti possidetis*, the conceptual distinction which exists between external (classical/post-colonial) and internal aspects of self-determination, and the secession in the view of international law regulating self-determination.

Oxford Dictionary of Law defines *uti possidetis*, which means “as you possess” in Latin, as follows:

A principle usually applied in international law to the delineation of borders. When a colony gains independence, the colonial boundaries are accepted as the boundaries of the newly independent state...³⁸

In Colin Warbrick’s words, *uti possidetis* “was given particular political and legal weight in Africa... by the decision of the Organization of African Unity³⁹ in 1964 by Resolution 16(1)...”. By adopting this decision, the member states of the organization “pledged themselves to respect colonial frontiers as they existed at the moment of decolonization”. Warbrick also states that, accepting the established borders, “however arbitrary and dysfunctional they might have been”, was fundamental to identify both the territory and the people of the state.⁴⁰

In addition, Shaw notes that “the ‘self’ in question must be determined within the accepted colonial territorial framework”, and states that attempt to widen this have been unsuccessful due to the fact that the UN has always opposed efforts which may cause partial or total damage in the national unity or in the territorial integrity of a member state.⁴¹

There have also been several decisions accepted by various courts emphasizing the importance of *uti possidetis*, such as the Canadian Supreme

³⁸ *Oxford Dictionary of Law*, ed. by Elizabeth A. Martin (Oxford: Oxford University Press, 2003), p. 521.

³⁹ This organization recently changed its name as African Union.

⁴⁰ Colin Warbrick, “States and Recognition in International Law” in *International Law*, ed. by Malcolm D. Evans, First Edition (New York: Oxford University Press, 2003), p. 214.

⁴¹ Shaw, p. 230.

Court's (CSC) decision on Quebec decision and ICJ's decision in the Burkina-Faso v. Mali case:

The CSC noted that the right of self-determination should be exercised “within the framework of existing sovereign states” and emphasized “the maintenance of the territorial integrity of those states”.⁴²

The ICJ described *uti possidetis* as “a general principle, which is logically connected with the phenomenon of obtaining independence, wherever it occurs”.⁴³

Apart from its external/classical context (which has been examined in the previous parts of this essay), self-determination has also an internal aspect, which suits better the needs of contemporary international politics.

The Committee on the Elimination of Racial Discrimination (CERD) passed a recommendation in 1996 which distinguished internal self-determination from the external one. The CERD described the internal self-determination as the “right of every citizen to take part in the conduct of public affairs at any level”.⁴⁴

Within the framework of internal self-determination, Antonio Cassese formulates a new concept that he names “political self-determination”. Cassese considers this new concept to be “more consonant with new demands for freedom at the present time”.⁴⁵

The definition of the CSC regarding internal self-determination, which is acknowledged by the Court as a concept fulfilling the external self-determination, is as follows: “a people's pursuit of its political, economic, social and cultural development within the framework of an existing state”.⁴⁶

⁴² *Ibid.*, p. 231.

⁴³ Warbrick, p. 215.

⁴⁴ Shaw, p. 273.

⁴⁵ Twining, p. 83.

⁴⁶ Shaw, p. 273.

In Twining's words; "the right to internal self-determination is directed against authoritarian regimes, therefore, not only against external interference but mainly against internal interference".⁴⁷

Shaw points out that a development concerning self-determination, which can extend this right as to include the right of secession from a state, is possible, but notes that it has not persuasively happened yet.⁴⁸

Similarly, Alfred P. Rubin states that; "... despite various treaties, there is no positive law right to secession".⁴⁹

In its article published in *Denver Journal of International Law and Policy*, Ved P. Nanda points to the "uncertainty" of the status of secession, "since it is neither permitted nor prohibited under international law".⁵⁰ Indeed, although "United Nations and its member states do not support claims for unilateral secession", in the light of the developments which took place after the examples of Kosovo and East-Timor, and the decision of CSC regarding the claim for Quebec's secession; it is possible to indicate that some exceptional conditions may allow the acceptance of a claim to secede. These exceptional circumstances are; the materialization of secession within post-colonial context, and the realization of secession against undemocratic, authoritarian regimes violating human rights.⁵¹

Similarly, Alan Buchanan argues that the right to secede should be seen as "a remedy of last resort for serious injustices". According to Buchanan, "a limited set of special conditions" may make a group's claim to secession legitimate. Like Nanda, he cites two situations justifying secession:

⁴⁷ Twining, p. 83.

⁴⁸ Shaw, p. 231.

⁴⁹ Alfred P. Rubin, "Secession and Self-Determination: A Legal, Moral, and Political Analysis" *Stanford Journal of International Law*, 2000, Vol. 36, 269.

⁵⁰ Ved. P. Nanda, "Self-Determination and Secession Under International Law", *Denver Journal of International Law and Polity*, 2000-2001, Vol. p. 29, 305.

⁵¹ *Ibid.*

“persistent and serious violations of individual human rights” and “past unrepressed unjust seizure of territory”.⁵²

F. Turkish Cypriots: an example of self determination at its best.

When examining the Turkish Cypriot case, one should primarily ask the question whether the “orthodox” rules of classical/post colonial self determination is sufficient for the need of contemporary international politics. As this question is relevant for many controversial examples such as Kosovo, Quebec, Chechnya and Palestine, it is also applicable to the Turkish Cypriot case.

The evolution of the political will of Turkish Cypriot people since 1960’s, resulting in the proclamation of the Turkish Republic of Northern Cyprus (TRNC) in 1983, and showing an intention in favour of the unification of Cyprus within a federal framework by accepting the “Annan Plan” in 2004 in the referendum, can be analysed within the context of self-determination in international law. In other words; Turkish Cypriot people’s attempts to materialize its political will since 1960’s concern many facts that can be examined both in the classical and alternative/controversial contexts of self-determination.

In order to fully comprehend the Turkish Cypriot case, one should start with the study of the historical development of the Turkish Cypriot political identity until 1983 on which the Turkish Republic of Northern Cyprus was proclaimed and proceed with a legal analysis on the statehood and non-recognition of the TRNC. Finally, a study of the non-colonial self determination based on a process of three stages (firstly the “exhaustion of peaceful methods”, secondly the fact that a claim to self-determination reflects the will of the majority of the relevant community, and finally the

⁵² Buchanan’s opinions are quoted in; Steiner and Alston, 1287.

materialization of the use of force and the claim to independence as “a means of last resort”)⁵³ must be made in the Turkish Cypriot context.

1. The Historical Development of the Turkish Cypriot People’s Political Will

1.1 Years of Crisis in Cyprus (1963-1974) and Turkish Cypriots: from “Community to People”

The Zurich and London Agreements (1959)⁵⁴ concluded between United Kingdom, Turkey and Greece gave birth to the creation of an independent republic with a “bi-communal nature”⁵⁵ in Cyprus, which was under British rule since 1878 succeeding the Ottoman period that had begun in 1571.

The substantive objective of the Treaty of Guarantee signed on August 16th, 1960 between the United Kingdom, Greece, Turkey and the Republic of Cyprus was “to prohibit union of Cyprus with any other state and to protect the constitutional rights of both communities”.⁵⁶ Moreover, the Constitution of Republic of Cyprus “prohibited the political or economic union of Cyprus with any other State”.⁵⁷

However, although the union of Cyprus with Greece or Turkey was clearly prohibited, certain Greek Cypriot officials like President Makarios

⁵³ See Jonathan I. Charney, “Self-Determination: Chechnya, Kosovo and East Timor”, *Vanderbilt Journal of Transnational Law*, 2001, Vol.34, pp. 455-467 (HeinOnline).

⁵⁴ See Zaim M. Necatigil, *The Cyprus Question and the Turkish Position in International Law*, (Oxford: Oxford University Press, 1989), pp. 1-13.

⁵⁵ *Ibid*, 13. The main provisions of the 1960 Constitution based on the political equality of Greek and Turkish communities were; a presidential regime that the President being Greek and the Vice-President being Turkish, the composition of Council of Ministers by seven Greek and three Turkish ministers in the light of the principle of participation of two national communities in the central government, the formation of the House of Representatives by 35 Greek and 15 Turkish members elected on the basis of two separate communal electoral lists, and the establishment of two separate Communal Chambers exercising autonomy in certain matters (*ibid*, pp. 13-15).

⁵⁶ *Ibid*, pp. 101-102

⁵⁷ Michael Stephen, *The Cyprus Question*, (London: The British-Northern Cyprus Parliamentary Group, 1997), pp. 7-8.

and Minister of Internal Affairs Polykarpos Yorgadjis made many statements in favour of Enosis (the union of Cyprus with Greece) between August 1960 and December 1963, the date when inter-communal clashes started.⁵⁸

In order to limit the constitutional rights of Turkish Cypriot community, the President of the Republic, Archbishop Makarios made thirteen proposals for the amendment of the Constitution to the Turkish Vice-President Dr. Fazıl Küçük on November 30th, 1963. These proposals were rejected by Küçük, and then by Turkey (one of the three Guaranteeing Powers of the Treaty of Guarantee) on 16 December 1963.⁵⁹

Soon after the refusal of Makarios' proposals by the Turkish side, illegally organized Greek militia began attacking Turkish population of the island⁶⁰, in accordance with a secret project called Akritas Plan. The responsibility for proper functioning of the plan was assumed by Makarios, and many other top ranking Greek members of the government, including the Minister of Internal Affairs Yorgadjis, who also was involved in the plot.⁶¹

The clashes between Greek Cypriot forces and Turkish Cypriots' anti-terrorist militia Turkish Resistance Organization (TMT) continued until August 1964, during which many unarmed Turkish Cypriot civilians lost their lives, and thousands of them had to flee their towns and villages in order to reach the safer areas. According to official records, during the 1963-1964 crisis; 364 Turkish Cypriots and 174 Greek Cypriots were killed, and about 25,000 Turkish Cypriots became refugees in their own country.⁶² Turkish Cypriots

⁵⁸ Makarios made 19 statements expressing his intention for the union of Cyprus with Greece [See: *Cyprus Problem: Why No Solution*, (Lefkoşa: Public Relations Department of the TRNC Ministry of Foreign Affairs and Defence, 1997), 23-27. For Yorgadjis' pro-Enosis speech in 1962, see: Pierre Oberling, *The Road to Bellapais: The Turkish Cypriot Exodus to Northern Cyprus*, (Boulder: Social Science Monographs, 1982), 68.

⁵⁹ Necatigil, pp. 21-23.

⁶⁰ See Oberling, pp. 87-121.

⁶¹ Necatigil, p. 24

⁶² Oberling, p. 120 and Stephen, p. 19.

were forced to live in some enclaves in the island⁶³ until the military intervention of Turkey in 1974.

However, the necessary withdrawal of Turkish Cypriots into enclaves resulted in the emergence of a separate Turkish Cypriot administrative structure step by step, which would complete its formation finally in 1983 by the proclamation of TRNC.

Moreover, as the inter-communal hostilities that broke-out in 1963-64 caused the exodus of Turkish Cypriots from their villages and towns to the enclaves, the social structure of Cyprus began to evolve from the co-existence of two communities living together to the emergence of two separate peoples in the island.

In other words; Cyprus was already divided in 1964, but not in 1974⁶⁴, and the “attempts to carry out the Akritas Plan almost completed the physical separation between the two communities”⁶⁵. The Turkish Cypriot-controlled areas, where the Greek Cypriot controlled central government could not exercise any authority, were at first administrated by a General Committee. In addition to this unit, the Turkish Communal Chamber continued to operate, and the Turkish members of the House of Representatives used to hold separate meetings.⁶⁶ On December 28th, 1967, the Provisional Cyprus Turkish Administration (PCTA) was established, and as Oberling expresses; the formation of PCTA completed the separation between Greek and Turkish Cypriot communities.⁶⁷

⁶³ Stephen, p. 18.

⁶⁴ *ibid.*

⁶⁵ Oberling, pp. 120-121.

⁶⁶ Necatigil, p. 60 .

⁶⁷ Oberling, pp. 144-145.

Concerning the absence of Turkish Cypriots in the state affairs since the 1963-64 crisis, which can be interpreted as the de facto collapse of Republic of Cyprus, Thomas Ehrlich states that;

... Greek Cypriots were in complete control of all machinery of national government. Whether Turkish Cypriots were excluded –as Turkey claimed- or whether they had absented themselves when the crisis began in December 1963 – as the Archbishop contented- the fact remained that they did not participate...⁶⁸

1.2. The Proclamation of the Turkish Federated State of Cyprus (1975)

On July 15th, 1974, a coup backed by the military dictatorship of Greece broke out in Cyprus. The Makarios regime was toppled and Nicos Sampson was declared “President”. As a response to the threat of Enosis and of the ethnic cleansing against Turkish Cypriot people, Turkey began to carry out a military operation⁶⁹ on 20 July 1974.

The United Nations Security Council (SC) held an emergency session on the same day and adopted Resolution 353 which “calls upon all states to respect the sovereignty, independence and territorial integrity of Cyprus..., calls upon all parties to the present fighting as a first step to cease all firing..., demands an immediate end to foreign military intervention in the Republic of Cyprus...”. Turkey decided to comply with the SC’s call for cease-fire on July 22nd.⁷⁰

⁶⁸ Thomas Ehrlich, *Cyprus 1958-1967*, (London: Oxford University Press, 1974), p. 102.

⁶⁹ As Article II of the Treaty of Guarantee states that United Kingdom would guarantee the state of affairs created by the 1960 Constitution, Turkish Prime Minister Bülent Ecevit proposed a joint Turkish-British military operation. However, the Labour Government refused that proposal (this decision would be criticized by UK House of Commons Select Committee in 1976). Then, Turkey intervened to Cyprus under Article IV of the Treaty of Guarantee (Stephen, p. 24).

⁷⁰ Oberling, pp. 167-168. Apart from SC Resolution 353, the UN General Assembly (GA) also passed a resolution regarding the situation in Cyprus: The Resolution 3212 of GA called upon all states to respect the sovereignty, the independence, the territorial integrity, and the policy of non-alignment of Republic of Cyprus, and demanded the immediate withdrawal of all foreign military forces [Mehmet Atay, “Birle?mi? Milletler Genel Kurul Kararlarında Kıbrıs Sorunu (The Cyprus Problem in UN General Assembly Resolutions)”, *Avrasya Dosyası*, (Eurasian Dossier), Ankara, Spring 2002, Vol.8, No.1, p. 306].

Then, following the failure of the negotiations between three Guarantor Powers in Geneva⁷¹ and the massacres of Turkish Cypriot civilians in the Greek controlled part of the island⁷², Turkey carried out the second phase of the military operation. As Necatigil states; this operation “brought about 36 per cent of territory in the north under the control of the Cyprus Turkish Administration.”⁷³

On February 13th, 1975, the Turkish Federated State of Cyprus (TFSC) succeeded the Autonomous Cyprus Turkish Administration (1974-1975). In one aspect, the declaration of TFSC was an action of Turkish Cypriots against the “political limbo” that they used to live in⁷⁴, in another aspect, it was a reaction against “Makarios” assumption of the presidency without having been re-elected to that office⁷⁵.

The UN Security Council reacted to the foundation of the TFSC by adopting the Resolution 367 which regretted the proclamation of TFSC.⁷⁶ The SC members were also “virtually unanimous... in declaring continued recognition of the ‘Government of Cyprus’ under Archbishop Makarios”.⁷⁷

On the other hand, as Michael Stephen emphasizes, there was “an inherent contradiction” in Resolution 367: This resolution stressed negotiations

⁷¹ See Necatigil, pp. 82-84.

⁷² Many newspapers from Western media; such as Washington Post, New York Times, Herald Tribune, and France Soir; reported the mass killings of Turkish Cypriots by Greek Cypriot forces (see Necatigil, pp. 84-85).

⁷³ *Ibid*, 86.

⁷⁴ Stephen, p. 30.

⁷⁵ Oberling, p. 189.

⁷⁶ Stephen, p. 30.

⁷⁷ Necatigil, p. 90.

between Greek and Turkish communities on equal footing, however it regretted the formation of a Turkish Cypriot state which would ensure to Turkish Cypriot people to be on equal footing vis-à-vis Greek Cypriots.⁷⁸

Moreover, taking into account the existence of “the declared intention that [the TFSC] should one day form part of a federation for the whole of Cyprus”⁷⁹, and the TFSC Constitution “which left the door open for the creation of a federal republic of Cyprus of which the Turkish Federated State would be one of the components”⁸⁰; it’s possible to say that the proclamation of TFSC was not a secessionist action against the territorial integrity of the republic (which collapsed de facto in the 1963-64 crisis) whose political regime was foreseen to be regulated by the 1960 Constitution. The word federated which stood in the name of the state was obviously for symbolizing the intention to be a part of a federal structure in the future. Therefore, the founding of TFSC was not in contradiction with the SC Resolution 353 and the GA Resolution 3212 which emphasized the territorial integrity of the Republic of Cyprus.

The exchange of population in 1975 between the Greeks living in the north and the Turks staying in the south definitely completed the social evolution of the island towards the existence of two separate peoples living in different geographical areas.

1.3 Proclamation of the Turkish Republic of Northern Cyprus (TRNC) (1983)

Since “no progress toward settlement having been made”⁸¹, the Legislative Assembly of the TFSC unanimously voted for the proclamation of the Turkish Republic of Northern Cyprus (TRNC) on November 15th, 1983. The proclamation stressed that the TRNC would consider the Treaty

⁷⁸ Stephen, p. 30.

⁷⁹ *Ibid.*,

⁸⁰ Necatigil, p. 89.

⁸¹ Stephen, p. 30.

of Guarantee (1960) as binding, would pursue a policy of non-alignment, would be loyal to the principles of UN Charter, and would aim the establishment of a federal republic in the island. Furthermore, the proclamation of independence underlined that “the founding of Turkish Republic of Northern Cyprus is a manifestation of the right of self-determination of the Turkish Cypriot people of Cyprus”.⁸²

In response to the proclamation of TRNC, the SC passed resolutions 541 and 550, which described the Declaration of Independence as “legally invalid”, and called for the non-recognition of TRNC.

However, the SC has never stated whether the constitutional law of Cyprus or international law constitutes the basis of the alleged illegality.⁸³ Pointing to the fact that the TRNC is sometimes qualified as a breakaway state, Stephen explains that; “... there was nothing to break away from. It was the Greek

Cypriots who broke away from the 1960 Republic in 1963...”⁸⁴

2. A Legal Analysis of TRNC

2.1 The Statehood and the Problem of Non-Recognition of TRNC

In addition to SC resolutions 541 and 550, there have been many acts or decisions of International Community that oppose to the statehood, sovereignty, and the probable recognition of the TRNC by other states. In accordance with this attitude of International Community, no state in the world (except Turkey) has recognized the TRNC. Kypros Chrysostomides argues that;

⁸² Necatigil, p. 174.

⁸³ Stephen, p. 30.

⁸⁴ *Ibid*, p. 32.

... the decisions of the ECHR and the ECtHR of the Council of Europe ... clearly stated that since 1974, the Republic of Cyprus has been prevented from exercising its jurisdiction in the northern part of its territory,... and that recognition by Turkey of the then “TFSC” did not invest it with a state character...⁸⁵

Furthermore, the Committee of Ministers of the Council of Europe decided in 1983 that it continued to consider the government of the “Republic of Cyprus” as the sole legitimate government of the island, and, after emphasizing the fact that the TRNC is not recognized by “International Community”, the European Court of Human Rights also concluded in 2001 that “the Republic of Cyprus has remained the sole legitimate government of Cyprus”.⁸⁶

However, in the light of the Article 1 of the Montevideo Convention⁸⁷, it’s possible to argue that the TRNC possess all the qualifications⁸⁸ for being described as a State. The TRNC has definitely got a defined territory, a permanent population, and a government. In terms of the criteria of capacity to enter into relations with other states, the meaning of this principle should be clarified.

According to Colin Warbrick, in one sense, this principle “is to import a role for recognition as a pre-condition for relations”. However, in another sense, the capacity referred to constitutes a “legal authority” to enter into relations with other states: as Warbrick points out; the “legal independence which permits the government to make the arrangements it wishes with foreign States...”.⁸⁹ In the light of the latter aspect of the capacity to enter into relations

⁸⁵ Kypros Chrysostomides, *The Republic of Cyprus: A Study in International Law*, (The Hague: Martinus Nijhoff Publishers, 2000), p. 325.

⁸⁶ Shaw, p. 213.

⁸⁷ The Convention on the Rights and Duties of States (1933).

⁸⁸ This convention states that; “The State as a person of international law should possess the following qualifications: (a) a permanent population, (b) a defined territory, (c) government; and (d) capacity to enter into relations with other states” (Warbrick, p. 221).

⁸⁹ Warbrick, p. 229.

with other states, the TRNC possess the capacity in question. There is no obstacle in the legal independence of TRNC in this matter, as the existence of the Offices of the Representative of TRNC in Brussels, New York, Washington, London, Baku, Abu Dhabi, and Islamabad⁹⁰, and its status of observer in the Organization of the Islamic Conference indicate. Therefore, the TRNC cannot establish diplomatic relations with other states due to the political decisions of International Community not to recognize it, but not because of a lack in its capacity to enter into relations with other states.

Despite the possession of all the criteria of statehood (that the recognition is not included) mentioned in the Convention of Montevideo, Malcolm Shaw argues that the TRNC “cannot be regarded as a sovereign state, but remains as a de facto administrated entity...”⁹¹, and according to Kypros Chrysostomides, the TFSC and the TRNC were created by the “Turkish invasion”, and that their existence depends on the presence of Turkish troops in northern Cyprus.⁹²

However, although Chrysostomides ignores the existence of the “Turkish Cypriot authorities” (or in other words; Turkish Cypriot Administration) prior to Turkey’s military intervention⁹³, the TFSC and the TRNC are the consequences of the administrative evolution of the General Committee to PCTA, and of the PCTA firstly to a state claiming to be federated, and finally to a sovereign state. In this respect, it is irrelevant to argue that the TFSC and the TRNC are the result of the Turkish intervention, but it’s a fact that this evolution would have not been achieved without Turkish military presence in Northern Cyprus.

⁹⁰ For more information about the offices of representative, see <http://www.trncinfo.com/> (the website of the Deputy Prime Ministry and Ministry of Foreign Affairs of TRNC).

⁹¹ Shaw, p. 213.

⁹² Chrysostomides, p. 262 and p. 326.

⁹³ See *ibid.*, p. 261.

In his classification of the different types of the fact of “not recognizing” between states, Warbrick describes the case of not recognizing a state because of “a specific obligation imposed by the Security Council not to do so” as different from the “orthodox” not recognizing decisions. According to Warbrick, this kind of “not recognizing” is largely part of the law of responsibility.⁹⁴ This is exactly the case for TRNC.

However, Stephen criticizes the Resolutions 541 and 550 (which claim to create an “obligation” for states within the framework of the law of responsibility) by saying that; “The Security Council is a political body. It should not purport to act as a judicial body or expect to be respected as such.”⁹⁵

Another crucial point is that, the resolutions of SC aiming to prevent the recognition of TRNC were adopted within the framework of Chapter VI of UN Charter, and therefore they don’t have the same binding value that the decisions adopted under Chapter VII have. Nevertheless, Chrysostomides argues that;

... even if the (Resolutions 541 and 550) are not considered binding in the same manner as those taken under Chapter VII of the Charter, the United Nations organs have declared as binding the legal obligation of non-recognition of the “TRNC”, based on customary and general principles of international law.⁹⁶

⁹⁴ Warbrick, p. 242.

⁹⁵ Stephen, p. 31.

⁹⁶ Chrysostomides, p. 323.

2.2 A Comparison Between Bangladeshi Secession and the Turkish Cypriot “Secession”

The declaration of TRNC on November 15th, 1983 can be qualified as “secession” from the “Republic of Cyprus”, since the latter has been the latest political organization in Cyprus which is internationally recognized as the sole sovereign authority of the island.

However, as the participation of both communities “in the running of the affairs of the Republic of Cyprus had ceased in December 1963”, and the Greek Cypriots -who had assumed the functions and the powers of the republic- amended the Constitution in a manner inconsistent with the prohibition posed by international treaties; the Turkish Cypriots cannot be regarded as seceding from a constitutional order, so the declaration of the statehood in 1983 didn’t constitute a secession from the Republic of Cyprus.⁹⁷

Nevertheless, the proclamation of TRNC can be still considered in terms of self-determination even in case of its interpretation as a “secession”. As Necatigil states; “... under certain circumstances, the international principle of self-determination can be invoked as the basis of legitimate secession”⁹⁸, “as a self-help remedy in cases of extreme oppression”⁹⁹. The case of Bangladeshi independence; which is the only successful post-World War secession, and which “had a very good case for self-determination”¹⁰⁰; constitutes an example of legitimate secession, and has many similarities with the Turkish Cypriot case.

In both cases, there has been a geographical separation of peoples between

⁹⁷ Necatigil, p. 285.

⁹⁸ *Ibid.*, p. 196.

⁹⁹ *Ibid.*, p. 181

¹⁰⁰ Alexis Heraclides, *The Self-Determination of Minorities in International Politics*, (London: Frank Cass and Company Limited, 1991), p. 164

the parties of conflict: The East Pakistan (which would become “Bangladesh” after the secession) has been “geographically and ethnologically different” from West Pakistan¹⁰¹, and Turkish Cypriot people who lived in certain enclaves since 1963-64 crisis was geographically separated from Greek Cypriots. In both cases, the liberation from oppression and the realization of independence was materialized by the military intervention of a foreign power (India, and Turkey respectively). In addition, by taking into account the attacks of Greek Cypriot forces against Turkish Cypriot people in 1964, 1967 and 1974; it’s possible to state that the following words of a Bangladeshi leader reflects the situation in Cyprus (before 1974) as well:

“... These acts indicate that the concept of two countries is already deeply rooted in the minds of General Yahya and his associates, who would not dare commit such atrocities on their countrymen.”¹⁰²

However, despite all these similarities, Bangladeshi independence has been recognized on international plane but TRNC cannot obtain such a recognition, because of political reasons.

3. A New Approach to the Turkish Cypriot Self-Determination

3.1 The Adaptation of J.Charney’s Opinions on Self-Determination to the Turkish Cypriot Case

In his commentary published in 2001, Jonathan I. Charney examined the differences between the situations of Albanian Kosovars and Chechens in terms of right to self-determination, and made some deductions regarding the criteria that allow a people to obtain an international support for its claim to self- determination in the non-colonial context.¹⁰³

¹⁰¹ Chrysostomides, p. 259. Chrysostomides cites the geographical (the existence of a distance of 2000 miles) and the ethnological difference between West and East Pakistan as a difference from the situation in Cyprus by saying ‘there was never before in Cyprus a fixed territory, as, for example, in the case of Bangladesh...’. He neglects the Turkish enclaves by stating that they ‘represented a marginal percentage of the territory of the Republic of Cyprus’ (Chrysostomides, p. 259 and p. 262).

¹⁰² Heraclides, p. 155.

¹⁰³ Charney, supra note 1.

Firstly, Charney points out that “in Kosovo the international community essentially endorsed the Albanian Kosovar”s claims to self-determination”, then he states that, the reactions to the events happened in Chechnya were however focused on the violence used by Russian forces, but not on “the possible right to self-determination” of Chechens.¹⁰⁴

Then, Charney makes a distinction between the paths used by the two peoples towards the claim to independence: All efforts of ethnic Albanians of Kosovo for a peaceful solution were exhausted (according to international community), the claims of self-determination reflected the will of ethnic Albanians’ majority, the armed force was used as a last option by Kosovo Liberation Army and the independence was declared after all other solutions had been rendered unreachable¹⁰⁵; however “the situation in Chechnya quickly escalated to the use of force and a claim to independence without significant evidence that the Chechen forces represented the will of the Chechen people”¹⁰⁶.

In the light of the facts cited above, Charney points to the following three criteria allowing “the support of the international community” to a people having “a claim of self-determination in the non- colonial context:

- a. a bona fide exhaustion of peaceful methods of resolving the dispute...
- b. a demonstration that the persons making the group’s self-determination claim represent the will of the majority of that group; and
- c. a resort to the use of force and a claim to independence is taken only as a means of last resort.¹⁰⁷

¹⁰⁴ *Ibid*, pp. 458-459.

¹⁰⁵ *Ibid*, pp. 460-461 and 464.

¹⁰⁶ *Ibid*, p. 464.

¹⁰⁷ *Ibid*, p. 464.

If this model is examined within the Turkish Cypriot historical background, it is clear that Turkish Cypriots did have a strong point for a right to self-determination separate from that conferred to the whole population of the island in 1960.

After the inter-communal clashes composed of Greek Cypriot forces' attacks to Turkish Cypriots and the armed resistance of the latter in 1964 and 1967, inter-communal negotiations were held between the two communities for a period of 6 years beginning from 1968. However, a solution could not be achieved.¹⁰⁸ After the exhaustion of these peaceful efforts, the violence and the threat of violence were eliminated by Turkey's intervention in 1974, an action which put an end to the bloodshed in Cyprus.

Secondly, the Turkish Cypriot authorities who founded the TFSC and the TRNC were democratically elected by the Turkish Cypriot people. Furthermore, the proclamation of TRNC in November 1983 was supported by 87,928 signatures of the adult population.¹⁰⁹ These facts prove that the majority of Turkish Cypriots was in favour of the claim to self-determination, a concept which was mentioned in the proclamation of independence of TRNC¹¹⁰.

Finally, the declaration of independence constituted a means of last resort, because it was realized 9 years after the Turkish intervention and 8 years after TFSC was founded, and it was the response of Turkish Cypriots to the lack of progress for a solution to the Cyprus question.

In sum, the events between 1968 and 1983 constitute a case consistent with Charney's model of three phases, however, unlike Kosovar Albanians' situation;

¹⁰⁸ See Necatigil, pp. 63-71.

¹⁰⁹ Ibid, p. 196.

¹¹⁰ Necatigil, supra note 39.

a separate right to self-determination for Turkish Cypriots has never been recognized by the international community because of political reasons again.

4. Conclusion: International Law sacrificed to International Politics

The restricted conception of self-determination which is strictly limited by the principle of *uti possidetis* is insufficient for the materialization of Turkish Cypriot self-determination. Although the international agreements founding the Republic of Cyprus in 1960 conceived this principle for the whole population of Cyprus, the political events occurred between 1963 and 1974 resulted in the emergence of a separate Turkish Cypriot people on the island, and therefore the concept of self-determination must be conceived separately for the Turkish Cypriot people.