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QUESTION OF CYPRUS

SECURITY COUNCIL
Forty-fifth year

Letter dated 7 August 1990 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General

I have the honour to submit, enclosed herewith, a letter addressed to you by His Excellency Mr. Özer Koray, Representative of the Turkish Republic of Northern Cyprus, to which is attached the text of a paper entitled "Turkish Republic of Northern Cyprus - the Status of the Two Communities in Cyprus" (see annex).

I would be grateful if my letter and its annex were circulated as a document of the forty-fourth session of the General Assembly, under agenda item 47, and of the Security Council.

(Signed) Mustafa AKSIN
Ambassador
Permanent Representative

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ANNEX

Letter dated 7 August 1990 from Mr. Özer Koray to the Secretary-General

Upon instructions from my Government, I have the honour to enclose herewith the text of an opinion paper entitled "Turkish Republic of Northern Cyprus - the Status of the Two Communities in Cyprus" written by eminent law Professor Mr. E. Lauterpacht, CBE, QC, dated 10 July 1990 (see attachment).

(Signed) Özer KORAY

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Attachment

TURKISH REPUBLIC OF NORTHERN CYPRUS

THE STATUS OF THE TWO COMMUNITIES IN CYPRUS

Opinion of Mr. E. Lauterpacht, CBE, QC

1. This Opinion deals with two related questions. One is the status of the two communities, Greek and Turkish, in Cyprus, in relation to the settlement of the Cyprus question. The other is the interpretation and significance of Security Council resolutions 541 (1983) and 550 (1984), both of which purported to pronounce unlawful and invalid the 1983 Declaration of Independence of the Turkish Republic of Northern Cyprus ("the TRNC") and called upon States not to recognize the TRNC.

2. In summary, the Opinion reaches the following conclusions:

Part I (paras. 3-32)

On the basis of an examination of the treaties and other instruments, including the Cyprus Constitution, concluded in 1959 and 1960, and of the resolutions of the Security Council and General Assembly, as well as of statements by the Secretary-General of the United Nations, it can properly be said that the Turkish Cypriot Community possesses the same political status as the Greek Cypriot Community, that the two communities participate in the negotiations for the settlement of the Cyprus question on an equal footing and that, it follows, the Greek Cypriot Community should not enjoy any privileged position in the negotiations, whether on matters of substance or of procedure, by reason of the fact that it presents itself as the Government of the Republic of Cyprus.

Part II (paras. 33-53)

(a) Resolutions 541 (1983) and 550 (1984) of the Security Council in so far, in particular, as they purport to treat the 1983 declaration by the TRNC of its independent statehood as incompatible with the 1960 Treaties of Establishment and Guarantee and as being legally invalid, and to call upon States not to recognize the TRNC, are legally not soundly based.

(b) The Security Council itself defined its concern with the affairs of the Republic of Cyprus in terms of the 1960 Constitution and of the Treaties of Establishment and of Guarantee concluded at the same time. The resolutions in effect purported to express legal conclusions based upon what must presumably have appeared to the Security Council at the time to be valid legal considerations. But because, as a matter of fact, the action of the Turkish Cypriot community clearly flowed from and was a reaction to the prior conduct of the Greek Cypriot community, and because the Greek Cypriot community owed duties to the Republic of Cyprus and to the Turkish Cypriot community no less than the latter did to the former, as a matter of law, no judgement could properly be passed by the Security Council upon the conduct of one side without at the same time passing judgement on the conduct of the other.

(c) The Security Council did not adopt this even-handed approach. Instead it dealt with the action of the Turkish Cypriot community in isolation. If it had assessed the situation as a whole, it could not possibly have concluded that the conduct of the Turkish Cypriot community violated the controlling legal instruments while the conduct of the Greek Cypriot community did not. Nor could it have reached any other conclusion than that the action of the Greek Cypriot community justified the conduct of the Turkish Cypriot community.

(d) The resolutions of the Security Council were, therefore, tainted by such a degree of selectivity and incompleteness as to render them arbitrary and discriminatory, and thus not well founded in law. It follows that the call to States not to recognize the TRNC was not legally justified. The action of the Security Council in this case was quite different to its action in relation to Rhodesia and the African bantustans where there were no controlling treaties. Accordingly, pending the settlement of the Cyprus question by negotiations between the two communities, the Security Council's call for non-recognition of the TRNC should not be maintained.

(e) It is wrong for the Security Council to express legal opinions more suited to a judicial than a political body. The Security Council does not adhere to judicial forms and cannot in the course of a debate on any situation probe the legal issues with the thoroughness and fairness of a judicial body. Its decisions should not, therefore, extend beyond the prescription of specific action aimed at maintaining or restoring international peace.

PART I. THE STATUS OF THE CYPRIOT COMMUNITIES IN THE CONTEXT OF THE SETTLEMENT OF THE CYPRUS QUESTION

3. The position of the Greek and Turkish parties in Cyprus in relation to the settlement of the Cyprus question is really quite straightforward. The two parties are separate communities of equal standing in the negotiations, each exercising its right to determine its own future and neither being subordinate to the other in any material respect. The disparity in numbers between them does not affect their equality of status in relation to the settlement of the Cyprus problem.

4. The positions of the communities thus described derives from a number of basic texts and is uniformly reflected in statements of the guarantor Powers, Greece, Turkey and the United Kingdom of Great Britain and Northern Ireland, and in acts of the United Nations, whether in the form of resolutions of the Security Council and the General Assembly or in statements of the Secretary-General.

The basic texts

1. Prior to the independence of Cyprus

5. An early acknowledgement of the status of the two communities - and a particularly significant one as emanating from the Colonial Secretary of Britain, at that time the country responsible for the governance of Cyprus - is to be found

in the statement of Mr. Lennox Boyd made in the House of Commons on 19 December 1956:

> "... it will be the purpose of Her Majesty's Government to ensure that any exercise of self-determination should be effected in such a manner that the Turkish Cypriot community, no less than the Greek Cypriot community shall, in the special circumstances of Cyprus, be given freedom to decide for themselves their future status. In other words, Her Majesty's Government recognize that the exercise of self-determination in such a mixed population must include partition among the eventual options."

This statement was confirmed by the Prime Minister, Mr. Macmillan, on 26 June 1958, when he also described the Colonial Secretary's assurances as "pledges".

6. This identification of the essential parties to the Cyprus situation and of their basic parity was carried through into the negotiations leading up to the independence of Cyprus. The Memorandum setting out the Agreed Foundation for the Final Settlement of the Problem of Cyprus, signed in London on 19 February 1959, took note "of the Declaration by the Representative of the Greek-Cypriot community and the representative of the Turkish Cypriot community that they accept the documents annexed to this Memorandum as the agreed foundation for the final settlement of the problem of Cyprus". 1/

7. The Zurich Accord, on which the London Agreement was based, incorporated the concept of the two communities in the first paragraph of the document setting out "Basic Structure of the Republic of Cyprus". This provided that:

> "The State of Cyprus shall be a Republic with a presidential régime, the President being Greek and the Vice-President Turkish elected by universal suffrage by the Greek and Turkish communities of the Island respectively."

The attribution to the Greek Cypriot community of the Presidency and to the Turkish Cypriot community of the Vice-Presidency was an understandable reflection of the greater numerical size of the Greek Cypriot community. But it contained no statement or acknowledgement of any superior constitutional status for the Greek Cypriot Community. Indeed, the "Basic Structure" is replete with provisions specifically assuring the respective rights of each of the two communities and providing for checks and balances to assure the rights of each, for example, it specifies a Council of Ministers composed of seven Greek Ministers and three Turkish Ministers, it vests executive authority in the President and Vice-President and grants them each a right of veto over decisions of the Council of Ministers and laws and decisions of the House of Representatives, in laying down that the House of Representatives should be elected in the proportion of 70 per cent for the Greek community and 30 per cent for the Turkish community, in the establishment of Communal Chambers for each community, in the specification that the Civil Service should also be composed as to 70 per cent of Greeks and as to 30 per cent of Turks, and so on.

2. The Cyprus Constitution of 1960

8. All the features of the Basic Structure were immediately implemented in many Articles of the Constitution of Cyprus, notably Articles 1, 2, 46-51, 57, 59, 60, 62, 67, 72, 73, 77, 86-111, 123, 125, 133, 153, 159, 171 and 173. Moreover, Article 182 provided that the Basic Articles of the Constitution (which were listed in Annex III and by and large are those listed above) could not in any way be amended. Article 185 provided that the territory of the Republic is "one and indivisible". It also excluded "the integral or partial union of Cyprus with any other State or the separatist independence". This provision was intended to prevent any Enosis or union with Greece by the Greek Cypriots and any union with Turkey by the Turkish Cypriots.

3. The internationalization of the Constitution: the Treaties of Establishment and Guarantee

9. These fundamental elements of the Cyprus Constitution were lifted onto the plane of international law by treaties contemporaneously concluded between Cyprus, Greece, Turkey and the United Kingdom. The Treaty of Establishment defined the territory of the Republic of Cyprus and contained a Preamble expressing the commitment of all the Parties to the maintenance of the status of the two communities by declaring their desire "to make provision to give effect to the Declarations" made by, inter alia, "the Representative of the Greek Cypriot Community and by the Representative of the Turkish Cypriot Community". It also contained - in a manner binding all parties - acknowledgement of the entitlement of the United Kingdom to retain the so-called "Sovereign Base Areas".

10. Even more direct and explicit in its terms was the Treaty of Guarantee, the parties to which were the Republic of Cyprus of the one part and Greece, Turkey and the United Kingdom of the other part. In the Preamble they

- stated

> "that the recognition and maintenance of the independence, territorial integrity and security of the Republic of Cyprus, as established and regulated by the Basic Articles of its Constitution, are in their common interest" (emphasis supplied) and

- expressed their desire

> "to co-operate to ensure respect for the state of affairs created by that Constitution".

11. The operative part contained three articles of dominant importance.

12. In the first, the Republic of Cyprus undertook to ensure the maintenance of "respect for its Constitution" as well as not to participate in any political or economic union with any State. (Art. 1)

13. In the second, Greece, Turkey and the United Kingdom, after noting the undertakings of the Republic of Cyprus, recognized and guaranteed "the state of affairs established by the Basic Articles of its [of Cyprus] Constitution" (Art. 2)

14. In the third, Greece, Turkey and the United Kingdom undertook that, in the event of a breach of the provisions of the Treaty, they would consult together.

> "In so far as common or concerted action may not prove possible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty." (Art. 4)

15. In addition, Cyprus, Greece and Turkey undertook to respect the integrity of the British Sovereign Base Areas and to guarantee the use and enjoyment by the United Kingdom of its rights therein. 2/

16. Thus, an essential and inescapable ingredient of the coming into being of the Republic of Cyprus was the concept of the balanced and guaranteed participation of both communities, Turkish no less than Greek, in every basic aspect of the Government of Cyprus. The exclusion from the governmental process of Cyprus of one or the other of the communities would mean that the Government so functioning would not be the Government of the Republic of Cyprus as contemplated and established by the international settlement and treaties concluded in 1960. Any such limping Government would lack constitutional legitimacy and, in so far as it claimed to represent the Republic of Cyprus, would as a matter of international law be in breach of the fundamental undertakings on the international plane given by the Republic in the 1960 Treaties regarding the bi-communal character of the Republic and its Government.

4. Recognition by the United Nations of the equal status of the Greek and Turkish Cypriot communities

17. With the one exception that will be examined more closely in part II of this Opinion (para. 33 and following), the practice of the United Nations has been strikingly uniform in its acknowledgement that the Cyprus problem involves the two communities and that in this involvement they stand on a footing of equality. This practice takes the form of resolutions of the Security Council and of the General Assembly, and of reports of the Secretary-General.

18. At the time of its first consideration of the problem in 1964 the Security Council noted the special position of the communities. In its resolution of 4 March 1964, the Security Council called upon "the communities in Cyprus and their leaders to act with the utmost restraint" and recommended that the Secretary-General should appoint a mediator who should use his best endeavours "with the representatives of the communities" to promote a settlement (S/5575). 3/

19. The acceptance by the Security Council of the primacy of the Constitution of Cyprus in the resolution of the problem and, therefore, of the entitlement of the Turkish Cypriot community to full participation in the government of Cyprus, is shown in the Security Council's resolution 353 (1974) of 20 July 1974, following

upon the Greek coup of 15 July 1974 and the intervention by Turkey in the exercise of its rights as a guarantor of the 1960 settlement. There, the preamble declared the concern of the Council "about the necessity to restore the constitutional structure of the Republic of Cyprus, established and guaranteed by international agreements". It may be noted, parenthetically, that that concern was reiterated 10 days later in the Geneva Declaration issued by the Foreign Ministers of Greece, Turkey and the United Kingdom when they urged that "negotiations should be carried on to secure the restoration of peace in the area and the re-establishment of constitutional government in Cyprus". The Foreign Ministers also acknowledged the status of the communities by agreeing "that representatives of the Greek Cypriot and Turkish Cypriot Communities should, at an early stage, participate in the talks relating to the Constitution", including the question "of an immediate return to constitutional legitimacy". Lastly, they "noted the existence in practice in the Republic of Cyprus of two autonomous administrations, that of the Greek Cypriot community and that of the Turkish Cypriot community".

20. On 30 August 1974, the Security Council again acknowledged the role of the two communities by expressing its appreciation to the Secretary-General for the part he played in bringing about talks between the leaders of the two communities (resolution 361 (1974)).

21. Later in the same year, the General Assembly entered the picture by adopting a resolution that, among other things, stated that it "considers that the constitutional system of the Republic of Cyprus concerns the Greek Cypriot and Turkish Cypriot communities" and "commends the contact and negotiations taking place on an equal footing, with the good offices of the Secretary-General, between the representatives of the two communities, and calls for their continuation with a view to reaching freely a mutually acceptable political settlement, based on their fundamental and legitimate rights" (General Assembly resolution 3212 (XXIX) of 1 November 1974). This resolution was endorsed by the Security Council in resolution 365 (1974) of 13 December 1974.

22. On 13 February 1975, the Turkish Cypriot community proclaimed the Turkish Federated State of Cyprus ("TFSC"). According to the Introduction to the text of the Constitution of the TFSC published on 1 July 1975 the Turkish Cypriots had by February 1975 found that, having regard to developments since 1963,

> "it was absolutely necessary for the Turkish Cypriot Community to make a fundamental re-organization of its internal structure in the light of the large region which it had to administer".

The Security Council expressed "regret" at this development

> "as, inter alia, tending to compromise the continuation of negotiations between the representatives of the two communities on an equal footing" (resolution 367 (1975), para. 2).

There is, of course, an inherent contradiction in the resolution in so far as, on the one hand, it stresses negotiations between the communities "on an equal footing" and, on the other, it regrets the assertion by the Turkish Cypriot

community of the quality of statehood that evinced the entitlement and need of that community to possess equal standing as a State with the Greek Cypriot community. But in any event, it is sufficient to note the continuing identification by the Security Council of the role of the two communities on an equal footing.

23. Throughout this period the approach of the Secretary-General to the two sides in the dispute had consistently been on the basis that the talks were between the two communities, not between the Republic of Cyprus and some secessionist body. His approach is reflected in his interim report on discussions regarding the powers and functions of a federal government. This was expressed in terms of his having "met ... with the representatives of the Greek Cypriot and Turkish Cypriot communities" (United Nations document S/11789 of 5 August 1975). Also, in his report of 8 December 1975 (S/11900 and Add.1) the Secretary-General expressed the view that in the then circumstances the best available means of making progress towards a settlement "is through continued talks between the representatives of the two communities".

24. This view was echoed in General Assembly resolution 3395 (XXX) of 20 November 1975, when the Assembly called

> "for the immediate resumption in a meaningful and constructive manner of the negotiations between the representatives of the two communities, under the auspices of the Secretary-General, to be conducted freely on an equal footing with a view to reaching a mutually acceptable agreement based on their fundamental and legitimate rights".

For its part, the Security Council endorsed this wording by repeating it in the preambles to resolutions 391 (1976), 401 (1976) and 410 (1977).

25. In the formal outcome of the ensuing discussions between the two communities there was no departure from the concept of negotiation on an equal footing. The "High-Level Agreement" of 12 February 1977 between President Makarios and President Denktas declared that "we are seeking an independent, non-aligned, bi-communal Federal Republic". Bi-zonality was also accepted: "the territory under the administration of each community should be discussed ..."

26. Later in the same year the Security Council again called upon "the representatives of the two communities" to resume negotiations (resolution 414 (1977) of 15 September 1977), as did the General Assembly in the by now well-hallowed phrase "negotiations between the representatives of the two communities, to be conducted freely on an equal footing" (resolution 32/15 of 9 November 1977).

27. The next High-Level Agreement (the so-called "10-Point Agreement") of 19 May 1979 between President Denktas and President Kyprianou in no way departed from this approach. Even though the Agreement did not restate the approach expressly, it accepted it impliedly. This Agreement was referred to in General Assembly resolution 34/30 of 20 November 1979 when "the representatives of the two communities" were called on to resume negotiations "on an equal footing". Similar wording also appeared in General Assembly resolution 37/253 of 13 May 1983.

28. There began in December 1981 a series of Security Council resolutions which, in renewing the mandate of UNFICYP (as many resolutions had previously done) also noted that "the parties have resumed their intercommunal talks". (See resolutions 495 (1981), 510 (1982), 526 (1982) and 534 (1983).)

29. In short, for the period ending in November 1983 (when the Turkish Cypriot community declared the establishment of the TRNC), there is a clear pattern of acknowledgement by the United Nations of the separate status of the two communities in Cyprus, of the requirement that they should negotiate on "an equal footing" and that the eventual solution should take the form of a unified state, albeit bi-zonal in character.

30. As this exposition of the position of the United Nations regarding the status of the Cypriot communities has so far been presented in chronological order, it might be expected that the next item for mention would be the developments in the United Nations following, and related to, the declaration of the independence of the TRNC on 15 November 1983. However, this event occasioned the adoption of views in the United Nations which, upon closer scrutiny, appear not to be fully consistent with the main trend of United Nations emphasis upon the separate but equal status of the two communities. For this reason, it will be convenient briefly to postpone the treatment of that episode to part II of this Opinion.

31. The remainder of what needs to be said about the approach of the United Nations to the status of the two communities is brief. In general, not only has the United Nations not departed from the pattern established before 1983; it has in fact reiterated its emphasis upon the equal status of the two communities. Thus, in the Secretary-General's "Talking points" as delivered at his Vienna meeting with the representatives of the two sides on 6 and 7 August 1984, he said (emphasis supplied):

> "As regards the establishment of a central government for the federal republic, it will be politically imperative to find a proper balance between the equal political status of the two communities, the unity of the country, and the functional requirements of a government capable of fulfilling effectively the powers assigned to it."

This approach has marked all the Secretary-General's contributions since that date including, for example, the "Draft Framework Agreement on Cyprus" presented by him on 29 March 1986. Again, in his opening statement at the meeting held in New York in February 1990, he said:

> "Cyprus is the common home of the Greek Cypriot community and of the Turkish Cypriot community. Their relationship is not one of majority and minority, but one of two communities in the state of Cyprus. The mandate given to me by the Security Council makes it clear that my mission of good offices is with the two communities. My mandate is also explicit that the participation of the two communities in this process is on an equal footing." (S/21183, p. 7)

Later in the statement the Secretary-General also said:

> "The political equality of the two communities in and the bi-communal nature of the federation need to be acknowledged. While political equality does not mean equal numerical participation in all federal government branches and administration, it should be reflected inter alia in various ways: ... and in the equality and identical powers and functions of the two federated states." (ibid.)

32. Most recently, the Security Council, in its resolution of 12 March 1990 (649 (1990)) called upon

> "the leaders of the two communities to pursue their efforts to reach freely a mutually acceptable solution providing for the establishment of a federation that will be bi-communal as regards the constitutional aspects and bi-zonal as regards the territorial aspects in line with the present resolution and their 1977 and 1979 high-level agreements, and to co-operate, on an equal footing, with the Secretary-General in completing, in the first instance and on an urgent basis, an outline of an overall agreement, as agreed in June 1989".

PART II. THE ESTABLISHMENT OF THE TRNC AND SECURITY COUNCIL RESOLUTIONS 541 (1983) AND 550 (1986)

33. On 15 November 1983 the establishment of the TRNC as an independent State was declared by the Turkish Cypriot people. This took a step further the process of separate political identification of the Turkish Cypriot community that had been initiated on 13 February 1975 by the proclamation of the TFSC. The difference now was that, whereas the TFSC was essentially a restructuring "of the autonomous Turkish Cypriot administration" (see the statement of Mr. Denktas issued on 13 February 1975) that had come into being in the period since the subversion of the Constitution by the Greek Cypriots in December 1963, and made no formal claim to independence, the TRNC was declared to be an independent State.

34. The reaction of the Security Council was expressed on two occasions. The first was in resolution 541 (1983) of 18 November 1983. The Security Council stated its "concern" at the Declaration, "considered" that the Declaration was "incompatible with the 1960 Treaty concerning the establishment of the Republic of Cyprus and the 1960 Treaty of Guarantee", "deplored ... the purported secession of part of the Republic of Cyprus" and concluded that the Declaration was "legally invalid", called for its withdrawal and called upon all States not to recognize any Cypriot State other than the Republic of Cyprus.

35. The second Security Council resolution, adopted six months later on 11 May 1984, was resolution 550 (1984). After declaring in its preambular part the concern of the Security Council at the "further secessionist acts" it

> "condemns all secessionist actions, including the purported exchange of ambassadors between Turkey and the Turkish Cypriot leadership, declares them illegal and invalid and calls for their immediate withdrawal".

The Security Council also reiterated its call to all States not to recognize "the purported State" of the TRNC.

36. It is evident that the position of the Security Council in relation to the TRNC is predicated upon the Council's assessment of the legal position. This was declared in the resolutions in two important legal findings which are essentially as follows:

- the 1983 Declaration of the TRNC "is incompatible with the 1960 Treaty concerning the establishment of the Republic of Cyprus and the 1960 Treaty of Guarantee"; and

- the creation of the TRNC is "legally invalid".

Each of these propositions calls for closer scrutiny.

1. The proposition that the establishment of the TRNC "is incompatible with the 1960 Treaty concerning the establishment of Cyprus and the 1960 Treaty of Guarantee"

(a) "The 1960 Treaty concerning the establishment of Cyprus"

37. This is, presumably, to be taken as a reference to the treaty that is generally known as "the Treaty of Establishment". To the extent that this Treaty can be said to be binding upon the Turkish Cypriot community (since, given the denial by the Security Council of the existence of the TRNC, the Treaty clearly cannot be binding on the latter entity), this must derive from the preambular provision in which the stated parties (the United Kingdom, Greece, Turkey and the Republic of Cyprus) express their desire

> "to make provisions to give effect to the ... Declarations made at the [London] Conference ... by the Representative of the Greek Cypriot Community and by the Representative of the Turkish Cypriot Community". 4/

The operative points of these declarations were that each representative

> "accepts the documents and declarations as the agreed foundation for the final settlement of the problem of Cyprus".

The principal item in the "documents and declarations" there referred to included the "Basic Structure of the Republic of Cyprus" (already referred to, see above, para. 7), all the elements of which were carried through into the Cyprus Constitution of 1960. The absolutely fundamental feature of this Structure was the joint participation in the Government of Cyprus of both the Greek and the Turkish Cypriot communities in the precise, detailed and, above all, balanced manner set out in those documents. Now, while it is obviously true that the 1983 proclamation of the existence of the TRNC as an independent State is incompatible with that structure, it is (and, equally, was at the time of the adoption of the Security Council resolutions 541 (1983) and 550 (1984)) absurd to disregard the undoubted fact that the dominant and controlling features of the Basic Structure and the

Constitution had been inoperative for a score of years, since the time (in 1963-1964) when the Greek Cypriot community had effectively excluded the Turkish Cypriot community from the scheme of power-sharing established by the Basic Structure and the Constitution.

38. This is not to say that the 1960 Treaty of Establishment was no longer in force in 1983. It is only to say that if the Security Council attached importance to the idea of compatibility of the conduct of the Turkish Cypriot community with the Treaty, it should have attached the same importance to the compatibility with that Treaty of the conduct of the Greek Cypriot community. By failing to do so, the Security Council not only signally failed to apply in an objective and even-handed manner the substantive legal requirements to which it had itself made reference; it also failed to adhere to the standard of equal treatment that it had repeatedly affirmed in its use, in relation to the negotiations between the two sides, of the words "on an equal footing".

39. In short, if the Security Council had taken a whole (as opposed to an incomplete) view of the situation in 1983, it should not have found that the TRNC Declaration was "incompatible" with the 1960 Treaty of Establishment without also having found that the conduct of the Greek Cypriot community had for the previous 20 years been "incompatible" with the 1960 settlement and, moreover, that it was that conduct of the Greek Cypriot community that had led directly to the reaction of the Turkish Cypriot community. There can be no legal basis for holding one party to the terms of an agreement without predicating the requirement of an equal degree of compliance by the other. There should be recalled in this connection the statement by the International Court of Justice in the Namibia Advisory Opinion (ICJ Reports 1971, at p. 46) of what it termed "one of the fundamental principles" governing the international relationship involved there:

> "... a party which disowns or does not fulfil its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship".

That statement is equally applicable to the Cyprus situation.

40. The failure of the Security Council to conform to these basic and controlling legal considerations undermines comprehensively the rationality and persuasiveness of its resolutions and, hence, the legal worth of those resolutions. The fact that seven years have passed since the adoption of those resolutions cannot serve to validate the unsound legal approach then adopted. There is nothing to prevent the Security Council from now endeavouring to put matters right by seeking to match the approach adopted in these two resolutions to the undoubted historical facts; indeed every legal consideration militates in favour of the adoption by the Security Council of a more principled position that would make a positive contribution to the settlement of the question, namely, the retraction of its denial of the legality and validity of the action of the Turkish Cypriot community and of its call to refrain from recognition of the TRNC. 5/

(b) "The 1960 Treaty of Guarantee"

41. Security Council resolution 541 (1983) also refers to the incompatibility of the Turkish Cypriot action with the 1960 Treaty of Guarantee. All the observations made above regarding the 1960 Treaty of Establishment are equally applicable to this Treaty. In addition, however, it is appropriate to note that this Treaty, even more expressly than the Treaty of Establishment, gives international standing to the Basic Structure and the Constitution of 1960. Thus, in the Preamble, the Parties state the consideration

> "that the recognition and maintenance of the independence, territorial integrity and security of the Republic of Cyprus, as established and regulated by the Basic Articles of its Constitution, are in their common interest".

The reason for giving emphasis in the phrase just quoted to the words "as established and regulated by the Basic Articles of its Constitution" is that the effect of these words is to define that "Republic of Cyprus" of which the independence and territorial integrity is to be recognized and maintained. In terms of the Treaty of Guarantee, a Cyprus that is not regulated by the Basic Articles of its Constitution is not "the Republic of Cyprus" at all and it follows that the assertion of the independence of the TRNC cannot be an unlawful secession.

42. Reference must also be made to Article 1 of the same Treaty:

> "The Republic of Cyprus undertakes to ensure the maintenance of its independence, territorial integrity and security, as well as respect for its Constitution.
>
> It undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever. It accordingly declares prohibited any activity likely to promote, directly or indirectly, either union with any other State or partition of the Island."

43. The Security Council has evidently taken the view that this Treaty is directly binding upon the Turkish Cypriot community, otherwise the Security Council could not have deemed the 1983 Declaration of the TRNC to be "incompatible" with that Treaty. But if that is the case and if the Treaty is binding on the Turkish Cypriot community, it must be at least as binding on the Greek Cypriot community, if not more so, because it is that community which is holding itself out to be "the Republic of Cyprus".

44. The Security Council was, therefore, in error in failing to apply the terms of the Treaty of Guarantee equally to both communities. It is, in the historical circumstances of the situation, impossible to attribute a responsibility to the Turkish Cypriot community for conduct said to be "incompatible" with the Treaty of Guarantee without, at the same time, assessing the relevance to the situation of the conduct of the Greek Cypriot community and, in particular, its deliberate disregard of the terms of the Cyprus Constitution throughout the period of 20 years preceding the establishment of the TRNC.

2. The proposition that the 1983 Declaration of the TRNC is "legally invalid"

45. The express statement by the Security Council, both in paragraph 2 of resolution 541 (1983) and in paragraph 2 of resolution 550 (1984) that the 1983 Declaration is "legally invalid" requires consideration of the question: by reference to what law is this legal invalidity to be determined? There are only two possibilities: one is the constitutional law of Cyprus; the other is international law.

46. As regards the constitutional law of Cyprus, it will be clear that no assessment of the legal validity of the conduct of the Turkish Cypriot community can be carried out without a comparable consideration of the legal validity of the conduct of the Greek Cypriot community. The two legal situations are necessarily interconnected. Any assessment of the one without a corresponding assessment of the other is, therefore, bound to be inherently flawed. But more than that, as already stated, any consideration of the one without consideration of the other contradicts the policy reflected in the Security Council's own declared position that the parties must negotiate "on an equal footing" - an approach which logically carries with it the principle, necessarily part of any lawyer's approach to the consideration of an issue between two parties, that both must be treated with perfect equality.

47. There may, of course, be some who attach special weight to the fact that the Greek Cypriots are in a numerical majority in Cyprus. That consideration may be relevant to the political act of distributing power and positions within the Constitution. This is shown by the fact that, for example, the 1960 Constitution provides that the Council of Ministers shall be composed of seven Greek Ministers and three Turkish Ministers (Art. 46) and that 70 per cent of the members of the House of Representatives shall be elected by the Greek community and 30 per cent by the Turkish community. But inequality of numbers cannot generate inequality of obligation. The fact that one community may constitutionally be entitled to more Ministers or more representatives than the other does not mean there is some corresponding entitlement the more freely to reject the duty of compliance with an agreed Constitution. The numerical majority of the Greek community cannot be invoked to justify fundamental departures from the Constitution by that community while insistence is still placed on conformity by the Turkish community with its obligations under the same instrument.

48. In so far as the "illegality" of the TRNC action is thought to derive from international law, the consideration already given above to the relevance and operation of the 1960 Treaties should be sufficient to dispose of that point.

49. The possibility remains, however, that some may see in the references to national unity and territorial integrity in the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 1960), and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970), a reason for characterizing the TRNC declaration as illegal. No doubt these prescriptions are of general importance, but the fact of their

generality must be emphasized. In contrast, the present situation is very specific - especially in the relevance to it of the 1960 Treaties and the Basic Structure and 1960 Constitution which are endorsed and guaranteed in those Treaties. It is axiomatic and beyond discussion that treaties override customary international law. The general terms of the Declarations on colonialism and on principles of international law - which at best are no more than customary international law - must give way to the explicit and clear requirements of the relevant treaties.

50. This same consideration bears with special weight on any supposed similarity between the present case and the other episodes in which the Security Council has called upon States not to recognize certain secessionist or new entities. Such action was taken indirectly over Katanga and expressly over Rhodesia and the African "bantustans". But they are totally distinguishable from the present situation. The principal point of distinction is that they were not affected by any controlling treaty - in contrast with the role here of the 1960 Treaties of Establishment and of Guarantee. A second point of distinction is that in the last two of those cases the inhibition on recognition derived from the fact that the establishment of the entity involved a continuance, in one or another form, of the concept of colonialism. That certainly is not true of the claim to independence by the Turkish Cypriot community.

51. The truth of the matter is that in determining that the establishment of the TRNC was illegal and invalid, and in attaching to that determination the sanction that States should not recognize the TRNC, the Security Council was evidently purporting to act in a judicial capacity. That is the only proper description of the conduct of anyone or any body that claims the right to make findings of "illegality" or "invalidity". Yet in so acting the Security Council did not behave in the manner appropriate to the performance of a judicial function. True, it heard both sides, in the sense that it heard speeches from President Denktas as well as from the representative of the Greek Cypriot community. But having regard to the range and complexity of the issues upon which it ventured directly or indirectly to make a finding, namely, the conformity with the 1960 Constitution of the conduct of the two communities, its scrutiny of the situation was at best superficial. The judgement, in the form of a draft resolution, was prepared and was in circulation before the debate even took place - an order of proceeding that is in no way compatible with the judicial process of ascertaining facts and weighing arguments before reaching a reasoned conclusion.

52. It must, of course, be acknowledged that the Security Council is not organized or intended to act as a judicial body. But in that case, it should be recognized that the conduct of the Security Council should stop short of passing judgement upon legal issues. Decisions of the Security Council should be limited to prescribing a course of action directed towards eliminating the situation that amounts to a threat to the peace, a breach of the peace or an act of aggression. That prescription should be founded on the primary responsibility of the Security Council to maintain international peace and security. If threshold determinations of law are necessarily involved, they should only be expressed if they can be subjected to proper judicial review. Even though this view of the matter is not one that has commended itself to the Security Council over the years, the validity

of these considerations is such that it is proper to draw attention to them in the hope that, at least in this case, the injustice that flows from this practice may be remedied.

Notes

1/ Declarations to this effect were signed by Dr. Kutchuk (representing the Turkish Cypriot community) and Archbishop Makarios (representing the Greek Cypriot community) on the same day.

2/ This obligation has particular relevance to the apprehension expressed in some quarters in the United Kingdom regarding the possible effect that recognition by the United Kingdom of the TRNC might have upon the British position in the sovereign base areas. In countering any threat to its position, the United Kingdom would be entitled to call upon the help of its co-guarantors.

3/ The terminology used by the Security Council has occasionally varied. Thus on 22 December 1967 it invited "the parties" to avail themselves of the good offices offered by the Secretary-General and called upon "the parties" to show moderation and restraint (resolution 244 (1967)). While this wording clearly covers the two communities, it also appears to have been intended to cover the States involved, namely, Greece and Turkey. Similar language also appears in later resolutions - most of which dealt with the renewal of the mandate of the United Nations Peace-keeping Force in Cyprus (UNFICYP).

4/ There is no other provision in the Treaty of Establishment which contains any commitment by the two Cypriot communities to observe the terms of the settlement.

5/ It may be added that the concern that the Security Council has shown over the action that Turkey, as a guarantor of the constitutional structure of Cyprus, was obliged to take in 1974 and thereafter can have no legal bearing upon the identification of the responsibility of the Greek Cypriot community for the prior breach of the Basic Structure and the Constitution in the decade preceding that intervention.
