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ASAMBLEA GENERAL
Quincuagésimo segundo período de sesiones
Tema 61 del programa
CUESTIÓN DE CHIPRE

CONSEJO DE SEGURIDAD
Quincuagésimo segundo año

Carta de fecha 29 de septiembre de 1997 dirigida al Secretario General por el Representante Permanente de Turquía ante las Naciones Unidas

Siguiendo instrucciones de mi Gobierno, tengo el honor de incluir adjunto el texto de una opinión jurídica preparada por un abogado de renombre internacional, el Sr. Christian Heinze, de Alemania, relativa a la solicitud unilateral de la administración grecochipriota de admisión como miembro en la Unión Europea (UE) (véase anexo).

La opinión del Sr. Heinze analiza detenidamente la incompatibilidad del ingreso de la administración grecochipriota en nombre de "Chipre" en la Unión Europea, con el derecho internacional universalmente aplicable, con la legislación de la Unión Europea y con las disposiciones de los acuerdos de Londres-Zurich de 1959 y del Tratado de Garantía de 1960. La mencionada opinión demuestra, entre cosas, que la solicitud unilateral de la administración grecochipriota, en nombre del "Gobierno de la República de Chipre", carece de toda base jurídica y no puede ser obligatoria para la población turcochipriota o para Chipre en su conjunto.

La administración grecochipriota no tiene autoridad legal o constitucional para actuar como único gobierno legítimo de la isla. Desde 1963, los dos pueblos, cofundadores de la República bicomunal de Chipre en 1960, han tenido sus propias administraciones separadas, elegidas democráticamente, y el régimen grecochipriota nunca ha ejercido la soberanía sobre la totalidad de Chipre.

Teniendo presente la fundación legal de la República bicomunal de Chipre en 1960 y la igualdad por lo que respecta al estatuto político de las dos comunidades de Chipre, cualquier apoyo prestado a la parte grecochipriota en su tentativa unilateral de ingreso en la UE no haría más que "legitimar" las

violaciones por parte de la administración grecochipriota tanto del derecho constitucional nacional como del derecho internacional de los tratados.

La administración turcochipriota y Turquía han señalado constantemente a la atención las repercusiones jurídicas y políticas del proceso unilateral iniciado por la administración grecochipriota con miras a su ingreso en la UE, y sus efectos negativos sobre las negociaciones entre las dos administraciones de Chipre. Es de esperar que la presente opinión jurídica sea tenida en cuenta por todos los interesados a fin de no causar un nuevo daño al delicado proceso de negociación intercomunal y a los objetivos de un futuro arreglo.

Agradecería que tuviera a bien hacer distribuir el texto de la presente carta y su anexo* como documento de la Asamblea General, en relación con el tema 61 de la Asamblea General y del Consejo de Seguridad.

(Firmado) Hüseyin E. ÇELEM
Embajador
Representante Permanente

* El anexo adjunto se distribuye en la forma y en el idioma en que ha sido presentado.

ANNEX

On the question of the compatibility of the admission of Cyprus into the European Union with international law, the law of the EU and the Cyprus Treaties of 1959/60.

Appraisal study

presented to the Republic of Turkey
by Dr. Christian Heinze (attorney-at-law), Munich,
March 1997

(Translation from the German original version:
Dr. iur. Christian Rumpf, Stuttgart/Heidelberg, and Neil Jakob, Dublin)

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Preface: Unless specified otherwise, "Community" refers to the European Community and "community" refers to the Greek and/or Turkish communities in Cyprus.

A. Application for admission and its consideration by the EU. Commissioning of the appraisal study.

On 19.12.1972 the European Economic Community concluded an agreement with the government acting on the behalf of the "Republic of Cyprus", but representing only the Greek Cypriot community without the participation of the organs of the Turkish-Cypriot community, on the **association** of this "Republic of Cyprus" with the Community.

> Agreement between the Council of the European Communities and the "Government of Cyprus" mentioned in the agreement for the establishment of an association between the European Economic Community (EEC) and the "Republic of Cyprus" of 19.12.1972 (OJ EC L 133/2 of 21.5.1973), in force since 1.6.1973; cf. Regulation EEC 1246/72 of 14.5.1973 (ibid., page 1), passed despite the serious and convincing arguments to the contrary put forward by the Turkish Cypriot community on 6.4.1973.

In the following years, the agreement was implemented through the administrative co-operation of the Community with the Greek Cypriot Government.

> Cf. the Protocol on Finance between the EEC and the Republic of Cyprus of 15.9.1977 (OJ L 332/2 of 29.7.1978), and Council Regulation (EEC) 2760/78 of 23.11.1978 (ibid., page 1) as well as a number of other Protocols on Finance of recent times.

On 3. July 1990, acting on behalf of the so-called "Government of the Republic of Cyprus", its Foreign Minister informed the President of the European Economic Community, the European Coal and Steel Community and the European Atomic Energy Community, that his Government was applying for **"Cyprus" to become a member** of these Communities. On 17.9.1990, the Council of the European Communities decided to initiate the procedure for membership applications as specified by Art. 98 ECSC Treaty, Art. 237 EEC Treaty and Art. 205 EAEC Treaty, and, in accordance with this, requested the statement from the Commission as required by these articles.

The **Commission** delivered its statement on 30.6.1993. It mentions "crisis" and the "outbreak" of violence between the communities of the young (founded in 1960) Republic of Cyprus, which climaxed in the 1974 coup inspired by the supporters of a union between Cyprus and Greece. This resulted in a Turkish intervention which, according to the statement mentioned, had as a consequence the de facto separation of the communities. Further, in its statement the Commission takes note of the fact, that there was no exchange of goods or services between the territories of the two communities and

that the northern part of the island had declared itself an independent republic in 1983. The statement presumes that the admission of "Cyprus" into the Community would increase security and wealth and bring the two communities closer to each other. It is of the opinion that the leaders of the Turkish community are aware of the economic and social advantages an "integration with Europe" would have for that community. The statement is based on the assumption that the Community is willing to initiate the admission procedure "as soon as a possible settlement" becomes more likely, but that it is willing, with the consent of the Council, to take up immediate talks with the "Government of Cyprus" in order to familiarise this government with the "acquis communautaire". With regard to the required settlement of the Cyprus conflict, the Commission demands, amongst other things, a guarantee of the right of both communities to pursue their fundamental interests, as well as the safeguarding of the correct implementation of Community law on the whole island. In the case of the talks between the communities on the settlement of the Cyprus question failing, the statement regards it as appropriate to reappraise the question of admitting "Cyprus" into the Community in January 1995.

In its "Conclusions" of 4.10.1993, the EC **Council** advocated the implementation of the instruments of the Treaty of Association, regardless of a settlement of the conflict, in order to contribute to the transfer of "Cyprus" into the Community in close co-operation with the "Cypriot Government", and declared its support for the reappraisal put forward by the Commission. On 31.10.1994, the Council of the Community, called "European Union" (EU) since 1.11.1993, declared that the Commission would present reports in early 1995 on, amongst other things, the entrance of "Cyprus". In doing so, it referred to the declaration of the "Corfu Summit" of 25.6.1994, which stated that the next phase of the expansion of the Community would include "Cyprus" and that any settlement of the Cyprus problem would have to respect the sovereignty, independence, territorial integrity and unity of "the country"

> the declaration of the "Dublin Summit" of 25./26.6.1990 stated the same demands in relation to "Cyprus", the Council Conference in Essen of December 1994 confirmed these demands

in accordance with the relevant resolutions of the United Nations Organisation (hereafter: UN) and "high-level agreements" (most likely referring to the high-level agreements between the two communities, e.g. of 12.2.1977 and of 19.5.1979). In its meeting of 6.3.1995 the Council assumed ("estime que") that the talks on the admission of "Cyprus" would begin 6 months after the end of the Government Conference of 1996.

> The Conference has been taking place in several meetings since 1996 and is ongoing; it is expected to conclude in late 1997 or early 1998.

The Council was also of the opinion that the admission of "Cyprus" would enhance the wealth of both Cypriot communities, especially the Turkish one. At the same time, the Council demanded that the advantages would have to be understood better by the Turkish community and asked the Commission to establish, in its consultations with the "Government of Cyprus", the necessary contacts with the Turkish community. The "Republic of Cyprus" would "naturally" remain the only negotiations partner of the

European Union. On 12.6.1995, in a joint resolution, the Association Council of the European Union (Cyprus) agreed on a "structured" dialogue, as proposed by the Council on 6.3.1995, with the applicant (CE-CY 703/95). During the Council Meeting in Cannes on 26./27.6.1995, in the course of which the resolutions of 6.3.1995 were ratified, "Cyprus", as the Association Council phrased it, was present.

The European **Parliament** welcomed and supported these developments in its resolution of 12.7.1995 (A4-156/95) and referred to the "status quo" as being unacceptable. It stated that, with reference to UN Security Council Resolution 939 (1994), it regarded Cyprus as a unity with a "legitimate" government. Further, the Parliament decided that the Commission should continue the dialogue with the Turkish community of the northern part of the island. The resolution states that measures aimed at arriving at a settlement should "take into account" the international "rule of law" and the relevant UN resolutions.

The Republic of Turkey commissioned an **appraisal study** on the question, of whether or not the admission of Cyprus into the EU is compatible with universally applicable international law, the law of the European Union and the Cyprus Treaties of 1959 and 1960. I present the appraisal study as follows:

B. Consideration of the application for admission and of the admission of Cyprus according to international law.

I. Status of the applicant according to international law.

The applicant for the admission of Cyprus into the EU is **not a government** of the **Republic of Cyprus** founded in 1960 but a government of the Greek Republic of Southern Cyprus. The republic founded in 1960 no longer exists. However, even if it still existed, the applicant would not be its government.

1. Statehood in Cyprus.

The applicant is the government of a state whose territory is restricted to the southern part of Cyprus and whose people are restricted to the Greek Cypriots living there. This state was created when, between 1963 and 1974, Greek organs of the Republic of Cyprus and parts thereof and new organs founded by these or by Greek Cypriots, seized power over a part of the island's territory in a **revolutionary process**. They ceased to recognize fundamental parts of the Constitution of Cyprus of 1960

the Constitution of Cyprus of 1960 is reproduced in the English parliamentary publication "Cyprus, July 1960, Her Majesty's Stationary Office, Cmnd. 1093", Part II, Appendix D (pages 91ff.); on the publication of the constitution cf. *Blümel*, Die Verfassungsgerichtsbarkeit in der Republik Zypern, in: *Mosler*, ed., Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, No. 36, Verfassungsgerichtsbarkeit in der Gegenwart, Heymanns Verlag, Cologne and Berlin, 1962, pages 643ff., footnote 2,

and consequently separated themselves and the Greek community from the Republic of Cyprus (**Greek Cypriot secession**).

The implementation of the fundamental principles of the Constitution of 1960, which protected the basic interests of the Turkish community, had already failed before 1963 due to Greek resistance. Examples of this are the refusal of the Greek Cypriot organs to implement the constitutional demands for a minimum participation of the Turkish community in the republican civil service, the creation of a Cypriot army and of separate Greek-Turkish communal administrations in the 5 largest towns on the island. As early as spring 1963, the Greek President of Cyprus, Archbishop Makarios, declared that he would disregard the decision of the Cypriot Constitutional Court if it decided in favour of Turkish Cypriot rights in the matter of communal administration. From mid 1963 at the very latest, he publicly demanded the abolition of the principal constitutional rights favouring the Turkish community (cf. Neue Zürcher Zeitung, Fernausgabe No. 215 of 7. August 1963 and No. 218 of 10. August 1963 as well as Frankfurter Allgemeine Zeitung No. 189 of 17. August 1963 and at great length Glafkos *Clerides*, Cyprus, my deposition, Volume I, Alithia, Nikosia, 1989, esp. Chapters III and IX) and in late November 1963, declared 13 points in which the Greek community desired to change the constitution (cf. Neue Zürcher Zeitung, Fernausgabe No. 356 of 28. December 1963 and Glafkos *Clerides*, op.cit., pages 175f.). The demands included constitutional guarantees whose amendment the constitution ruled out categorically. Such demands are, in principle, also the contents of a formal statement by President Makarios made to the organs of the UN on 13. May 1964 (reproduced in Polyvios *Polyviou*, Cyprus, Conflict and Negotiation 1960-1980, Duckworth 1980, pages 36-38), even if this statement - likewise in the presentation of *Clerides* - is used to place the blame on the Turkish party.

Between 1963 and 1966 the Greek organs of government, administration and legislation proceded to disregard the Turkish participatory rights as guaranteed by the Constitution of 1960. They also passed and implemented important, one-sided governmental, administrative and legislative measures against the Turkish community which were incompatible with the constitution; cf. the **Appendix** of this appraisal study for details. The actual unfolding of events of the Greek Cypriot accession and expansion of power for the period 1963-1971 has been researched and documented in an extensive, meticulous and academic manner by Richard A. *Patrick*, academic geo-political scientist and officer of the United Nations Peace-Keeping Force in Cyprus ("UNFICYP") during the period in question (Political Geography and the Cyprus Conflict: 1963-1971, Department of Geography Publication Series No. 4, University of Waterloo, 1976). Some of the facts acknowledged in the **Appendix** of this study can also be found in the reports of the UN Secretary General. The known course of the revolutionary process was largely in accordance with the so-called Akritas Plan of 1963 for the Greek Cypriots coup aimed at the subjugation of the Turkish Cypriots (cf. *Clerides*, op.cit., pages 212-219).

The new Greek Cypriot sovereign power created a structure, which since 1966 at the very latest, exercises constitutional power over the **Greek community** through a government, a parliament, a judiciary and further organs in southern Cyprus. However, neither the election nor the appointment of the organs is compatible with the Constitution of 1960,

insofar as it was intended to guarantee the Turkish Cypriot rights of participation in the state and in the staffing of its organs, such rights of participation being deliberately denied to the Turks in the course of the election or appointment of the new Greek organs.

However, this Greek Cypriot sovereign power was never able to impose itself on **part of the island's territory**. From 1964 onwards, the Turkish community resisted Greek rule by forming enclaves scattered across the island into which Turkish Cypriots withdrew from other parts of the island.

> Cf. *Patrick*, op.cit., e.g. page 21 and the maps on pages 268, 280, 347, 464 and 469, as well as *Leigh*, Opinion on the Legal Situation in International Law of the Turkish Cypriot and the Greek Cypriot Communities in Cyprus, of 20.7.1990, typo script, pages 14-15 with reference to the Reports of the UN Secretary General of 11.3.1965 (S/6228), of 10.9.1964 (S/5950) and of 29.7.1965 (S/6569, Addendum 1 and 2).

In 1974 these Turkish enclaves became a continuous territory on the northern part of the island whose southern border traversed the town of Nicosia = (Turkish) Lefko°a. Since then, the sovereignty of the applicant no longer extends to this area. Turkish Cypriots, who had up to then lived outside this area, withdrew into it, giving up enclaves outside of this area.

> In their joint Geneva Declaration of 30.7.1974, the foreign ministers of the United Kingdom of Great Britain and Northern Ireland (hereafter: United Kingdom), Greece and Turkey described the outcome of this as "two autonomous administrations, (namely) the Greek Cypriot one and the Turkish Cypriot one".

According to international law, the necessary and sufficient characteristics of **the term state** are the constitutional and permanently secured sovereignty over a defined area and its population.

> Cf. *Delbrück* in Georg *Dahm*/Jost *Delbrück*/Rüdiger *Wolfrum*, Völkerrecht, Volume I,1, Die Grundlagen. Die Völkerrechtssubjekte, De Gruyter Verlag, Berlin and New York, 2. ed. 1989, page 129; *Oppenheims's*, ed. *Jennings*, Robert/*Watts*, Arthur, International Law, Volume 1, Peace, 9. ed. 1992, Reprint 1996, Longman, London and New York, pages 120ff.; *Talmon*, Recognition of Governments, an analysis of the new British policy and practice, The British Yearbook of International Law, 1992, pages 231ff., 234 FN, 239; each with several sources.

The **applicant** only fulfils these characteristics with regard to the **southern part of the island**. That it also claims sovereignty over the northern part of the island and its Turkish Cypriot community does not replace actual power as a precondition of state quality. The population of the northern part of Cyprus, aided by troops of the Republic of Turkey since 1974, have prevented the applicant from doing so.

Turkish Cypriots themselves have, in a process parallel to the creation of the Greek state of southern Cyprus - at first in the enclaves mentioned and since 1974 in north Cyprus - created a constitutional state, the **Turkish Republic of Northern Cyprus**,

which since that time imposes sovereignty over this part of the island and the population contained therein.

> This process of dividing a community into two states is known as "dismembratio" ("dismemberment") in international law and is recognised as a state founding process in which the state existing prior to the division ceases to exist; cf. *Delbrück* in *Dahm/Delbrück/Wolfrum*, op.cit., pages 151f. with examples; *Jennings/Watts* in *Oppenheim's* International Law, op.cit, page 219; as well as Dieter *Blumenwitz*, Opinion on the Legal Status of Greek Cypriots and Turkish Cypriots as Parties to a future Agreement for Cyprus, June 1991, typo script, page 7. That the Turkish Republic of Northern Cyprus is sovereign in a legal sense has been shown by E. *Lauterpacht* and Monroe *Leigh* in their appraisal study "Turkish Republic of Northern Cyprus", typo script, of 31.5.1991.
>
> As far as sovereignty is classed as an essential part of the term state, it refers to **legal** independence (in the sense of which it is absent in protectorates or federal states); factual connections and dependencies are not contrary to this, cf. *Jennings/Watts* in *Oppenheim's* International Law, op.cit., page 122 with footnote 8, page 123, and the general practice between states, e.g. with regard to the community of states of the former USSR.
> The Greek party to the conflict, however, is attempting to justify its separation from the Constitution of 1960 with its supposed "unworkability" and as a reaction to the "withdrawal" of the Turkish Cypriots from their participatory rights with the aim of dividing the island. This statement is not only repudiated by its incompatibility with the Turkish interests and the balance of power in and with regard to Cyprus, but especially by the inclusion of the conflict in obvious Greek Cypriot agitation and politics over a series of decades and by the actual course of the conflict. However, even if it was true it would not change the fact that the Greek community rules itself and only itself without the participation of the Turkish Cypriots as specified by the constitution and that its sovereignty is restricted to the southern part of the island. Even with this interpretation the definition of "dismembratio" would be met.

The constitutional nature of both parts of the island, based on the legislation, administration and enforcement of the law as exercised by the sovereign power and their founding on the basis of democratic self-determination of the populations they rule upon, cannot seriously be denied.

> Cf. e.g. the Report submitted to the Committee on Foreign Affairs, U.S. House of Representatives, and the Committee on Foreign Relations U.S. Senate by the U.S. Department of State, February 1987, 100th Congress 2nd Session, Country Reports pages 875-880, and the publication of Turkish Cypriot laws in the Turkish Cypriot "Official Gazette", No. 1 of which was published on 27.7.1965.

Consequently this study will not deal with them any further.

It is of no importance for statehood in the sense of international law whether the effective sovereign power rules justly or unjustly over a defined area and with which means it was founded, if a realistic possibility of revision - of territorial changes with the maintenance of at least a part of the disputed territory it holds - does not exist. There is a good reason for this: **effective guarantors** of inner and outer **peace** are still mostly states in today's world and their guarantee function is necessarily attached to a territory. Where the peace of a territory is secured in an effective and permanent manner by the existing state, the interest in this peace and the function of the state to secure this supersedes even

justified interests in disputed territories and legal claims on parts of territories. Equally, this interest is higher than a sanctioning of possible breaches of law which might have taken place in the course of creating the state. Further, recognition as a state does not contradict claims on parts of its territory according to international law or the sanctioning of previous wrongdoing, but itself only makes it possible to even speak of such claims.

However, even if one does not accord to the principle of effectiveness, all important to the quality of being a state in accordance with international law, one must accept the outcome if a revision of the creation of state is not possible without breaching the **right of self-determination** of the communities which constitute the states created by the dissolution of a state.

It is difficult to distinguish between a temporary condition and a permanent situation having effect on the legal quality of a state. The point of transition can only be realised when it has been accomplished. An interpretation based on the peace making sense and reason of the normative meaning of the term 'state' in international law, cannot however deny that the pre-conditions of statehood with regard to the two republics of southern and northern Cyprus exist. There is no doubt about the determination of the Turkish population of northern Cyprus to defend its right of self-determination freed of Greek majority rule, if need be by putting their lives at risk. The allied power of Turkey is sufficient to defend the northern part of the island against the territorial claims of the applicant. There is also no doubt about Turkey's determination to help with this defence in the future, despite the military and economic efforts necessary at a time when Turkey was and still is occupied with other domestic and foreign problems. The aspirations of the Greek party to the conflict to extend its rule over the Turkish Republic of Northern Cyprus has also been strenuously resisted in declarations and actions of the UN and a number of other important powers. Further, nobody other than the Greek party to the conflict would seriously consider a forced re-integration of the population segregated largely for 33 years and almost completely for 22 years.

> It is noteworthy that segregation was not a process restricted to the period from 1964-1974, but had been continuously taking place for more than a century. As part of this the number of integrated communities dropped from 346 in 1891, to 252 in 1931, to 114 in 1960 and to 48 in 1970; cf. *Patrick*, op.cit. page 12.

Insofar there is agreement, with the exception of the applicant, that the status quo of territorial separation of the Cypriot communities is a condition for peace unless it is changed by agreement with the parties to the conflict.

> I have presented a brief outline of the "Cyprus conflict" with an appreciation of the legal implications in my article "Zum Stand des Zypern-Konflikts unter besonderer Würdigung des Grundsatzes der Selbstbestimmung der Völker", Zeitschrift für Politik, Heymanns Verlag, Cologne and Berlin, 1991, pages 406ff.; further references to the above mentioned legal questions can also be found there.

2. The government of Cyprus.

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Under these circumstances, the assumption of a continued existence of the Republic of Cyprus of 1960 would be **fictional**.

> Based on the ethnic and cultural unity of the German people, even after its division, and the continuation of its common consensus on a unified political existence whose implementation was simply not possible due to predominant foreign influences, "Cyprus" cannot be compared to the situation of the German Reich after the creation of two separate German states following the Second World War. Whereas the German people never abandoned the will to coexist in a single German state and the basic consensus on its constitution, the Greek community not only fails to guarantee the Turkish community's right to self-determination in the form of participation, but also strictly refuses such participation. This refusal is confirmed by Greek Cypriot politics since at least 1963 which had become manifest from the beginning of the Greek Cypriot fight for independence in the form of general Greek Cypriot enthusiasm and willingness to sacrifice themselves for their integration into Greece ("enosis") or at least for Greek supremacy in Cyprus. This is particularly evident from the one-sided separation of the Greek Cypriot party to the conflict from the attachment to the Constitution of 1960. Further, their tactics at the consultations on a "Cyprus solution" under UN aegis, which aim at making this supremacy possible with their final determination being the achievement of supremacy itself: the consultations fail due to the rejection of truly effective guarantees for the self-determination and self-assertion of the Turkish Cypriot community by the applicant. The desire of the Greek Cypriot community to govern itself in its own territory without the restrictions of Turkish rights cannot, after the segregation of the communities, be denied with regard to the right of self-determination of the Greek Cypriots (to which they continuously refer). On the other hand, the Turkish community with its security interests in mind and fearing a reduction of its self-determination, prosecution and subjugation, is not willing to live in a state dominated by the Greek community. Further, contrary to the German Reich, since the Turkish conquest of Cyprus in 1571 there has never been a state, let alone a Cypriot republic, which did not guarantee the rights of self-determination or at least participation of the Turkish community.
>
> The situation in Cyprus is comparable to that of Germany only insofar as since 1949 international relations had to increasingly acknowledge the existence of two German states. Nobody would have thought it possible that the Federal Republic could have applied for the German Democratic Republic to become a member of the EEC as a means of expanding its sovereignty over a unified Germany at the expense of the former.

Nonetheless, if one was to accept the fiction of a "Republic of Cyprus" the applicant would not be the government of this state. This follows from the fact that it was not formed in accordance with the standardised rules of organisation and conduct of the Constitution of the Republic of Cyprus of 1960 and does not abide by its rules. This is true for the parliament to whom it owes its legality as well as for the president and the entire Greek Cypriot executive and judiciary.

> Cf. for details E. *Lauterpacht, CBE, QC*, Opinion on the Turkish Republic of Northern Cyprus - the Status of the two communities in Cyprus, of 19.7.1990, typo script and reproduced in the Circular No. A/44/968 - S 21463 of 9.8.1990, pages 8f. as distributed to the UN General Assembly.

The right to represent a republic of Cyprus can only be based on a legal relationship between the two communities as stated in the Constitution of 1960. However if one, like

the applicant, does not fulfil its obligations from such a legal relationship, one cannot base rights on it.

> E. *Lauterpacht*, Opinion, op.cit., quotes this principle of international law, which the appraisal study on Namibia by the International Justice Court (IJC 1971, page 46) referred to as "fundamental", and points out its applicability to the situation in Cyprus.

Even if one no longer regards the Constitution of 1960 as relevant, one arrives at no other conclusion. On the contrary, if it is not applicable any more one cannot consider the applicant as representing "Cyprus". The applicant is not a de facto government of a "Cyprus" which the applicant possibly intends to contrast to the Republic of Cyprus founded in 1960 in the wording of its applications, as its sovereignty does not extend to northern Cyprus. There is also no legal title apparent from which a right for such an extension could be deduced. The Constitution of the Republic of Cyprus of 1960 cannot justify such a right as the applicant owes its existence to the abolition of this constitution through its organs or predecessors insofar as the constitution demanded the representation and self-determination of the Turkish population. There is no question that the population of the northern part of the island does not want to belong to a Greek governed "Cyprus" and that it is not simply prevented from doing so by the use of force. Should this need repudiation, it would be apparent from the costly resistance of the Turkish Cypriots against Greek rule over several decades and the abandonment of their homes in the south by many of them to seek refuge in a safer and freer existence in the north of the island. The continuous politics of the repeated formation of organs of state in the north of the island confirms this. These politics and formations of organs took place before the eyes of the world whose monitoring was not obstructed but rather encouraged by the Turkish community. The fact that a large part of its population used to live in Northern Cyprus cannot support any territorial claims of the applicant or else, world peace would be endangered by many similar „justifiable" claims. Such demands would also be contradicted by the fact that the relocation took place as a result of the use of force by the Greek party to the conflict in its attempt to abolish the participatory rights of the Turkish community in the Republic of Cyprus which were guaranteed by the Constitution of 1960.

> Would demands based on international law, such as return or compensation, have to be acknowledged as a consequence of relocation, the conclusions presented here would not be affected and therefore it is not necessary to deal with such demands here.

3. The question of recognition.

The UN, the European Union as well as all states whose actions and proclamations have a bearing on Cyprus, with the exception of Turkey, since 1964, recognised the current government formed by only the Greek Cypriot community in Cyprus - since 1974 only southern Cyprus - as the government of "Cyprus" or a Republic of Cyprus, and deny the statehood of the Turkish Republic of North Cyprus. However, the well founded predominant opinion in international law is that the quality of being a state in accordance with international law is neither created nor dependent upon recognition.

Recognition does not have a "constitutive" but rather a "declaratory" effect; cf. *Delbrück* in *Dahm/Delbrück/Wolfrum*, op.cit., pages 186-189 including many references; Dieter *Blumenwitz*, Der Vertrag vom 12.9.1990 über die abschließende Regelung mit Bezug auf Deutschland, NJW 1990, 3041, 3047 and Gutachten, op.cit., page 5; Monroe *Leigh*, op.cit., page 21 with reference to *Crawford* and *Brierly*. Unclear are *Jennings/Watts* in *Oppenheim's* International Law, op.cit., page 133, according to these authors, recognition is "declaratory of an existing fact" but also "constitutive in its nature, at least so far as concerns relations with the recognising state".

The predominant opinion deserves to be preferred, because non-recognition of a structure that meets the requirements of a state in accordance with law, denies the rights and obligations and, consequently, the relations of a state in accordance with international law. In such case, denial of recognition prevents that the new state, on the one hand, can be made accountable and on the other hand, that it receives the protection of international law against aggression, that its members can enjoy inner and outer security and normal access to international communication in the broadest sense and that recognition thus fulfils its function of promoting peace and justice.

The function of recognition in promoting peace is emphasised by *Blumenwitz*, op.cit., page 5. The opinion to the contrary seems to be influenced by the wrongful assumption, that the freedom to decide on the recognition of states was a legitimate or even an appropriate instrument of enforcing policy, or that unjust proceedings in the creation of a new state should not be legalised. The opinion to the contrary also has difficulties with the resulting consequences of international law in cases in which only one state (as is the case of the Turkish Republic of Northern Cyprus) or a number of states recognise one but not the other state. The opinion which credits recognition with having a constitutive importance, attempts to disregard these difficulties as well as the conclusion that the non-existence of a state rules out the presence of rights and obligations, by accepting that "not completely sovereign states" have rights and obligations comparable to those of states, cf. e.g. *Jennings/Watts* in *Oppenheim's* International Law, op.cit., pages 123f. However, a difference is hardly discernible, as this construction, at least with regard to legal consequences, becomes almost identical with the theory of an only declaratory importance of recognition.

It is a correct opinion that the quality of being a state follows immediately from facts which are in need of assessment and objectively assessable. Therefore, an appreciation or judgement of events, on the basis of constitutional or international law, which led to the formation of a state, is irrelevant. With regard to the theory put forward in some of the literature, that rights cannot arise from injustice,

Jennings/Watts in *Oppenheim's* International Law, op.cit., pages 183f., refer to the principle "ex iniuria ius non oritur" and are of the opinion that it justifies refusing recognition as states to structures created in an unlawful manner; contrary to this *Kelsen*, Principles of International Law, 2. ed. 1966, pages 316f. : "The principle...ex iniuria ius non oritur...does not, or not without important exceptions, apply in international law"; further *Delbrück* in *Dahm/Delbrück/Wolfrum*, op.cit., page 133: "In the form of a constitutional order, created through revolution for example, ... one constantly comes across the experience that ex facto ius oritur"; on the conflict between the two principles, see also *Jennings/Watts* in *Oppenheim's* International Law, op.cit., page 186 ("the latter prevails in the long term"); incidentally, the

principle ex iniuria ius non oritur should be put forward to oppose the usurpation of a "Cypriot" state power by the applicant,

the following will deal with some of the aspects which are mentioned in the discussion on the Cyprus conflict to justify the withholding of the recognition of state quality from the Turkish Republic of Northern Cyprus.

a) On the question of a ban on secession.

There is no ban on secession in international law.

A ban on secession which the mother state does not at least tolerate, concludes from every constitution. However, according to constitutional law, the establishment of a new power after the coup with which the Greek Cypriots abolished the Constitution of 1960, does not preclude the validity of a new (revolutionary) constitution. A fortiori, international law must accept the completed coup after a new power of state has been established and recognise the latter.

Even if such ban on secession did exist, it would not be valid as it would be incompatible with the right of self-determination.

Cf. *Blumenwitz*, Gutachten, op.cit., page 3. E. *Lauterpacht*, Opinion, op.cit., pages 24f., refers to aspects, which justify a disapproval of secession in the cases of Katanga, Rhodesia and the "Bantustans", but which are absent with regard to Cyprus. Whereas the Cyprus conflict is the subject of treaty regulations of international law, such are absent in the aforementioned cases.

However, with regard to Cyprus such a question can be ignored. The only state from which a "secession" of the Turkish Republic of Northern Cyprus may be considered is the Republic of Cyprus founded in 1960. Regardless of the fact that from a rightful point of view this republic no longer exists, it was the Greek community and the organs or parts thereof supported by it, which abandoned this republic in a revolutionary process implemented since 1963 at the very latest, before the Turkish Cypriots formed their organs of state. The actions of the Turkish Cypriots cannot be detached from the previous **Greek Cypriot secession** from the Constitution of 1960, and from the exclusion of the Turkish Cypriots from the participation arrangement of 1960 by the **revolution** of the Greek Cypriot organs and community. After the Greek Cypriot secession, a Turkish Cypriot secession was no longer possible as the object of a secession no longer existed. The Turkish Cypriot community, prevented from participating in the implementation of the Constitution of 1960 by exclusion, cannot be prevented from founding its own successor state.

Similarly, E. *Lauterpacht*, Opinion, op.cit, page 19.

b) The right of self-determination.

Far from preventing the recognition of the Turkish Republic of Northern Cyprus as a state, the principle of self-determination encourages it.

The Turkish community had no other alternative but to exercise its right of self-determination and create the Turkish Republic of Northern Cyprus. This was a consequence of the Greek Cypriot revolution and secession connected with the creation of a Greek Cypriot state which the Greek community justified through their right to self-determination.

> Cf. *Tamkoc*, The Turkish Cypriot State. The embodiment of the Right of Self -Determination, London 1988. The possibility of separate exercise of the right to self-determination of the two Cypriot communities was already the basis of the participation of the United Kingdom in the founding of the Republic of Cyprus. This is evident in the statement of its Colonial Secretary *Lennox Boyd* of 19.12.1956: "... the exercise of self-determination in such a mixed population must include partition among the eventual options" (562 Parl. Deb. H.C. 5th ser. 1267-1270). This statement was confirmed and referred to as a "pledge" by Prime Minister *McMillan* on 26.6.1958, cf. E. *Lauterpacht*, Opinion, op.cit., page 4, and idem. in his appraisal study, material to point 47 of the 44. session of the General Assembly of the UN CA 44/928 S/21190) of 14.3.1990; cf. also Ludwig *Dischler*, Die Zypernfrage, Metzner Verlag, Frankfurt and Berlin, 1960, page 142.

The Turkish Cypriot community was also not merely a minority whose right to form their own state on the basis of self-determination could be denied. A state never existed in which this community was simply a minority. To the contrary, in the **Constitution of the Republic of Cyprus** of 1960 which the Greek and Turkish communities (leaving aside the participation of the United Kingdom and the Republics of Greece and Turkey) jointly gave themselves,

> cf. E. *Lauterpacht* and Monroe *Leigh*, appraisal study "Turkish Republic of Northern Cyprus", 31.5.1991, page 5,

the right of the latter to self-determination was guaranteed by just those rights of **participation** in fundamental matters of the state (e.g. defence, foreign policy, taxation and not only the common rights of minorities) which were abolished for the territory of the applicant by the Greek Cypriot revolution from 1963 onwards. The territorially integrated coexistence of two communities, that lack a basic consensus on fundamental aspects of the political, social and cultural cohabitation, makes such participation the only possible form of realising self-determination, however curtailed such self-determination might be. Without such a basic consensus (just as it is missing in Cyprus) democracy, based on the rule of the majority, through which self-determination is expressed, cannot exist. Simple minority rights do not contain such self-determination.

> *Blay*, Self-determination in Cyprus, Australian Yearbook of International Law, 1984, page 71, refers to "double self-determination" in this context.

Participation can not be forced without the willingness of the other participatory partner to co-operate. When one partner denies participation, only the option of complete self-

determination remains. It is the closest thing in spirit and purpose to an attested compromise on participation. He who violates constitutional rights of participation cannot refuse the entitled to demand complete self-determination. This is recognised by the term "defensive self-determination" in international law.

> Cf. *Blumenwitz*, Der Vertrag vom 12.9.1990 über die abschließende Regelung mit Bezug auf Deutschland, NJW, 1990, page 3043.

The obstruction which territorially integrated coexistence of different communities presents to complete self-determination has been removed from the Turkish as well as Greek communities since 1974.

> Cf. *Blumenwitz*, Gutachten, op.cit., page 4.

This circumstance gave both communities more state rights than the Constitution of 1960 allowed for. This result is not due to the Turkish community but must be attributed to the breakaway of the applicant and its predecessors from the Constitution of 1960

> which it justified with her right to the principle of self-determination .

and is to be welcomed from the view point of self-determination. It was particularly the applicant who profited from this development by ridding itself of the burden of Turkish participation (as opposed to the acceptance of a certain predominance of the Greek community in the solution of 1960) in her territory, perceived as intolerable by the Greek community.

Therefore, the right to self-determination does not stand in opposition to the state created by the Turkish Cypriots but is more likely to support it, especially under the conditions created by the Greek Cypriot community since 1963. When the right to self-determination is joined to the principle of **equal treatment** of states,

> cf. *Blumenwitz*, op.cit., page 5 with footnote 8, who points out that this principle is also applied to the Cypriot communities by the UN Security Council as stated in Resolutions 367 of 12.3.1975 (§§ 2 and 6) and 649 of 12.3.1990; on the right of the Turkish Cypriot community to equal treatment with the Greek Cypriot community as repeatedly confirmed by the institutions of the UN, cf. also E. *Lauterpacht*, Opinion, op.cit., pages 1, 3ff., 9ff. with references; cf. furthermore the "draft framework agreement" of 1986 and the "set of ideas on an overall framework agreement on Cyprus" by the Secretary General of summer 1989, published in a revised form in the Annex to his report to the Security Council of 21.8.1992 (S/24472) and the UN Security Council Resolution 774 (1992) of 26.8.1992 which confirms this version of the "set of ideas",

then, together with other valid reasons, a right of the Turkish Republic to international recognition as a state,

> under certain preconditions, which this republic meets, such a claim is approved of by Hersch *Lauterpacht*, Recognition in international law, 1947, pages 158-161; cf. also *Delbrück* in *Dahm/Delbrück/Wolfrum*, op.cit., pages 196 and 201,

or at least the justification of recognition, is the logical consequence.

> Thus, in the above mentioned "set of ideas" of the UN Secretary General (S/24472, Annex), the two Cypriot communities are referred to as "(federal) states" in the event that an arrangement to solve the conflict can be found. However, it is difficult to see how this quality can be attributed to the communities within a "framework agreement" if they do not already have the quality of being a state beforehand.

c) The territorial question.

Even the securing of a territory in order to secure the rights of the Turkish Cypriot community cannot be held against their founding of a state.

It was not constitutional law and certainly not international law that denied the Turkish Cypriots the right to defend the Republic of Cyprus against the massive Greek revolution since 1963 and particularly to resist the practice of unconstitutional state force.

> Cf. on this the **Appendix** of this appraisal study, footnote 18.

The refusal of the (revolutionary, secessionist Greek Cypriot) government to guarantee their rights under the Constitution of 1960, enabled the Turkish Cypriots to enforce their rights themselves, if need be through the use of force. These rights were aimed at Turkish Cypriot participation in the state, but particularly at the protection of their personal liberty, their bodily integrity and civil rights. That complete self-determination was the only alternative to participation, due to the lack of willingness of the other self-determination partner to honour the self-determination constitution, has already been shown. Besides the effective participation in the organs of the Republic of Cyprus, the Constitution of 1960 especially guarantees the Turkish Cypriots honouring of their **human rights**

> this was confirmed by the statement by the English Government on 17. February 1959 on the occasion of the Cyprus Conference in London, which states that the English Government intends to transfer sovereignty over Cyprus to the Republic of Cyprus on the condition that the basic human rights of the different communities in Cyprus are secured in agreements; cf. Cmnd 679, pages 11f.

and particularly the basic rights of the Turkish Cypriots. These not only include the principal right of **freedom from unconstitutional government** but also the basic rights to **life and integrity** and personal liberty, which the Constitution of 1960 disregarded, and the **protection of civil rights** by the government. These rights were subject to massive and repeated violation beginning in the 1950's, continuing in 1963

> *Patrick*, op.cit., page 12 mentions the inter-communal violence of 1958 as the reason for Turkish Cypriots to leave their homes (in conjunction with a "segregation" already taking place since the 19. Century), whereby the "violence" can only be regarded as the triggering cause if it was initiated by the Greek Cypriot side; with reference to 1963/64 the author writes on page 78: "The authors investigations reveal that the overwhelming majority of Turkish Cypriot refugees

> moved only after Turkish Cypriots had been killed, abducted or harassed by Greek Cypriots within their village, quarter, or in the local vicinity"

and becoming particularly evident in 1974. This was undertaken partly by the Greek Cypriot institutions, partly tolerated by them, partly - as early as 1963/64 but especially in 1974 - by Greek forces opposing the ruling Greek Cypriot government, who could not contain them and, to the extent that the Turkish Cypriots were being fought, did not desire to contain them as is apparent and in accordance with their frequently and openly expressed political convictions and objectives. The Greek Cypriot state organised or tolerated the violation of the basic rights of the Turkish Cypriots. At the very least, it was not willing or able to guarantee the **protection by the government of the rights of the Turkish Cypriots** as demanded by the constitution.

Since 1963, with the advent of the revolutionary process, the Turkish Cypriots could only defend their constitutional rights of participation, liberty and security and their civil rights against the Greek Cypriots by concentrating in enclaves spread over the whole island and in which they protected and administered themselves. However, in this form, the Turkish Cypriot community could not be sustained and defended indefinitely against the continuous Greek Cypriot attempts at subjugation. Particularly since the Greek Cypriot organs enforced a blockade of the enclaves which made maintaining adequate supplies for a humane existence of the inhabitants impossible, at times reducing their living conditions to a degrading and inhumane standard.

Even after a large proportion of the Turkish Cypriots had existed in unbearable uncertainty regarding the law, in fear and in under-supply for ten years, there was still no solution in sight which could have guaranteed the basic and participatory rights of the Turkish Cypriots. Moreover, the repeated violent measures of the Greek Cypriot organs to subjugate the Turkish Cypriots to a rule, which was relieved of all the restrictions the Constitution of 1960 had contained to protect the Turkish Cypriot community, continued. Under these circumstances, there was no other possibility for the Turkish Cypriots to assert themselves and to permanently retain their rights, than to further concentrate themselves in a continuous territory, in which they could permanently exercise their right to self-determination and where they could attempt to defend their inner and outer security. Faced with the revolutionary process initiated by the Greek Cypriot community, the Turkish Cypriots could base their right to concentrate in such territories on the self-determination and human rights acknowledged and laid down in the Constitution of 1960.

> It must be emphasised that this does not refer to the permissibility of the confiscation of private property or the curtailing of rights to residence.

What the Greek Cypriot community lost by this development is not absolute executive power over this territory, as they never actually possessed it either by law or in actual fact. Especially, the Greek revolution never succeeded in completely controlling the territory of the island and was not at all able to establish such control with regard to the Turkish community. The constitutional executive power of 1960 was lost for the whole territory of the island, not only for that of the Turkish Republic of Northern Cyprus.

However, the constitutional executive power of 1960 was not a Greek Cypriot executive power but a shared executive power of the Greek and Turkish communities. The loss of this shared executive power of 1960 was, however, initiated by the Greek Cypriot community by renouncing the Constitution of 1960. Thus, the change of its sovereign territory due to the consolidation of the Turkish Cypriot territory must be accepted by the Greek community.

> E. *Lauterpacht*, Opinion, op.cit. page 24 remarks that the principle of territorial integrity, as defined in the Declaration on the granting of independence to colonies and their peoples of 1960 and the Declaration on international law with regard to friendly relations and co-operation between states of 1970, cannot be applied without consideration of the specific state of affairs of Cyprus.

d) Turkish military action.

It has been submitted that the use of force connected to the Turkish military action of 1974 prevents the recognition of the Turkish Republic of Northern Cyprus as a state in accordance with international law for legal reasons. This view cannot be sustained.

aa) Intervention according to international law ?

International law acknowledges the right of a legitimate government to seek foreign assistance in quelling uprisings. Such support is not defined by international law as intervention, because it is not directed against a state.

> *Dahm*, Völkerrecht, Kohlhammer Verlag, Stuttgart, Volume I, 1958, page 202.

When the Turkish Cypriot community, defending their constitutional rights which were of constitutive importance for the state created in 1960 against usurpatory revolution, requested the assistance of Turkey and the latter provided the required assistance, this cannot, according to the state of affairs with regard to international and constitutional law as established by the Constitution and Treaties of 1960 as well as by the Greek Cypriot revolutionary process since 1963, be regarded as intervention.

> International law is also aware of the legal issue of "assistance in an emergency", however, not as a generally recognised principle, cf. *Dahm*, op.cit., Volume 2, pages 360 & 425.

The actions of Turkey were not directed against the Republic of Cyprus which, since 1964, no longer existed. Even if one assumes that the republic still existed, an organ, which could have decided in a legally binding manner whether the Turkish assistance was justified or not, did not exist.

Furthermore, the basis of the assistance was the **possible implementation** of parts of the Constitution of 1960 even after the Greek Cypriot revolution. The implementation of the constitution was still possible to a certain degree, even after the failure of

participation due to Greek Cypriot resistance, as its fundamental principles were to serve the **protection of the participatory and human rights** of the Turkish Cypriots.

bb) Treaty law.

However, even if the military action by Turkey in 1974 was regarded as an intervention in the sense of international law, it would still have been justified on the basis of Art. 4 of the **Treaty of Guarantee** of 16.8.1960 as concluded between the Republic of Cyprus, Greece, Turkey and the United Kingdom, which stipulates that Turkey was permitted "to take action with the sole aim of re-establishing the **state of affairs** created by the present treaty".

> Reproduced in the English parliamentary publication "Cyprus, July 1960, Her Majesty's Stationary Office, Cmnd. 1093", Part II, Appendix B, page 86.

According to its preamble, the Treaty of Guarantee is designed to guarantee the continued existence of the constitutional Republic of Cyprus based on basic articles. Article II Paragraph 1 refers to the state of affairs to be guaranteed as that which the basic articles "established". These basic articles are defined by Art. 182 in conjunction with Annex III of the Constitution of 1960. As shown in the Appendix of this appraisal study, they are intended to guarantee, besides the Turkish Cypriot participation, the human and civil rights of the Turkish Cypriots. The state of affairs which Turkey was permitted to re-establish through intervention, was not simply to keep Cyprus independent of Greece and to repulse Greek military intentions which had the unification ("enosis") of Cyprus and Greece as their object. It was, moreover, the rights of the Turkish Cypriot community to a **dignified existence** in the form of personal **security** and **participation** in the state, guaranteed by an **organisation based on the rule of law**, which were the objectives of the protection clauses of the Treaties and Constitution of 1959 and 1960.

> Parts of the Greek Cypriots and their political leadership may have been against the actions of their own forces in 1974 which were aimed at achieving Enosis. However, their aim of **subjugating** the Turkish Cypriots under the regime created through the Greek Cypriot revolution was identical to Greek Cypriot policy. This policy was always and still is at the centre of the Cyprus conflict, it was and is wholeheartedly supported by the Greek Cypriot community, its leadership and its organs. Consultations on the Cyprus conflict fail to achieve a tangible outcome because the Greek Cypriot party is unwilling to abandon this goal. It only wants "solutions" which could be regarded as intermediary steps towards achieving such a goal. As Archbishop Makarios repeatedly stated, the solution of 1960 was only a first step towards attaining the true aims of the Greek Cypriots: Cyprus is Greek and will remain Greek.

The Turkish military action was **necessary** to re-establish this part of the "state of affairs" of 1960, as the Turkish Cypriot community, faced with the Greek Cypriot superiority which was reinforced by Greece, would hardly have been strong enough. It is covered by the wording and purpose of the guarantee enablement ("to the action"), which intends all, as far as these are necessary, measures to be taken. In view of the state of affairs in 1974, the military action and creation of a continuous and safe **territory** was

appropriate. This is due to the fact that all other measures, especially the unsuccessful ten year endeavour of the UN, had proved incapable of securing the rights of the Turkish Cypriots as mentioned above, particularly their most basic security. This is especially the case since they were not even based on effective measures which could have attained this goal. The attacks on the Turkish Cypriot community by the Greek Cypriot government's considerably expanded military power, Greece and a number of armed irregular forces active in Cyprus during the summer of 1974, excluded any other measure but the reciprocal massive expansion of military power to protect them.

> Therefore, it is questionable, whether the Turkish military action of 1974, insofar as it was intended to defend Cyprus against unification with Greece, was necessary to the extent to which it was executed, as it is especially the second phase of this military action which remains controversial. Nonetheless, the intervention as a whole was certainly justified on the basis of the Turkish Cypriot's right to self-determination and security.

The further preconditions for intervention on the basis of the Treaty of Guarantee, namely, that the partners to the treaty consult each other in the event of the state of affairs, created by the basic articles of the Cypriot constitution, being threatened and that joint or agreed action proved impossible, existed: in the course of the conference of the partners to the treaty in Geneva from 25. to 30. July 1974 in which these consultations took place, no agreement could be reached. This was particularly so due to the fact that Greece supported the measures in breach of the constitution and treaties which threatened the Turkish Cypriot community and aimed at subjugating them to the Greek Cypriot regime.

Even if the removal of territories from the area of Greek Cypriot revolutionary achievements went too far and included expulsions in breach of international law, this cannot be considered here. The causes of the intervention, though possibly not its consequences, were in accordance with the law.

cc) The ban on the use of force in international law.

The conclusions presented here are also in accordance with Article 2 Paragraph 4 of the United Nations Charter (UN Charter) (Article 51 UN Charter is obviously of no relevance here). It is undeniably common practice of the UN that this fundamental principle of the charter does not prohibit intervention at the request or with the consent of the affected state. Consequently, it does not contradict intervention rights **as laid down in international treaties.**

> On the general effectiveness of guarantees of constitutional conditions in international treaties, cf. *Dahm*, op.cit., Volume I, pages 214f. with references. There are no sufficient indications that the UN Charter fundamentally changed anything in the situation of international law as described by *Dahm*. Whereas *Jennings/Watts* in: *Oppenheim's* International Law (op.cit.) acknowledge, in conjunction with a detailed discussion of the ban on the use of force, agreed rights to intervene with the purpose of guaranteeing a certain form of government in another country, they refer to the permissibility of the Turkish intervention of 1974 as "questionable" without stating the reasons for this; Volume I, pages 446f., footnotes 39 and 41.

There is no indication in international law of a ban on the use of force for the purposes of **defence**, such as was necessary for the defence of the Turkish Cypriots against the revolutionary Greek Cypriot seizure of power, which aimed at subjugating the Turkish Cypriots, as well as the permanent implementation and guarantee of the right to self-determination, personal liberty, physical integrity and civil rights of this community. The military action, through which Turkey aided the Turkish Cypriot community, was necessary to reinstate or, where they had been maintained through the unbearable sacrifices entailed by self-defence, to permanently guarantee these rights.

> The opinion, which also attempts to ban intervention in accordance with a treaty from existing international law, can only be supported to the degree to which the **legal object to be protected can be effectively guaranteed by other means.**

At least within the framework of such limitations on a ban on the use of force under international law, the intervention right of the Treaty of Guarantee cannot even be declared invalid if it is contrary to the general principles of international common law, as treaties supersede international law.

> E. *Lauterpacht*, Opinion, op.cit., page 24. *Blumenwitz*, Gutachten, op.cit., pages 9f., points out that neither the **Stimson Doctrine** (implemented by the Government of the USA in 1932 with regard to the proclamation of a state of Manchuko) nor the Resolution of the General Assembly 2625 (XXV), which reject the acceptance of territorial gains by the use of force, can be equally valid for all types of territorial changes regardless of their legal background. This doctrine and resolution do not consider the case of dismembratio and are not applicable to it.

dd) Consequences of intervention.

Even if the Turkish intervention had been in breach of law, this could not justify the refusal to recognise the Turkish Republic of Northern Cyprus as a state. The **process of this republic becoming a state preceded the intervention**. Its actual origin was the successful resistance of the Turkish Cypriots against Greek Cypriot usurpation since 1963 of their constitutional rights of 1960. Its legal peculiarity and basis is not only the principle of self-determination, but also the status of the Turkish Cypriot community, based on constitutional law and guaranteed by a treaty of international law in 1960, as one of the two bodies possessing participatory rights which founded and constituted the republic of 1960, and which they were obliged to support in the future.

> The particular treaty and constitutional rights of the Turkish Cypriots as a community, the Greek Cypriot revolution against the Constitution of 1960 guaranteeing these rights and the right of Turkey to intervene in order to guarantee the state of affairs that this constitution and the Treaties of 1960 created, are dealt with in the brief study of the process of the Turkish Republic of Northern Cyprus becoming a state by *Jennings/Watts* in *Oppenheim's* International Law, op.cit., pages 189f. and should have influenced the above mentioned statements pages 446f.

e) On the question of independence.

It has been argued, that only free and independent communities could be endowed with the qualities of state in accordance with international law.

> Such is the British state policy with regard to foreign relations of a community since 1980, cf. *Talmon*, op.cit., page 249; *Leigh*, op.cit., page 21 concurs.

Insofar as this refers to freedom through self-determination, this precondition has been met by the Turkish Cypriots particularly and only by establishing their republic. However, external independence in the sense of being a precondition to the term state cannot be questioned because of "dependence" on - military and/or economic - assistance. To the contrary, as state practice at all times has been and still is far from questioning statehood because of all kinds of other dependencies, especially also with the UN Charter being in force.

f) Consequences of the Cyprus Treaties of 1959/60.

It is true that recognition of being a state of both the Greek Republic of Southern Cyprus as well as the Turkish Republic of Northern Cyprus is incompatible with the agreements of the Cyprus Treaties of 1959/60: Art. I of the Treaty of Guarantee between Cyprus, Greece, the United Kingdom and Turkey of 18.6.1960 prohibits the Republic of Cyprus (and its communities) to undertake any such measures which further a division of the island. In Article II Paragraph 2 of the Treaty of Guarantee, Greece, Turkey and the United Kingdom obliged themselves to - "so far as it concerns them" - refrain from any activities aimed at a **division** of the island.

However, treaties cannot - notwithstanding the limitations of their influence on the relationship of the parties to a treaty to each other - be opposed to the constituent legal effects of the **founding of a state** if its preconditions on the basis of the general principles of international law are met. Further, as already mentioned above, the Turkish Cypriot founding of a state cannot be appreciated appropriately without reference to the revolutionary Greek Cypriot founding of a state which previously transgressed the ban on partition.

As a matter of fact, all states, with the exception of Turkey, and international organisations concerned with Cyprus have recognised the applicant, despite the violation of the Cyprus Treaties with regard to the unity of Cyprus by the Greek Cypriot revolution since 1963, as a government. It would be an inadmissible contradiction to this practice to refuse the Turkish Republic of Northern Cyprus its right to the recognition of its statehood, resulting from this revolution, on the basis of the terms of the treaties while the breach of these very terms by the Greek Cypriot organs has not been viewed as an obstacle in the recognition of these very organs as the government of a state under international law.

/...

The breach of law of a "venire contra factum proprium" as a general principle of law, derived from the idea of equity, is also acknowledged in current international law. Cf. *Delbrück* in *Dahm/Delbrück/Wolfrum*, op.cit., page 68.

g) Legal actions of the United Nations with regard to Cyprus.

The UN Security Council has repeatedly "called on all states" not to recognise the Turkish Republic of Northern Cyprus, despite no organ of the UN ever having justified this appeal with a deduction from international law.

Cf. Res. 541 of 18.11.1983 and Res. 550 of 1984. On this issue, the Security Council merely stated that the declaration of independence of the Turkish Republic of Cyprus was incompatible with the Cyprus Treaties; contrasting view in E. *Lauterpacht*, op.cit.

Further, the Security Council "disapproved" of the Turkish intervention in Cyprus without, however, ever declaring it to be in breach of law

cf. *Leigh*, op.cit, page 16, footnote 15 with reference to Security Council Resolution 360 (1974)

or even prohibiting it.

In its Resolution 353 (1974) of 21.7.1974, the Security Council still expressly restricted its appeal for a withdrawal of troops to those foreign troops, whose presence was "not authorised by international treaties".

The recommendations of the Security Council are based on its demand, as most recently formulated in Res. 1092 (1996) of 23.12.1996 (cf. e.g. the previous Res. 939 (1994) of 29.7.1994), that there must exist only "a single sovereignty" for Cyprus and that "any form of partition" must be excluded. These demands are incompatible with the other principles of the Security Council of "two politically equal communities in a bi-communal and bi-zonal federation", at least under the present state of affairs in Cyprus. The territorial partition and equality is a form of partition and it would be unrealistic, at best a deception, to consider an agreement to be workable, according to which the Turkish Cypriot community would submit to a Greek dominated decision in a controversy of fundamental importance to the fate of the island, or even in the case of a crisis or state of emergency. With this contradiction, the Security Council presents itself as the decisive obstacle to a solution in Cyprus.

However, the question whether institutions of the UN have the legal capacity, possibly on the basis of the UN Charter, to oppose universally applicable international law and to grant or revoke the quality as a state, may be left aside. Also, the question as to whether institutions of the UN can, without formal legal procedures and without considering all the facts and legal causes, determine the existence of statehood in a binding manner,

E. *Lauterpacht*, Opinion, op.cit., pages 2f. and 23-26 points out that the Security Council does not have the authority to draw up legal assessments, at least not without formal legal procedures, and should have at least considered the reciprocal link (Synallagma) between the Greek and Turkish rights on Cyprus, but also the fact that Turkish steps were reactions to Greek ones; this author rightly questions (op.cit., page 25) the judgement-like quality of the appeal by the Security Council not to recognise the Turkish Republic of Northern Cyprus as a

state, because its wording was formulated even before the Security Council debate had taken place in which it was passed.

does not have to be followed up. With regard to the statehood of the two Cypriot states, no formal acts by such institutions which accord themselves constituent or determining qualities, have been passed or published. Under Chapter VII and especially Art. 40 UN Charter (on the basis of the determination of a violation of peace in accordance with Art. 39 UN Charter), such acts are only binding if they are issued by the Security Council as „measures". The resolutions, however, as adopted by the Security Council with regard to the Turkish action cannot create legal obligations or international law.

Blumenwitz refers to this in the above mentioned appraisal study of 1990, page 11, footnote 23. When the call in question which was made by the Security Council cannot formulate international law, then the call is not only without binding force, it is also itself in breach of international law.

II. Admission of Cyprus into the European Union and general principles of international law.

The assertion of the applicant to be the legitimate government of "Cyprus" is the basis for its claim to **extend its revolutionary territorial sovereignty** ("liberated" from the constraints of the Constitution of 1960 and especially from the articles favouring the Turkish Cypriot community) to include the territory of the Turkish Republic of Northern Cyprus.

Such expansion of the territorial sovereignty of the applicant is only possible by the use of force; substantial armament by the applicant during the last few years have increased its capabilities and indicate, when taken together with its claims on sovereignty and its forceful measures between 1963 and 1974, its intention to return to military measures to achieve this expansion.

The applicant derives its right to implement sanctions, like the **economic embargo** of the Turkish community and the Turkish Republic of Northern Cyprus as undertaken by the applicant over the past decades, from the claim to sovereignty.

The embargo is implemented and enforced by threatening or exercising sanctions against the economic partners of the Turkish Republic of Cyprus and/or its population. Even the non-recognition of the Turkish Republic of Northern Cyprus as a state, produces by itself grave consequences, as it excludes international flights to its airports.

The European Union has already supported these claims by recognising the applicant as the legitimate government of "Cyprus".

The recognition and support results from the Treaty of Association with Cyprus as well as from the already mentioned consideration of the membership application by the organs of the European Union.

It also supports the embargo by, amongst others, claiming on the one hand the territory of the Turkish Republic of Northern Cyprus as an association territory and at the same time, on the other hand only recognising certificates of origin for the territory of the Turkish Republic of Northern Cyprus if they are issued by an organ of the applicant.

> Cf. the judgement of the European High Court of 5.7.1994 based on a reference by the English High Court concerning the case of the Minister of Agriculture, Fisheries and food ex parte Anastasiou - Pissouri - Ltd. And others, interveners Cypfruvex - C 342/92. The judgement, in its presentation of the "irrefutable facts" (already unjust with regard to what is supposed to be irrefutable), states that the sovereignty of the applicant extends "over the whole island" (with the exception of the English sovereign territories), at the same time concluding that it cannot exercise its "powers" in northern Cyprus. Thus, the High Court does not regard "sovereignty" to be actual power, but the claim to power (even if this in fact cannot be realised without the use of substantial force), the merits of which it did not even examine. The judgement thereby confirmed this claim.

Thus the European Union has already become a party to the Cyprus conflict. This position of the European Union would be aggravated by the admission of "Cyprus" upon the Greek Cypriot application. After the admission of the applicant as its member the European Union would not only be justified - as shown below - but would also be obliged to enforce legislation of Community institutions in the whole of the territory of Cyprus, if necessary by using its executive power. In the sense of claiming executive power over the whole of Cyprus, this right and obligation would extend to the territory of the Turkish Republic of Northern Cyprus which the European Union referred to as the "sovereign territory" of the applicant in Art. 16 of the Treaty of Association mentioned above.

1. Ban on the use of force.

a) Joint security politics.

With Art. J of the Treaty Establishing the European Union (Maastricht Treaty, EU Treaty) of 7.2.1992 in the version of the Resolution of 1.1.1995 (OJ EC No. L 1/1 - EU Treaty), the European Union introduced a **common foreign and security policy**. This has, according to Art. J.1 Paragraph 2 (Objective 2) EU Treaty, amongst others, the strengthening of the security of the EU members in all ways as its objective. Consequently, after an acceptance into the EU of „Cyprus" upon the Greek-Cypriot application, the European Union would be required to support the, already accepted, territorial claims of the applicant.

> This possibility has already been raised in the "Oxford Analytica" of 22.12.1994, which states: "If Cyprus became a member, the EU might find itself forced to give effect to the claim of the Greek government to exercise jurisdiction over the whole of Cyprus (a claim already upheld by the European Court of Justice) and thus become embroiled in a conflict with Turkey."

According to Art. J.1 Paragraph 3 (Objective 2) EU Treaty the union pursues the objective of the security of its member states by **joint action** in the areas in which the members have important interests in common. Was the applicant to be regarded as the legitimate government of Cyprus, then it would be difficult not to regard the enforcement of European Union law in all of Cyprus as a common security interest in the sense of this treaty principle. Regardless of this, Art. K 1 Paragraphs 2, 6 and 7 define as matters of common interest rules governing the crossing of the external borders of the member states and the exercise of the controls thereon as well as judicial co-operation in civil and criminal matters.

With regard to the territory of the Turkish Republic of Northern Cyprus a realisation of these objectives and interests is not possible without the use of the executive power of the applicant, who could not prevail without military assistance. With an admission on the basis of the application the European Union exposes itself to the possibility of having to participate in military actions against the Turkish Republic of Northern Cyprus. Should such action turn out to be in breach of the ban on the use of force in international law, then the participation of the European Union in such a breach would be a direct consequence of the admission on the basis of the application.

b) Community law.

According to Art. 5 of the Treaty of Establishment of the European Community of 25.3.1957 in the version of the Resolution of 1.1.1995 (OJ EC No. L 1/1 - EEC Treaty) the member states undertake all measures to implement the treaty obligations. According to Art. 8a EEC Treaty the citizens of the member states have **the right to freedom of movement and residence** within the territory of the member states. Art. 54 and 63 EEC Treaty specify the codification in European law of the **right of establishment** and the **freedom to provide services** within the community. Thus, community law cannot be implemented by the applicant without the use of executive power. Consequently, the conclusions of a) apply accordingly.

c) Use of executive power.

Furthermore, it cannot be denied that the acknowledgement alone of the territorial claims of the applicant by the granting of membership on the basis of the application, would encourage it to implement military measures against the Turkish Republic of Northern Cyprus, which would be in breach of international law, regardless of further actions, let alone statements, by the European Union. Likewise the refusal of international recognition of the Turkish Republic of Northern Cyprus as a state in the legal sense of the notion has encouraged the applicant to arm itself in such an excessive manner that the UN Security Council regarded it as appropriate to call for disarmament.

SC Resolution 1092 (1996) of 23.12.1996 No. 7 and the previous resolutions.

As a result, granting "Cyprus" membership on the basis of the applicants application could be regarded as supporting actions in breach of international law. Consequently, due to the fact that the mere threat of the use of illegal force is unacceptable in international law, even the admission of "Cyprus" as pursued by the applicant, would be a breach of the ban on the threat of the use of force in international law, due to the above mentioned articles of the European Union Treaty, which in the context of such admission must be considered as at the very least declarations of intent.

Dahm, op.cit., Volume 2, page 358.

d) Irrelevance of the quality of being a state.

Even if it was not demanded by international law to recognise the Turkish Republic of Northern Cyprus as a state, the European Union would be in breach of international law by implementing measures which would lead to acceptance in accordance with these articles. This is resultant from the stipulations of international law that states not recognised are also to be treated like states in many respects, especially that they enjoy the ban on the use of force.

Cf. *Delbrück* in *Dahm/Delbrück/Wolfrum*, op.cit., page 194, with reference to the Charter of the Organisation of American States of 1933.

Should the applicant use force against the Turkish Republic of Northern Cyprus to enforce EU Law on the latters territory, then the Turkish Cypriot Republic, even without being internationally recognised, would, in accordance with Art. 2. Part 4 UN Charter, be entitled to defend itself with the use of force.

Cf. *Delbrück*, ibid.

Moreover, this also applies for other sanctions as they can be the object of sensible counteractions. Thus, the European Union would at least indirectly become a party of a possibly armed conflict.

2. The legal acts and politics of conflict of the UN.

The application by the Greek Republic of Southern Cyprus for admission into the European Union is also incompatible with UN Security Council Resolutions and the politics of conflict of the UN. The European Union, by considering or accepting the application against the demands of the Security Council, contributes to a worsening of the conflict situation. This would especially be the case if acceptance was granted. The fact that institutions themselves, acting against their own resolutions and policy, welcome the membership talks and falsely expect them to contribute to a solution of the Cyprus conflict, does not change this.

/...

Cf. SC Res. 1092 (1996) of 23.12.1996 No. 17 and previous resolutions.

a) Ban on the use of force.

Even though the UN does not recognise the Turkish Republic of Northern Cyprus as a state, a forceful expansion of the sovereignty of the applicant and its preceding institutions both over the Turkish Cypriot enclaves established since 1964 and the territory of the Turkish Republic of Northern Cyprus, it has been and still is the opinion of the UN that this is not acceptable. This follows from the Security Council Resolutions

> the UN Security Council called on the "parties concerned" with the Cyprus conflict to refrain from any "action" or "threat of action" "that could aggravate the situation" or "action likely to worsen the situation"; cf. e.g. Resolution 186 of 4.3.1964 and Resolution 649 of 12.3.1990

and is impressively proven by the task and function of the UN forces which have been stationed in Cyprus since 1964 (UNFICYP).

b) Ban on union.

Furthermore, the Security Council has called for "non-alignment" of the Republic of Cyprus to be respected.

> Cf. SC Res. 367 (1975) of 12.3.1975; SC Res. 649, 716, more so SC Res. 774 (1992) S/24487, as well as SC Res. 939 and SC Res. 1092 (1996) of 23.12.1996 No. 14, according to which any solution to the Cyprus conflict "must exclude union in whole or in part with any other country". Even if these statements are primarily intended to exclude union with Greece, their applicability for becoming a member of the EU cannot be denied. For such a close association of several states as the application strives for is "union" and not only "alignment" in the meaning of the mentioned resolutions.

According to § 92 of the "set of ideas" of the UN Secretary General, matters pertaining to the membership of the Federal Republic (of Cyprus) (which according to the UN is to be created) in the European Union would be discussed and "agreed" before being presented to **both communities** for ratification in separate referendums. This appears incompatible with the above mentioned Security Council Resolutions whereby an agreement for solving the Cyprus conflict must exclude the "union" of Cyprus "with any other country". As it is impossible not to regard membership of the European Union as a "union" with its member states, it is inconceivable how the membership applied for can be reconciled with the "set of ideas".

C. Admission and the Constitution of the European Union.

I. Admission of states on the basis of ratification.

According to Art. O Paragraph 1 EU Treaty, only states can apply to become members of the union. In the case of the application being discussed here, a state of "Cyprus" which could be considered for membership is absent. However, even if such a state existed, the agreement regulating membership criteria according to Art. O Paragraph 2 [clause 2] EU Treaty requires amongst others the ratification of the applying state According to Art. 2 Point b) of the Vienna Convention on the Law of Treaties of 23.5.1969, ratification is the action by which a state proclaims in the international sphere to be bound by a treaty. Consequently, the Constitution of the European Union, with its prerequisite of ratification, would make the observance of those constitutional principles of the applying state, which are concerned with the validity of such a consent, a prerequisite for admission.

Was "Cyprus" to be admitted only principles of the Constitution of 1960 could be applied in considering whether such prerequisite is met for application. According to its Art. 185 No. 2 of this constitution **union is excluded**, thus the agreement cannot be effectively ratified.

> Art. 185 No. 2 of the Constitution of 1960 states: "The integral or partial union of Cyprus with any other state...is excluded". Membership of the European Union is "union with other states".

However, even if membership of the European Union was admissible, according to Art. 169 of the Constitution of 1960, it would need the **consent of a parliamentary law** as it is not a "treaty, convention or international agreement" of international law restricted to mere "economic co-operation". Obviously, this cannot be achieved as there is no constitutionally elected parliament of "Cyprus".

Should the European Union not be regarded as a "union" in the sense of Art. 185 No. 2, then the **Vice President** of the Republic of Cyprus would have the right, based on Art. 50 Paragraph 1 Point a) of the Constitution of 1960, to **veto** Cyprus becoming a member of an international organisation of which **Turkey is not a member**. Therefore, a ratification in accordance with the constitution cannot be achieved without consulting the Turkish Vice President of the Republic on this veto right.

II. Implementation of European Union law.

1. Organisational law.

In the institutions of the European Communities, member states can only be represented by institutions of theirs, legitimised to this end. Only institutions that were founded, exist and act in accordance with the constitution of the member state may be

regarded as legitimate. There are no such institutions of a Republic of Cyprus or of "Cyprus".

2. Other Community law.

The European Communities are based on the implementation and enforcement of their legal systems in the entire territory of the member states.

Examples are given above in Paragraph B II 1 a).

As shown in Paragraph B II, the applicant would not be able to fulfil the obligation of every member state, to enforce European law, in "Cyprus", even if it were permissible to do so despite the ban on the use of force in international law.

III. Territorial and personal sovereignty.

Art. 223 Paragraph 1 (b) EEC Treaty expressly permits every member of the EU to "take such measures as it considers necessary for the protection of the essential interests of its security ..." This suggests to justify the applicants claim, to control the entire territory of "Cyprus", with security interests and to view the creation of a strong military force, which was recently strengthened by the purchase of Russian missiles, as an instrument of realising this territorial claim.

According to press reports the missiles, which have not yet been delivered, are capable of reaching aircraft not only over Cyprus but also over Turkey from southern Cyprus.

As already mentioned above in Paragraph B II 1 a), the European Union would as a consequence make itself liable to the demand (the enforcement of which by at least Greece and the applicant would have to be expected) to participate in measures by the applicant with the aim of expanding its sovereignty over the territory of the Turkish Republic of Northern Cyprus.

On the other hand, in Art. 224 EEC Treaty the member states agreed "to consult each other with a view to taking together the steps needed to prevent the functioning of the common market being obstructed by measures which a member state may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war ..." By accepting "Cyprus" as an EU member on the basis of the application and thus recognising the applicant as the government of "Cyprus", the European Union would also confirm its recognition of the formers territorial claims, enforcement of which Art. 223 would explicitly permit the applicant to undertake. Contrary to Art. 224 EEC Treaty it would not only not prevent the applicant from undertaking warlike measures which would affect the functioning of the common market, but adopt them and thus import them into the European Union.

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IV. The Cyprus Treaties.

1. Contents.

a) Zurich and London Agreements (1959)

On 19.2.1959 the English, Greek and Turkish Prime Ministers accepted in London, on behalf of their governments, amongst others, agreements about the basic structure of a Republic of Cyprus as well as the above mentioned Treaty of Guarantee between the Republic of Cyprus, Greece, the United Kingdom and Turkey as the agreed basis for a permanent solution of the Cyprus problem. This had been initialled by the Greek and Turkish Prime Ministers and the representatives of the Greek and Turkish Cypriot communities (Archbishop Makarios and Dr. Küçük) on 11.2.1959 in Zurich. At the same time, the Greek and Turkish Prime Ministers and the representatives of the communities initialled an Treaty of Alliance.

> The agreements are reproduced in the English parliamentary publication Miscellaneous No. 4 (1959) Conference on Cyprus, Documents signed and initialled at Lancaster House on 19.2.1959, Cmnd. 679, reprint 1964.

The agreements on the basic structure of the Republic of Cyprus determine that it should have constitutional qualities. According to them a Republic of Cyprus should be created with separate state organs for the Greek and Turkish Cypriots. Besides original and exclusive jurisdictions, the institutions were to have veto rights against executive decisions and laws of the republic which touched on important interests of the communities. Changes of fundamental constitutional principles were to require the approval of the Turkish Cypriot parliamentary faction. Quotas were to be assigned to the communities for their representation in executive bodies and in the army. A Constitutional Court presided over by a neutral president was to watch over the observance of the Constitution of the Republic of Cyprus. This arrangement was to be protected by Guarantee and Alliance Treaties. § 8 of the "basic structure" accorded veto rights to the Greek Cypriot president and the Turkish Cypriot vice president on laws pertaining to foreign policy. § 21 prohibited the complete or partial union of Cyprus with any other state or its partition. On 19.2.1959 Archbishop Makarios and Dr. Küçük, acting as representatives of their communities declared in separate documents, the agreements of 11.2.1959 as the agreed basis for a permanent solution to the problems of Cyprus.

b) Nicosia Treaties (1960)

In the ensuing months, a Greek-Turkish constitutional commission drew up the Constitution for the Republic of Cyprus. Elections were held in December 1959 in which Archbishop Makarios and Dr. Küçük were confirmed as the representatives of their communities. On 1. July 1960 those involved came to an agreement on the final version of

the Treaty of Establishment of the Republic of Cyprus, the constitution, the Treaty of Guarantee and the Treaty of Alliance. On 16. August 1960 these treaties were signed.

> The treaties are reproduced in the English parliamentary publication "Cyprus, July 1960, Her Majesty's Stationary Office, Cmnd. 1093", Part II, Appendix A (page 13 - Establishment Treaty), Appendix B (page 86 - Treaty of Guarantee) and Appendix C (page 88 - Treaty of Alliance).

In Art. 5 of the treaty between the United Kingdom, Greece, Turkey and the Republic of Cyprus concerning the **establishment** of the Republic of Cyprus (Treaty of Establishment), the latter promises to guarantee the human rights and basic liberties of every person (as outlined by the European Convention on Human Rights, 4.11.1950) under its jurisdiction.

> Essentially, the treaty regulates the legal relationship between the United Kingdom and Cyprus, especially with regard to the reserve areas of the United Kingdom on the island.

The contents of the Treaty of Guarantee between the Republic of Cyprus, Greece, Turkey and the United Kingdom have already been outlined above (see Paragraph B I 3 d, bb). It serves to guarantee the continued existence of the conditions in Cyprus as established by the agreements and treaties of 1959 and 1960, especially the exclusion of any political or economic "union" between Cyprus and any other state and, to this end, obliges the treaty partners to prevent such unions.

According to Art. 182 of the Constitution of the Republic of Cyprus, the articles listed in Annex III to the constitution, which were taken from the Agreement of Zurich of 11.2.1959, are the basic articles of the constitution. Art. II and IV of the Treaty of Guarantee refer to these articles.

In Art. II of the Treaty of Alliance between Cyprus, Greece and Turkey, the signatories pledged to resist all attacks on the independence and territorial integrity of the Republic of Cyprus. A systematic interpretation of this promise which reflects its general sense, concludes that it also includes resistance against attacks by internal revolutionary forces which aim at subjugating the island's territory by abolishing the constitution of the republic. This is confirmed by the preamble to the Treaty of Guarantee, which states, that the purpose of the treaty is the recognition and preservation of the independence, territorial integrity and security of the Republic of Cyprus "as established and regulated", and thus defined, "by the basic articles of its constitution".

> The importance of this formulation as a "definition" of the Republic of Cyprus of 1960 as an object to be protected in accordance with the Cyprus Treaties is rightly emphasised by E. *Lauterpacht*, Opinion, op.cit., page 22.

2. The relationship between admission and the treaties.

It may be put aside as to whether the incompatibility of an admission of "Cyprus" into the EU with the Constitution of the Republic of Cyprus of 1960, diminishes the effectiveness of the admission in accordance with international law.

> The European Communities seem to hold that agreements may be valid for member states which are incompatible with Community Law, because Art. 234 EEC Treaty is limited to obliging member states to take all appropriate steps to eliminate such incompatibilities.

Certainly, the admission is in breach of oligolateral liabilities of agreements of international law, namely, the above mentioned (in Part 1) treaties between Greece, Turkey, the United Kingdom and the Republic of Cyprus of 16.8.1960.

The Treaty of Guarantee prohibits the Republic of Cyprus from joining the EU. At the very least it makes becoming a member dependant upon a ratification under Turkish Cypriot participation. Should one regard the applicant as a Government of the Republic of Cyprus, the applicant's breach of the treaty becomes apparent due to this republic and the applying "Cyprus" being considered identical. However, even if the applicant claimed to represent not the Republic of Cyprus but another "Cyprus" extending over the whole island, this (in fact non-existent) state would also be bound by the Cyprus Treaties. Though the continuity of the treaties with regard to revolutionary state succession is a controversial issue in international law (it tends to be denied).

> *Delbrück* in *Dahm/Delbrück/Wolfrum,* op.cit., pages 164f.

With regard to Cyprus it is decisive that the applicant is identical to the community which, with the intention of attaining a renunciation of a division of the island from the Turkish community, expressly accepted the Cyprus Treaties as a community through its representative. The Greek Cypriot community cannot evade the resulting obligation by referring to its own revolutionary actions, not even after it one-sidedly declared itself sovereign of all of Cyprus - a theoretical not factual claim - and set itself up - with partial success - as such.

3. Approval of the application for admission by Greece or the United Kingdom.

According to Article O Paragraph 1 [Satz 2] EU Treaty, acceptance of a new member into the European Union requires an unanimous decision by the Council, thus the approval of the United Kingdom and Greece. Greece and the United Kingdom are partners in the Guarantee and Alliance Treaties which they concluded with the Republic of Turkey. In these they pledged to guarantee a state of affairs which is fundamentally defined and influenced by the ban on Cyprus joining other states, if not absolutely then at least not without the approval of the Turkish community. By agreeing to "Cyprus" becoming a member of the EC, the United Kingdom and Greece would be in breach of their obligations resulting from these treaties.

4. The relationship between admission and the Constitution of the European Union.

According to Art. 234 EEC Treaty

> *"The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty."*

In accordance with this article, the time of entry into force can only be the time at which the signatory has become a member of the EC. The United Kingdom and Greece became members of the EEC after the signing of the Treaties of 1959 and 1960. Consequently, in accordance with Art. 234 EEC Treaty, the treaties concluded by these states with Turkey and the Republic of Cyprus retain their validity insofar as they were concluded between member states.

> The EEC Treaty itself is bound by the general principles of international law and can thus "not one-sidedly invalidate a treaty obligation" (between members and third party states) "based on international law", cf. Klaus *Vogel*, Europarecht und völkerrechtliche Verträge der Mitgliedsstaaten, in Detlef *Merten*, Reiner *Schmidt*, Rupert *Stettner*, eds., Der Verwaltungsstaat im Wandel, Festschrift für Franz Knöpfle, Beck Verlag, Munich, 1996, pages 387 and 393. (Complimentary regulations to Art. 234 EEC Treaty: Art. 103 to 106 EAEC Treaty.)

However, as shown above, the European Community regards the membership of states which have concluded treaties in accordance with international law but incompatible with community law, as compatible with the constitution of the community. Whether this is also the case in instances in which the very incompatibility
is based on a treaty which expressly rules out membership, is questionable. In any case, an admission contrary to such a treaty would undermine the confidence in the community to respect treaties.

(signed Chr. Heinze)
