Self-Determination in Cyprus: The New Dimensions of an Old Conflict

By S.K.N. Blay
Lecturer in Law, University of Tasmania

Introduction

Since the Republic of Cyprus attained independence in 1960, its political history has been marked by inter-ethnic conflicts that have sometimes threatened world peace and security and left no semblance of communal harmony in the territory.[1] At the centre of the conflicts are Greek Cypriots and Turkish Cypriots, two mutually antagonistic ethnic groups who constitute the bulk of the territory's population.[2] For decades, Greek Cypriots have pursued *enosis* i.e., the unification of the island with Greece. The Turkish Cypriots on the other hand have insisted on the partition of the island into Turkish Cyprus and Greek Cyprus. Over the years, intransigence on both sides and international diplomatic pressure have prevented either *enosis* or partition. But on 15th November 1983, the conflict in Cyprus took on a new dimension. The leader of the Turkish Cypriots, Rauf Denktash announced on behalf of his people:

> "Expressing the legitimate and irrepressible will of the Turkish Cypriot people, we hereby declare before the world and history the establishment of the Turkish Republic of Northern Cyprus".[3]

For Turkish Cypriots the declaration was the translation of a long standing national dream into what promises to be a reality. In the eyes of the Greek Cypriots, the purported secession constitutes an unwarranted and abominable action. For the international community, the unilateral declaration of independence by the Turkish Cypriots marked a new page in the chequered history of Cyprus and a dangerous development in the delicate balance of power in the region. For the student of international law, the declaration raises important issues of law. The purpose of this article is to examine some of the legal aspects of the new developments in the Cyprus conflict. The discussion will focus on the background to the inter-communal conflicts in Cyprus that led to the partition, the legality of the Turkish Cypriot declaration and the legally permissible options of the Republic of Cyprus and other interested parties i.e. Turkey, Greece and the United Kingdom. The discussion will also deal with the legal status of the

1. Foley, *Legacy of Strife: Cyprus From Rebellion to Civil War* (1964); Xydis, *Cyprus: Conflict and Conciliation, 1954–1958,* (1967); Stephens, *Cyprus: A Place of Arms* (1966); Kyriakides, *Cyprus: Constitutionalism and Crisis Government* (1968). See also Ehrlich, 'Cyprus, The "Warlike Isle": Origins and Elements of the Current Crisis' (1966) 18 Stanford L Rev 1021; Evrivades, "The Legal Dimensions of the Cyprus Conflict" (1975) 10 Texas Int L Journ. 227.
2. Apart from these two major national groups, there are Cypriot minorities comprising Bretons, Armenians and Maronites.
3. *Time Magazine* 28th Nov. 1983, 20.

new "Republic" and the relevance of the law of recognition to its creation. Finally, it is also intended to deal briefly with the relevance of the Turkish Cypriot partition to the future of the principle of self-determination in the post colonial era.

For the purposes of this discussion, the Turkish Cypriot unilateral declaration of independence will be referred to as UDI. The newly created Turkish Republic of Northern Cyprus will be called the TRNC.

Historical background to the conflict in Cyprus

Detailed studies of the history of Cyprus and its inter-communal tensions have been made elsewhere.[4] Nevertheless, for our purposes it is desirable to examine briefly the history of the territory before independence, and the events of the post independence period that precipitated the UDI of November 1983. It is in the light of these accounts that one can fully appreciate the origins of Turkish Cypriot separatism and the related crises that have characterized the life of the community since independence.

The history of Cyprus is a tale of two nations — Greeks and Turks. The island's history is therefore intricately linked with that of the two states of Turkey and Greece. At the height of its imperial majesty, the Ottoman Empire ruled over Greece, Cyprus and a considerable part of Asia Minor.[5] In 1821, after the Greek War of Independence, Greece successfully established herself as a sovereign state and severed links with the Ottoman Empire.[6] In Cyprus, the Greeks who constituted about 80% of the population, looked up to their kinsmen in the newly emerged state of Greece with admiration. In time there was to emerge among Greek Cypriots nationalist sentiments, the main objective of which was *enosis*.

In 1878, Ottoman rule over Cyprus came to an end when the imperial Sultan of Turkey contracted to "assign the island of Cyprus to be occupied and administered by England", under the terms of the Cyprus Convention.[7] Article VI of the Annex to the Convention provided that England was to return Cyprus to Turkey if Russia restored to the Ottoman Empire, territorial possessions it had conquered and occupied during the Russian-Turkish war of 1877.[8]

The United Kingdom was therefore only to exercise *de facto* sovereignty over the island, while Turkey retained *de jure* sovereign rights.[9] The United Kingdom was however to enjoy "all the incidents of accession" in respect of the island.[10] These arrangements were terminated in 1914 when the United Kingdom annexed the territory basing its action on the "reason of the outbreak of war between His

4. See works cited in note 1.
5. See generally Hill, *A History of Cyprus* (1952) Vol. III, particularly Chapt. XV.
6. Stephens, op cit, note 1, 11–104, Loizos and Hitchens, *Cyprus*. Minority Rights Group Rep. No. 30 (1978) 14.
7. (1877–78) 68 British and Foreign State Papers, 744. On the origins and nature of the convention see generally Lee, *Great Britain and Cyprus Convention Policy of 1878* (1934); Hill, *A History of Cyprus* (1952) Vol. IV Chap. VII.
8. Annex to the Cyprus Convention, (1877–78) 68 British and Foreign State Papers, 746.
9. Oppenheim, *International Law* (Lauterpacht (ed.)) (1955) Vol. 1, p 455. On the status of Cyprus in this period see generally the decision of the Anglo-Turkish Mixed Tribunal in *Paranouk* v *Turkish Government* (1929–30) 11 Annual Digest 25–27.
10. O'Connell *The Law of State Succession* (1956) 62–63.

Majesty and His Imperial Majesty the Sultan of Turkey in November 1914''.[11] The annexation was formalized seven years later in the Treaty of Lausanne[12] in which Turkey conceded ''the annexation of Cyprus proclaimed by the British Government on the 5th November 1914'' (Article 20). Cyprus subsequently became a British colony in 1925.[13]

The Greek Cypriots, under the leadership of the Greek Orthodox Church initially welcomed the change in administration. They saw in it the possible avenues for the realization of *enosis*.[14] Thus throughout the British administration Greek Cypriots pursued *enosis* describing it as ''self-determination union''.[15] The rising tide of Greek nationalism and the apparent unwillingness of the United Kingdom to concede their demands culminated in severe riots in 1931.[16] The British administration subsequently suspended the colony's constitution and decreed any agitations in relation to *enosis* punishable under the sedition laws of Cyprus.[17]

Greek Cypriot demands for *enosis* produced a corresponding plea among Turkish Cypriots that in the event of a British decision to abandon the island, they ''pray and solicit in the name of justice that . . . the island be restored to (the) august sovereign, our illustrious Caliph and Monach, the everlasting Ottoman Empire''.[18] Even though such Turkish Cypriot demands came to be canvassed by political and religious organizations in later years, Turkish Cypriot separatism never assumed any significant form until 1945 when KATAK (Association of the Turkish Minority of Cyprus) was formed. The KATAK, later named CKTP (Cyprus Turkish Party) came to adopt partition as the objective of Turkish Cypriot nationalism in response to *enosis* in the days leading up to the independence of Cyprus.[19]

Self-determination and independence in Cyprus

After the Second World War and the widespread propagation of the principle of self-determination, Greek Cypriot demands for *enosis* took on new dimensions. In 1949, 96% of Greek Cypriots voted in a plebiscite to unite with Greece.[20] In 1950, Michael Muskos, the man who is believed to have organized the plebiscite, was elected as Archbishop Makarios III, and head of the Greek Orthodox Church. With his collaboration, Greece brought up the question of

11. Cyprus (Annexation) Order in Council, (1914) 108 British and Foreign State Papers, 165.
12. 28 LNTS, 12; (1923) 117 British and Foreign State Papers, 549.
13. (1925) 121 British and Foreign State Papers 99–106.
14. As far back as 1878, the Greek Cypriots under the leadership of the Greek Orthodox Church had expressed the hope that British rule would pave the way for the liberation of the territory. The 1925 declaration that formally made Cyprus a British colony was thus a break with Turkey and a step towards the eventual freedom of Cyprus from the Greek Cypriots' point of view. They were however opposed to any continued British rule once their bonds with Turkey were severed. (Hill op cit (note 7) 540–41).
15. Evrivades, op cit (note 1) 230–31.
16. Cyprus, *The Dispute and the Settlement.* Chatham House Memoranda (1959) 3–6.
17. Id, 5 Law 17 of 1931. The Act was repealed in 1946. (Hill, op cit, note 7, 493 note 1.
18. Turkish Communal Chamber, *History Speaks: A Documentary Survey,* (1964) 39–40.
19. Evrivades, op cit, note 1, 231.
20. Loizos and Hitchens, op cit, note 6. For an analysis of the plebiscite see Alastos, *Cyprus in History* (1955) 379–81.

self-determination for Cyprus in the 9th session of the General Assembly in 1954. The Cyprus issue which had hitherto been considered the domestic concern of the United Kingdom, became internationalized.

In the debates in the General Assembly, the Greek delegate argued that, "Greece alone has been the lasting element, the unalterable factor, the only permanent reality in the Island of Cyprus. It would not be enough to repeat that Cyprus belongs to the Greek world, Cyprus is Greece itself."[21] It is interesting to note that, despite the claim of ethnic bonds, Greece did not make a direct case for the unification with Cyprus on the basis of territorial integrity. It rather argued that due to the "past, present and future of the Hellenic nation, the principle of equal rights and self-determination of people" must be applied to Cyprus.[22] Considering that Greek Cypriots who constituted 80% of the population of Cyprus favoured *enosis* and had indicated this in the 1949 plebiscite,[23] the Greek demands for self-determination for Cyprus were indirectly a quest for the integration of the island. The United Kingdom, on the other hand counter-argued that under the Treaty of Lausanne, both Greece and Turkey recognized her sovereign rights over Cyprus and that this precluded their bringing the issue of the colony before the General Assembly.[24] The United Kingdom further contended that in any case, the Cyprus question was a domestic issue, the Assembly was therefore not competent to deal with it by virtue of Article 2(7) of the United Nations Charter.[25]

The United Kingdom's arguments were rather lame. Issues of decolonization, such as Cyprus, were obviously not covered by Article 2(7).[26] Furthermore, notwithstanding the rights of the United Kingdom under the Treaty of Lausanne, the self-determination provisions of Article 12 and Chapter XI of the United Nations Charter had precedence in dealing with the political future of the island by virtue of Article 103 of the Charter.[27] Be that as it may, the General Assembly did not support self-determination for Cyprus at the 9th session. It only noted that "for the time being, it does not appear appropriate to adopt a resolution on the question of Cyprus".[28]

The new international character of the Cyprus problem and the outbreak of anti-British guerrilla activity by Greek Cypriot nationalists under the banner of the EOKA (*Ethnici Organosis Kyprion Agoniston*), necessitated the search for a

21. (1954) UN Doc. No. A/270, 2.
22. Id, 1.
23. Note 20.
24. (1954) UNGAOR 9th sess. 8–9.
25. Id, 10–11.
26. Kelsen *The Law of the United Nations* (1951) 565, n 9. See however Jones, *The United Nations and the Domestic Jurisdiction of States* (1979) particularly Chapter IV. See also Higgins, *The Development of International Law Through the Political Organs of the United Nations* (1963) 90–106.
27. Article 103 provides that: "In the event of a conflict between the obligations of the Members of the United Nations under the . . . Charter and their obligations under any other international agreement, their obligations under the . . . Charter shall prevail".
28. (1954) UNGAOR 9th Sess. Supp. No. 21, (A/2890) 5.

scheme for self-rule for Cyprus.[29] After meetings between the United Kingdom, Greece and Archbishop Makarios III, the United Kingdom initiated a Tripartite Conference in 1955 to discuss the political future of Cyprus. The parties to the conference included the United Kingdom, Greece and Turkey. The conference convened in London, achieved nothing of substance, but it was nonetheless significant because it marked the beginning of the active participation of Turkey in the Cyprus question.[30]

(i) Turkey and self-determination in Cyprus

With its participation in the Tripartite Conference, Turkey came to evolve a definite policy on Cyprus. At the conference, it argued that self-determination could not be granted to Cyprus because the principle clashes with the rights of the United Kingdom under the Treaty of Lausanne.[31] More significantly it contended that "in case the British sovereignty came to an end, Cyprus cannot be taken in hand as an entity separate from Anatolia."[32] In effect, Turkey saw only two alternatives, continued British rule or a retrocession of the territory.

Turkey's policy on Cyprus was based on her security requirements. Cyprus provided a buffer zone between the most southerly part of Turkey (Iskenderum) and Greece. If the Greek Cypriots succeeded in their *enosis* campaign through self-determination or other means, Turkey's southern frontiers would not only be exposed to its long standing enemy, Greece, but the latter would also be in control of virtually all islands across the shores of Turkey, thus blocking the entire Turkish Coast. Turkey therefore sought a settlement that took account of these strategic realities.

In 1956, the British Government retained Lord Radcliff, a constitutional expert to draw a new constitution for Cyprus which allowed the island a measure of self-rule.[33] In introducing the constitution to the House of Commons, the then Secretary of Colonies indicated that even though the constitution did not grant complete self-determination, the issue would be considered if the self-government scheme in the new arrangement worked smoothly.[34] He further explained that in the event of any self-determination exercise in the colony, the Greek Cypriots could choose *enosis*. However he also stressed that if the Greek Cypriots chose *enosis*, Turkish Cypriots could have a separate vote and that the island would be partitioned if the Turkish Cypriots opted to join Turkey.[35] This

29. *Cyprus: The Dispute and the Settlement Chatham House Memoranda, (1959), 14; Ehrlich, op cit, note 1, 1030. The movement otherwise known as the National Organization Cyprus Struggle, was led by a Greek Cypriot army officer, Colonel George Grivas. For a systematic account of the operations of EOKA in the period before independence see generally Grivas, The Memoirs of General Grivas* (Foley ed. 1965).
30. See Foley, op cit, note 1. 35 for the view that Turkish participation was not only the most significant achievement of the conference but arguably the main purpose of it. On the significance of the Turkish participation see Ehrlich, *Cyprus* 1958–1967 (1973) 28 passim.
31. *The Tripartite Conference on the Eastern Mediterranean and Cyprus,* British Cmd Papers No. 9595 (1955) 24.
32. Ibid.
33. *Cyprus: The Dispute and Its Settlement,* Chatham House Memoranda, (1959), 21, 23.
34. (1956) 562 House of Commons Debate (5th Series) 1268 quoted in Ehrlich, op cit, note 1 1030 note 38.
35. Ibid.

implied concept of double self-determination for Cyprus became the first official suggestion and recognition of partition in the territory. From 1957 onwards, Turkey adopted the idea of double self-determination wholesale and made partition the cornerstone of its policy on Cyprus. From Turkey's point of view, partition would serve a double purpose by ensuring that the Turkish Cypriot minority were allowed to unite with their mainland kinsmen while at the same time satisfying her security needs.

With Turkey's active involvement, the focus of the Cyprus question, which had always been on the tensions between the United Kingdom on the one hand and Greece and Greek Cypriots on the other hand, shifted. Turkey, in its preoccupation with Turkish Cypriots' minority rights, and general opposition to *enosis,* took the place of the United Kingdom. The actors in the conflict thus became Greece and Turkey, each pursuing the interests of its kinsmen in Cyprus. The United Kingdom assumed the role of an arbiter between the two parties. In Cyprus itself, the Greek and Turkish Cypriots, with the active support of their 'parent' states, became increasingly hostile towards each other. Inter-communal relationship became characterized by mutual antagonism manifested in occasional outbursts of violence which only reinforced Turkish desires for partition.

(ii) Independence Settlements and Accords

In November 1957, following pressures from within the British Labour Party, the United Kingdom agreed to preliminary negotiations between Turkey and Greece to resolve the Cyprus question. In a memorandum to the parties, the United Kingdom indicated it was prepared to grant independence to Cyprus provided the United Kingdom's "military requirements were met in a manner which could not be challenged, by the retention of bases under British sovereignty."[36]

The negotiations between Turkey and Greece led to the Zurich Conference of 1959 in which the main features of a settlement on Cyprus were agreed upon by both parties and the United Kingdom. At Zurich, the parties adopted three main agreements viz (1) The Basic Structure of the Republic of Cyprus,[37] (2) The Treaty of Guarantee between Greece, Turkey and the United Kingdom and Cyprus,[38] (3) The Treaty of Alliance between Cyprus, Turkey and Greece.[39]

The Basic Structure of the Republic of Cyprus was fundamentally, a carefully designed series of interrelated checks and balances aimed at protecting the Turkish minority in Cyprus. The Treaty of Guarantee on the other hand dealt with undertakings by Cyprus to "ensure the maintenance of its independence, territorial integrity and security as well as respect for its constitution." In pursuance of these, Cyprus undertook to prohibit either partition or *enosis* under Article II of the Treaty. On their part, the United Kingdom, Greece and Turkey guaranteed the independence and territorial integrity of Cyprus. The full extent and implications of the treaty commitments of the Guarantor Powers are of great significance to the UDI. They will therefore be examined in detail later in the discussion. For our immediate purposes, it is sufficient to note that the *raison*

36. (1959) 600 House of Commons Debates (5th Series) 618.
37. (1954) British Cmd Papers 679.
38. (1974) 13 ILM 1259.
39. Id 1254.

d'etre of the Treaty was the prevention of either *enosis* or partition. Under the Treaty of Alliance, the parties undertook to resist any attack or aggression direct or indirect, directed against the independence or the territorial integrity of Cyprus (Art. III). To this end, the parties agreed to establish a Tripartite Headquarters in Cyprus, comprising 650 Turkish forces and 950 Greek forces.

At the conclusion of the talks in Zurich, the parties appointed a Joint Commission to draft a new constitution for the Republic of Cyprus. According to its terms of reference, the joint commission was to incorporate into the constitution the provisions of the "basic structure agreed (on) at the Zurich Conference".[40] Thus under Article 182(1) of the new constitution these provisions, so incorporated became the "Basic Articles". They could not be "amended whether by way of variation, addition or repeal". (Article 182(1)).

In several ways, the constitution of Cyprus, as based on the terms of the basic structure was a unique document. It provided for a presidential system of government with a Greek Cypriot president and a Turkish Cypriot as vice-president. (Art. 1,39,43(1)). Executive power was vested in both offices and it could be exercised jointly or severally (Art. 47,48 and 49). The vice-president however could not assume the position of the president in the event of his death or incapacity since the positions were distinct and exclusive to the respective ethnic communities. In matters of defence, foreign affairs and security, both the president and vice-president had veto powers. The constitution further provided for a Supreme Court (Art. 133) comprising a Greek Cypriot judge, a Turkish Cypriot judge and a neutral judge. In the High Court, there were two Greek Cypriot judges, one Turkish Cypriot judge and a neutral judge with 2 votes (Art. 50 and 57 (3)).

Out of the three important ministries of Defence, Foreign Affairs and Finance, one always had to be a Turkish Cypriot (Art. 46). There were to be two Communal Chambers with legislative powers over their respective issues relating to education, religion, and cultural affairs (Art. 87). Legislative powers not vested in the Communal Chambers were reserved for the territory's House of Representatives of 50 members comprising a Greek and Turkish Cypriot ratio of 70:30. Decisions in the House were to be made by a simple majority. However in order to modify electoral laws or to legislate in respect of the municipalities the constitution required a separate simple majority of Turkish Cypriot and Greek Cypriot members of the House. Representation in the public service was also based on the ratio of 70:30 in favour of the Greek Cypriot majority.[41]

Post independence crises and the road to partition

The fundamental principle underlying any attempts to foster nationhood among ethnically diverse groups is "unity in diversity". This principle was conspicuously lacking in the political arrangements that led to the creation of the Republic of Cyprus. One must admit that given the unique minority of Turkish

40. (1959) British Command Papers, No. 680, 6.

41. For a detailed analysis of the Cyprus constitution see De Smith, *The New Commonwealth and its Constitutions* (1964) pp 282–96; Cranshaw, "The Republic of Cyprus: From the Zurich Agreement to Independence" (1960) 16 The World Today, 526. See generally also Kyriakades, op cit, note 1.

Cypriots there was a need to devise a means to ensure the political equality of all the ethnic groups. However to achieve this, the republican constitution tended to accentuate and institutionalize the divisions among Greek and Turkish Cypriots. The constitution therefore sacrificed any existing traces of coagulating elements and formally stifled any hopes of forging the bonds of unity needed for the new republic.[42]

In the negotiations that led to the accords, the Greek and Turkish Cyriots themselves were hardly represented even though they were to be the objects of the accords. Admittedly, Cypriots participated in the Joint Commission that drafted the constitution. However it must be noted that the commission had only followed the terms of reference which had been suggested by the Guarantor Powers and had consequently incorporated the terms of the basic structure which had been drawn without Cypriot representation. Given such a state of affairs, it is right to suggest that the Cypriots themselves had not been encouraged to negotiate a compromise or a settlement which could have provided the basis for a unified Cyprus. The formalized divisions fostered bitterness, mistrust and suspicions in inter-communal relations. As one commentator notes:

> "The Greek Cypriot leadership strongly felt that the Agreements were not only imposed solutions, but that in addition, they secured for the Turkish Cypriots a privileged position disproportionate to their numbers and incompatible with the democratic principle of majority rule. Perhaps more important was the psychological fear which permeated the whole Greek Community, that Turkish Cypriots would use their rights and the separatist provisions in the Constitution as a stepping stone for the eventual partitioning of the island. For their part, Turkish Cypriots utterly rejected the notion that majority status diminishes their right, arguing that the constitution of 1960 recognized the two communities as distinct legal entities . . . A corresponding psychological fear held by the Turkish Cypriots was that the Greeks had never given up their goal of *enosis* and that majority rule if unchecked would eventually lead to the union with Greece."[43]

(i) Constitutional crisis

It was against this background of misgivings and acrimony that the Cypriot leaders attempted to work out the republican constitution. It was generally agreed that as a result of the complex checks and balances any success in operating the constitution and running the state could only be the result of an atmosphere of goodwill, sacrifice and a spirit of give-and-take rather than a strict interpretation of its provisions. But given the mutual intercommunal antagonism, these elements proved elusive after the first two years of independence.

The first signs of tension came up in 1963 when the Turkish Cypriot government, using its constitutional veto on taxation and municipal laws, caused

42. For a different opinion see Ehrlich, op cit, note 1, 1039. But see also Papastathopoulos, "Constitutionalism and Communalism: The case of Cyprus" (1969) 16 University of Toronto L J 118 particularly at 130.
43. Evrivades, op cit, note 1, 242.

a constitutional deadlock which threatened to paralyze the state.[44] In a rather dramatic reaction to these events, President Makarios declared that his government would seek to revise those constitutional provisions "which obstruct the state machinery and which if abused endanger the very existence of the state".[45] He subsequently submitted a memorandum on "Suggested Measures to Facilitate the Smooth Functioning of the State and to Remove Central Cause of Inter-Communal Friction."[46] Turkish Cypriots naturally, rejected the memorandum as a "pretext to take away (their) just rights."[47] The tensions and disagreements provided the fuel for widespread intercommunal violence when a quarrel broke out between two Greek Cypriot policemen and a Turkish Cypriot leading to the death of two Turks. Within a matter of days fighting spread all over Cyprus assuming the form of a civil war.[48]

(ii) The 1964 crisis

The inter-communal conflict took on a more complex dimension when Greek and Turkish armed forces stationed in Cyprus under the Treaty of Alliance became involved in the fighting, on the side of their kinsmen. Turkey immediately commenced military overflights in Cyprus sparking off rumours of a possible Turkish invasion. In the face of the mounting tensions in Cyprus and the prospects of a full scale war between Turkey and Greece, the three Guarantor Powers, at the initiative of the United Kingdom, undertook consultations and subsequently reported to the Cyprus Government that they were ready to assist "if invited to do so, in restoring peace and order by means of a joint peace-making force under British command".[49] In December 1964 a cease fire was negotiated between the warring factions and the peace-making force deployed immediately. Even though the Guarantor Powers had agreed on a joint force under British command, the peace-making force comprised only British troops normally stationed in Cyprus under the Treaty of Alliance. Following the deployment of the British troops, the United Kingdom called a meeting of the Guarantor Powers in London to negotiate a lasting settlement in Cyprus. At the London Conference however, Greece and Turkey failed to agree on any definite settlement. Perhaps the only significance of the conference was that it helped to highlight the irreconcilable differences between the Greeks and the Turks over Cyprus. Above all, it underscored the need for a 'long lasting' peace-making instrumentality to police the relationship between the warring Cypriots pending eventual peaceful settlement.

In view of the obvious difficulties in shouldering the peace-making burden on its own in Cyprus, the United Kingdom requested a meeting of the Security

44. For a detailed account of the constitutional crises see generally Salih, *Cyprus: An Analysis of Cypriot Political Discord* (1968). See also Kyriakides, op cit note 1. *Report of the U.N. Mediator on Cyprus to the Secretary General* 20 UNSCOR supp. Jan.-June 1965 UN Doc. No. 5/6253 (1965).
45. *The Times (London),* 5th Jan. 1962, 10 Col. 5. quoted in Evrivades, op cit, note 1, 245.
46. Ibid.
47. Kuchuk (Vice President) *Cyprus: Turkish Reply to Archbishop Makarios' Proposals* (1963) 21–23.
48. Foley, op cit, note 1, 166–168.
49. (1964) 19 UNSCOR Sp. Supp., U.N. Doc. S/5508 (1964) 2.

Council "to take appropriate steps to ensure that the dangerous situation (prevailing in Cyprus) can be resolved with a full regard to the rights and responsibilities of both Cypriot communities, of the Government of Cyprus and the Governments party to the Treaty of Guarantee."[50]

After several days of intense debates the Security Council adopted a resolution declaring that the situation in Cyprus was "likely to threaten international peace and security".[51] More significantly, the Council also recommended the establishment "with the consent of the Government of Cyprus, of a United Nations peace-making force" for the island. The force established, later to be known as the United Nations Force in Cyprus (UNFICYP), became operative and relieved the British forces in March 1965 and continues to operate today.[52]

The UNFICYP and its predecessor British contingent came to help maintain order between Greek and Turkish Cypriots. However, the seeds of discontent and indeed of partition had already been sown by the initial crises in 1964. The Turkish Cypriots saw the Greek Cypriot violence and the constitutional strategy as parts of a grand design to exterminate them and to prepare the way for *enosis*. They therefore maintained that the best solution was to re-structure the two communities into separately administered and autonomous cantons.[53] The Greek Cypriots of course counter-argued that the Turkish demands were inadmissible and that they were only the first steps to partition.[54]

By early 1965, the first practical signs of partition had become visible. Over 24,000 Turkish Cypriots living in mixed villages had fled from what they considered to be Greek Cypriot engineered massacres and camped in Nicosia. A series of Turkish Cypriot enclaves comprising of refugees fleeing their homes in mixed areas started emerging in parts of Cyprus. In Nicosia itself, the two communities were divided by what came to be called the "Green Line". The city's infamous Ledra Palace Hotel became an accepted checkpoint.[55]

Each community established its own national symbols and other related paraphernalia. The Greek Cypriots formed their national guard under Commander Grivas, a retired Greek Army officer. The Turks, on their part, organized the "Turkish Fighters". Greek Cypriots proudly displayed the Greek national flag and observed Greek national holidays. Turkish Cypriots sang Turkish slogans and glorified Ataturk, the founder of modern Turkey to commemorate the Turkish victories over Greece in days gone by.[56] Each side lived a separate life, sometimes without open animosities. But a definite "cold war" situation existed.

All ports needed for essential imports into Cyprus were located in Greek Cypriot controlled areas. So for about three years Greek Cypriots maintained an economic blockade of the Turkish Cypriot enclaves. The Turkish Cypriots on the other hand did not permit Greek Cypriots to enter their enclaves for "security

50. Id., S/5543 (1964) 2.
51. S/5575 (adopted 4th March 1964).
52. For a survey of the United Nations involvement in Cyprus in this period see *Secretary General's Report on the United Nations Operation in Cyprus,* U.N. Doc. S/7001 (1965).
53. Stephens, op cit, note 1, 180–181.
54. Ibid.
55. Loizos and Hitchens, op cit, note 6, 8.
56. Ibid.

reasons''.[57] Meanwhile both sides feverishly engaged in an extensive military build-up with the help of their ''parent states''.[58]

The Security Council further initiated debates aimed at securing a settlement and inter-communal harmony. However, the Turkish Cypriots sentimental desires for partition had already taken root. For the Turkish Cypriots, the need for partition was further reinforced by obvious economic disparities between them and the Greek Cypriots.[59] The latter had enjoyed the benefits of the tourist boom in the island after the 1963–4 crisis to the exclusion of Turkish Cypriots who had remained secluded in their enclaves. The differences in standard of living between the two communities is noted by one author:[60]

> ''On arrival at the Nicosia International Airport, a traveller felt as if on a Greek island until he crossed the check point at Nicosia's Ledra Palace Hotel. The shabbiness of the orient began at that barricade, made more dramatic by the neat prosperous appearance of the Greek side of the capital.''

Politically, things were no better. When the Turkish Cypriots withdrew from the government in the 1963–4 crisis, the Greek Cypriots enacted legislation that gave them total control of government. They also incorporated most of the Makarios constitutional proposals which had contributed to the constitutional crisis in 1963. In the period after 1965, the Greek Cypriots maintained that the Turkish Cypriots could only be re-admitted as partners in the administration if they accepted the legislation passed by the Greek Cypriot government in their absence. The Turkish Cypriots rejected this condition and found themselves alienated from the administration.

(iii) The 1967 crisis

Against the background of the growing separation of the two communities another crisis flared up in 1967. The Cypriot National Guard under the command of General Grivas, attacked a Turkish Cypriot village and one mixed village in retaliation for injuries against a police patrol.[61] The attack reinforced Turkish Cypriot paranoia of insecurity in Cyprus and immediately prompted a frantic preparation for a military campaign by Turkey. The Turkish airforce once again commenced overflights in Cyprus. For a while, it looked as if a Turkish invasion was imminent. A timely intervention by the United States and the United Nations saved the situation. As part of the settlement Turkey insisted on the dismissal of General Grivas as Commander of the National Guard.[62]

In 1968, the two communities agreed to enter into negotiations aimed at easing inter-communal tensions. Even though the talks could not bring about the

57. Id, 19.
58. Evrivades, op cit, note 1, 255 (note 119) 259.
59. For a comparative analysis of the standards of living between the Greeks and Turks in Cyprus see generally Notel, ''Economic Integration on Cyprus'' Seminar Paper presented at the Inquiry into the Resolution of the Cyprus Problem, (AUFS Centre for Mediterranean Studies, Rome, Nov. 1973).
60. Loizos and Hitchens, op cit, note 6, 8.
61. Ehrlich, op cit, note 1, 1052.
62. See an account of the crisis in (1967) 22 UNSCOR Sp. Supp. I, (Oct.-Dec.) 215–224, UN Doc. S/8248.

reintegration of the communities, it seemed to prevent any further inter-communal violence. There was little talk of *enosis* or partition after the negotiations. Both communities appeared to be headed for peaceful coexistence until 1971 when General Grivas re-entered Cyprus secretly and formed the EOKA-B, an extreme right-wing pro *enosis* movement.[63] The latter embarked upon well orchestrated acts of terrorism in Cyprus aimed at forcing the "reactionary" Makarios government to adopt *enosis*.

(iv) The 1974 crisis

Unlike Makarios, the extremists in EOKA-B did not seek to accommodate the desires or fears of the Turkish Cypriots who considered *enosis* a *bete noire*. Thus while Makarios sought to create a 'united' Cyprus in which Greeks controlled greater political power by virtue of their majority, the extremists in EOKA-B on the other hand considered any political program short of *enosis* as a betrayal of noble Greek ideals. In time, an intense power struggle broke out in the Greek Cypriot camp. This culminated in a Greek-inspired and directed military *coup* against the Makarios government in 1974. Archbishop Makarios was removed from office. Nikos Sampson, an infamous pro *enosis* Greek Cypriot, who had made his name as a 'Turk-killer' during the 1963–4 crisis was appointed the new president.[64]

Turkey and Turkish Cypriots viewed these developments with great concern. The Greek involvement in the *coup* confirmed their fears about the resurgence of the *enosis* movement. The appointment of Nikos Sampson helped to rekindle fears for the security of Turkish Cypriots. If Turkey had been looking for an excuse to partition the island, then the events of 1974 gave it one.

Turkey adopted the policy that the only way to ensure Turkish Cypriot security was to re-locate them all in a clearly defined territorial base under the protection of the Turkish army. In two assaults on Cyprus, Turkey invaded and secured about 32%[65] (i.e. virtually the entire Northern section) of the island for Turkish Cypriots. By early 1975, a reported figure of 183,000 Greek Cypriots had fled their homes in the Turkish-held north. Over 40,000 Turkish Cypriots also returned from Greek-held Cyprus to the North.[66]

Having secured a territorial base, the Turkish Cypriots immediately declared the Turkish Federated State of Cyprus. No state ever recognized the Turkish Federated State. It was, in any case not meant to be an independent state as such. The Turks had hoped to use the partition as a bargaining chip in negotiating for a cantonal administration or some form of federal arrangement that ensured a high degree of autonomy. As things turned out, the negotiations failed and the island remained partitioned. The Turkish Federated State of Cyprus maintained its own government and independent administration internally.[67]

The 1975 division amounted to a *de facto* partition in every sense and the

63. Evrivades, op cit, note 1, 260.
64. Ibid.
65. Evrivades indicates that the figure was 40% (op cit, note 1, 264).
66. Loizos and Hitchens, op cit, note 6, 10–11.
67. On the legal status of the Turkish Federated State during its existence see White "The Turkish Federated State of Cyprus: A Lawyer's View" (1981) 37 The World Today 135.

Turkish Federated State of Cyprus assumed the form of a *de facto* state. Externally however, only the Republic of Cyprus was recognized.[68]

After the 1974 *de facto* partition there were no major inter-communal clashes. However all attempts to reintegrate the two communities failed. In 1979, the United Nations General Assembly demanded the withdrawal of foreign (mostly Turkish) troops (numbering over 20,000 in all) from Cyprus.[69] The resolution adopted by 99 votes, 5 against and 35 abstentions, also called on both communities to engage in meaningful, result-oriented and constructive talks to resolve the long standing dispute. Following these appeals the Cypriots conducted inter-communal talks spasmodically but with little success.

(v) The 1983 UDI

In his annual report to the United Nations in 1982, the Secretary General of the United Nations Javier Perez de Cuellar, who was the former special United Nations envoy on the question of Cyprus, indicated that he was willing to use his good offices to help secure a solution in Cyprus. Consequently at the 37th session of the General Assembly in May 1983, a group of Non Aligned countries sponsored a resolution calling on Turkey to withdraw its forces from Cyprus to pave the way for a settlement.[70] More importantly, the resolution, adopted by a massive majority of 105 votes, 5 against and 20 abstentions, called on the Security Council to set a time frame for the withdrawal of Turkish troops, and further called on the Secretary General to "undertake such action or initiatives as he may consider appropriate" for the resolution of the Cyprus question.

The possibility that the Security Council might heed the call of the General Assembly and order a Turkish withdrawal from Cyprus, became a matter of real concern for the Turkish Cypriot leadership who loathed the idea of being left on their own in the future to bargain with Greek Cypriots. The massive support the Greek Cypriot government commanded at the General Assembly also became a source of uneasiness for the Turkish Cypriots. As far as they were concerned, given its obvious bias in favour of the Greek Cypriots, the United Nations was an improper venue for the settlement of the dispute.

Following the May 1983 resolution, the United Nations Secretary General established his 'good offices' and initiated the basis for a settlement. According to his scheme, Turkish Cypriots were to give up the 32–40% of the territory they now held and to take up only 20%. In return, the Greek Cypriots were to give up some governmental powers.[71] The fundamental objective of the scheme was to alter political power on the island and to divide the territory more equitably between the two communities. Greek Cypriot leader Spyros Kyprianou announced that his government accepted the new scheme.[72] Turkish Cypriot leader Denktash found it unsatisfactory. From the Turkish Cypriots' point of view, the growing support in the General Assembly for a united Cyprus was

68. This external recognition did not of course reflect the internal political realities in Cyprus, because following the withdrawal of the Turkish Cypriots, the "Republic of Cyprus" effectively became a Greek Cypriot Republic.
69. UN G.A. Res. 34/30, 20th Nov. 1979.
70. UN G.A. Res. 37/253 May 1983.
71. (1984) 30 Keesings Contemporary Archives 36238A.
72. *Ibid.*

nothing short of a pro-Greek Cypriot position adopted by an organization which did not appreciate their predicament. This factor coupled with the fear of the election of a moderate government in Turkey which would urge them to accept the United Nations scheme, made the UDI a most appealing alternative for the Turkish Cypriots. In August 1983, the Turkish Cypriot Assembly proclaimed self-determination for the territory. The UDI itself then became only a matter of time. On the 15th of November 1983, the Assembly overwhelmingly endorsed the declaration establishing the TRNC. Since then the new entity has been at pains to explain that the UDI is not an end in itself and that it is only to be used as the basis for negotiations to secure a bizonal or federal administration in Cyprus.[73] However, one thing is certain: like the 1974 partition, if the negotiations fail, the UDI could well become a means and an end in itself.

The legal aspects of the new developments in Cyprus

(i) Is the UDI legally valid?

In a resolution adopted a few days after the UDI, the United Nations Security Council condemned the Turkish Cypriot action and declared the UDI void.[74] The question is, to what extent is the UDI void or valid in international law? By the validity or otherwise of the UDI, we are not inquiring into the legitimacy of the rights of the Turkish Cypriots to self-determination. In other words, we are not concerned with the merits of the claims underlying the UDI. What is in issue here is the legality of secession or a partition such as the UDI in international law generally and under the treaty obligations of Cyprus in particular.

In international law, secession or the partitioning of a state through a revolution or some other means is neither legal nor illegal because the law does not forbid or permit it.[75] This is however only a general description of the apparent lacuna in international law; to relate this proposition to the Cyprus partition, one would have to examine the case in the context of the history of the territory and the peculiar treaties relating to the creation of the Republic of Cyprus.

We have indicated that under the Treaty of Guarantee, Cyprus undertook to prohibit any "activity likely to promote directly or indirectly either union with any state or partition of the island". Cyprus also accepted to ensure the "maintenance of its territorial integrity". The issue is whether the UDI is consistent with these treaty obligations of Cyprus. This issue in turn, presupposes that the Treaty of Guarantee, which was indisputably a limitation on the sovereignty of Cyprus was valid and legally binding on Cyprus. We will therefore discuss the legality of the Treaty before dealing with validity of the UDI.

(ii) Was the Treaty of Guarantee legally valid?

Even though it is generally accepted that the Treaty of Guarantee was a limitation on the sovereignty of Cyprus, and for that matter inconsistent with the concept of

73. The London Times 16th Nov. 1983, p. 6, Col. 1.
74. UN S.C. Res. 541.
75. Akehurst, *A Modern Introduction to International Law* (1982) 53; Umozurike, *Self-Determination in International Law* (1973) 119.

sovereign equality in the United Nations Charter, the validity of the treaty has never been seriously questioned.[76] Arguably, the limitations on Cyprus' sovereignty did not affect the validity of the treaty. There have been similar cases in international law. In the Treaty of Saint Germain for instance, Austria undertook that in the absence of a formal agreement of the League Council, it would "abstain from any act which might directly or indirectly or by any means whatever compromise her independence."[77] Under the Geneva Protocol of 1924, Austria further accepted not to violate her economic independence by granting any state a special regime or exclusive advantages that might threaten its economic independence. In 1930, when Austria indicated its intention to form a customs union with Germany, the League Council requested an advisory opinion from the Permanent Court of International Justice. The Court held that the intended union would be inconsistent with Austria's treaty obligations.[78] It is important to note that the legality of the treaty itself was not disputed and neither was the sovereignty of Austria as a State doubted at any point in time.

Similarly, in the case of Cyprus, the sovereignty of the territory has never been disputed despite the Treaty of Guarantee. With the admission of Cyprus into the United Nations in 1960 one could say that the organization impliedly conceded that whatever the provisions of the treaty were, they were consistent with the Charter in so far as the sovereignty of the territory was concerned.

If the Treaty of Guarantee was valid, then was the UDI a violation of Cyprus' obligations thereunder? Treaties are primarily signed between states. In fact the Treaty of Guarantee was signed between Cyprus (as a state) and the three Guarantor Powers. Cyprus as a state did not institute the UDI. Thus the Republic of Cyprus as such did not violate her treaty obligations. At best, it could only be said that as architects of the partition, the Turkish Cypriots were responsible for any breaches of the treaty. The question then is, what is the legal relationship between the constituent ethnic groups in Cyprus and the Treaty of Guarantee? Were the communities bound severally or did their legal obligations under the treaty only exist when considered in their collectivity as the state of Cyprus?

The treaty prohibitions deal directly with the issues of *enosis* and partition (Art. II). In other words, the treaty directly prohibits the Greek Cypriots from pursuing *enosis* while enjoining the Turkish Cypriots from demanding or instituting partition. These prohibitions were the *sine qua non* of the treaty and the basis of the creation of the Republic of Cyprus. Having accepted and signed the terms of the treaty, the two ethnic communities assumed legally binding obligations not to pursue their competing claims of *enosis* and partition. The two communities in their collectivity constituted the State of Cyprus and were party to the treaty with definite obligations.

Even if the two Cypriot communities were legally bound by the treaty, could the regulation of inter-communal relations in a state constitute a valid object of

76. See however Jacovides, *Treaties Conflicting with Peremptory Norms of International Law and the Zurich London 'Agreements'* (1966) 20–22 for the view that the right of intervention accorded to the Guarantor Powers under the Treaty of Guarantee amounted to "a state of affairs inconsistent with the basic elements of the principles of sovereign equality and non-intervention" (21).
77. Article 88 of the Treaty of St. Germain.
78. *Customs Union* case (1931) PCIJ Series A/B No. 41.

international law? In other words could an intranational issue be validly subject to international law? One must admit that international law is primarily concerned with the conduct of states and other international subjects. It does not deal with the organization of the peculiar internal structures of a state. However in certain exceptional cases, the situation could be different. In Palestine for instance the Partition Agreement of 1948 was a subject of an international accord even though it dealt with the internal organization of Palestine. Such cases are however *sui generis*. In the specific case of Cyprus it could be said that the intercommunal relationship was the subject of an international agreement that gave rise to specific international rights and obligations affecting the constituent ethnic groups. Thus after the signing of the 1960 Treaty of Guarantee the general legal position was that each community was legally bound by the treaty provisions.

(iii) Was the UDI a breach of the Treaty of Guarantee?

On the face of it, if the Turkish Cypriots were bound by the 1960 Treaty of Guarantee then it would follow that their UDI was a breach of Article II prohibiting partition, in which case, the UDI was illegal. However the issue may not be that simple. A generally accepted principle of law is that a party to any agreement may be discharged from any obligation thereof if one or more parties to the same agreement commits a material breach of its terms.[79] The Treaty of Guarantee has been the subject of numerous breaches since 1974. Firstly, as indicated earlier, Greece directed a pro *enosis coup d'etat* in Cyprus in 1974. The *coup* amounted to a *de facto enosis* in violation of Greece's obligations under the treaty. Secondly, following the "Greek" *coup*, Turkey invaded Cyprus. The Turkish action was justifiable under the treaty. However the treaty limited such intervention to the "sole purpose" of safeguarding "the independence, territorial integrity and security of the Republic of Cyprus." As things turned out, the Turkish intervention was not restricted to returning Cyprus to the *status quo ante*. Turkey rather occupied and consolidated its exclusive control over 32% of the island on behalf of Turkish Cypriots. The Turkish invasion of 1974 therefore amounted to a *de facto* partition in violation of the provisions of the Treaty of Guarantee. Thirdly, the United Kingdom also failed to meet its obligations under the treaty. Following the 'Greek' *coup* and the subsequent *de facto* partition by Turkey, the United Kingdom had an obligation under the treaty to consult with Greece and Turkey in relation to measures to return Cyprus to its pre-1974 position. This failing, the United Kingdom reserved the right to take independent action "with the sole aim of re-establishing the state of affairs created by the Treaty". The United Kingdom did not exercise this right. Its failure to take independent action in the face of a *de facto* partition coupled with other breaches by Greece and Turkey substantially undermined the essence of the treaty. Fourthly, when in July 1974 all the Guarantor powers met to work out a solution on Cyprus, the negotiations only dealt with the reorganization of Cyprus into cantons or on a bizonal basis. The object of the three-power negotiations was obviously not the re-establishment of the state of affairs envisaged under the

79. Article 60, the Vienna Convention on the Law of Treaties (1969). See also the *Tacna-Arica Arbitration* (1925) 2 R.I.A.A. 921.

Cyprus constitution and required by the Treaty of Guarantee. To this extent the three powers acted *ultra vires*. *A fortiori,* their failure to re-establish the pre-1974 constitutional order in Cyprus was tantamount to a material breach of the Treaty of Guarantee.

In view of all the material breaches, what was left of the Treaty of Guarantee as at the time of the UDI? More specifically, what were the legal obligations of the Turkish Cypriots under the treaty by 15th November, 1983? It could be argued that after 1974, the provisions of the treaty became null and void. The continued *de facto* partition of Cyprus up to the day of the UDI, contrary to the terms of the treaty, was in itself an eloquent testimony to the fact that the treaty had become a dead letter. Given the invalidity of the Treaty of Guarantee, the UDI of November 1983, could not be a breach of its terms or of any other international obligations.

The rights of the guarantor powers and the partition

If one assumes, for the purposes of argument, that the Treaty of Guarantee is still valid and legally binding, the UDI has significant implications for the Guarantor Powers. Article IV of the treaty provides that

> "In the event of a breach of the provisions . . . Greece, Turkey and the United Kingdom undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions.
>
> In so far as common or concerted action may prove impossible, 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."

On the basis that the UDI is a breach of the treaty, two basic questions arise: (1) in what circumstances can the Powers jointly or severally "take action"? (2) can any such "action" include the use of force?

Firstly, any action to be taken under the Treaty must be preceded by a material breach, which is in this case the partition by the Turkish Cypriots. Secondly, the action must take the form of joint "representations or measures" by the Guaranteeing Powers. In the specific case of the Turkish Cypriot UDI, one cannot realistically expect a joint effort among the three Powers to re-integrate the TRNC into the rest of Cyprus as envisaged under the Treaty. This is because apart from the fact that Turkey sponsored the 1974 *de facto* partition it has also lent its blessings to the UDI by recognizing the TRNC.[80] While the Turkish Cypriots and indeed Turkey may perhaps give up claims to sovereign statehood for the TRNC in exchange for a federation arrangement in a future negotiated settlement, any consultations to return Cyprus to its pre-1974 united position are bound to be fruitless.

This brings us to the next cause of action: as indicated earlier, where joint consultations fail to re-establish the pre-1974 state of affairs, each Power reserves the right to take unilateral action to end the partition. The terms of the Treaty of Guarantee do not give an exact indication as to the interpretation of the word "action". Article IV of the Treaty has two separate "limbs". The first

80. *The Times (London),* 16th Nov. 1983 p. 6 col. 1.

limb provides for joint "representation or measures". The second limb postulates that where "concerted or common action" proves impossible the Powers reserve the right to take unilateral "action". It is submitted the phrase "concerted or common action" in the second limb is in reference to the "joint representations or measures" in the first limb. Consequently, it is in the light of this phrase that one must view the meaning of "action" either on multilateral or unilateral basis. In other words, the second limb of Article IV could well read as follows: where joint representations and measures prove impossible, each Power reserves the right to engage in unilateral representations and measures with the sole aim of re-establishing the state of affairs created by the Treaty.

The clarification of the relationship between the phrase "representations or measures" and the word "action" in Article IV is useful only to the extent that it helps to establish that the phrase and the word refer to the same issue. It does not by itself explain the exact nature or limits of "measures" or "action" under the Treaty.

"Measures" or "action" could mean the use of peaceful non-coercive means. But both words could also mean the use of force or coercive methods. In view of the ambiguity one is forced to refer to the drafting history of the Treaty or the preparatory work on the Treaty.[81]

(i) The preparatory work

The drafting history of the Treaty of Guarantee does not provide any concrete clues for interpreting the word "action" or "measures". It is however significant to note that the drafters were made aware of the possible interpretations. Some months before the 1966 London negotiations, it had been indicated in a seminar paper at Cambridge that the word "action" in Article IV could easily be interpreted "to permit the unilateral use of force and that such a state of affairs contradicted the United Nations Charter prohibition on the use of force."[82] To avert this, it had further been suggested that a qualification be attached to the word "action" so that the draft would have read like this: "such action as is permitted under international law". This suggestion was then brought to the attention of the Greek Cypriot delegate on the drafting committee who subsequently included it in his submissions.[83] Apparently, the issue did not receive any serious attention during the drafting sessions. One is unable to make any definite statements in respect of the drafting committee's position on the issue of the use of force under Article IV because the *travaux preparatories* on the draft have been classified as confidential and out of public reach.[84]

There is however evidence that at least some delegates during the drafting did not intend that "action" was to be interpreted to mean the use of force: during the Security Council debates on the 1964 crisis in Cyprus, the Greek representative stated quite emphatically: "in Zurich where I was present, our intention was not to create a situation in which for one reason or the other, one of us might be able, one fine day, to put troops on our warships and dispatch them

81. Article 32 of the Vienna Convention on the Law of Treaties (1969).
82. Jacovides, op cit, note 73, 22 n.106.
83. Ibid.
84. Ehrlich, op cit, note 1, 1069 n.220.

to Cyprus.''[85] This view on its own is however not conclusive enough to support the contention that the drafting committee did not intend ''action'' or ''measures'' to include the use of force.

(ii) The practice of the parties

The subsequent consistent practice of the parties to a treaty may constitute evidence of their implied interpretation of its terms.[86] In the case of the Treaty of Guarantee, the appropriate interpretation of Article IV has always been of great significance to Cyprus. If ''measures'' or ''action'' is interpreted to mean the use of force, it would mean that any of the Guarantor Powers could intervene by force in Cyprus in the event of a breach. Cypriot statesmen have therefore generally taken the view that Article IV cannot legally be interpreted to mean the use of force. In the Security Council debates on the 1964 crisis, Cyprus argued that to interpret ''action'' or ''measures'' to mean military intervention would violate the doctrine of sovereign equality under Article 2(1) of the United Nations Charter and the prohibition of the use of force under Article 2(4).[87] Article 103 of the Charter stipulates that where the terms of a treaty conflict with a party's rights or obligations under the terms of the Charter, the latter prevails. By implication, Cyprus sought to argue that if the Guarantor Powers' rights and obligations under Article IV of the Treaty of Guarantee included the right of military intervention in Cyprus, then the Treaty was void to that extent by virtue of Article 103 of the Charter.[88]

At the debates Cyprus also demanded a clarification from the Powers on the interpretation of the word ''action''. The Cypriot delegate asked:

> Is it the view of the Governments of Greece, Turkey and the United Kingdom that they have the right of military intervention under the Treaty of Guarantee, particularly in view of the Charter?[89]

Greece answered in the negative.[90] But the United Kingdom took the view that the use of force under Article IV would not necessarily be inconsistent with the United Nations Charter if such force was used in situations where there was a threat to the independence and territorial integrity or security of the Republic of Cyprus as established by the Basic Articles of its constitution.[91] Turkey on the other hand declined to give any specific response.[92]

In terms of actual practice, the conduct of the Powers has been equally varied. Greece has never used force for the purpose of Article IV. The United Kingdom on the other hand deployed troops during the 1964 crisis. However its action was based on the explicit consent of the government of Cyprus. In stark contrast, Turkey categorically justified its military interventions in Cyprus in 1964 and 1974 on the basis of Article IV and thereby interpreting ''action'' to mean force.

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85. (1964) UNSCOR 19th year, 1098th m'ting, 19, (S/PV1098).
86. Fitzmaurice ''The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points'' (1957) 33 BYBIL 203, at 211–12.
87. (1964) UNSCOR 19th year 1098 m'ting, 16–17.
88. But see comments to the contrary in Ehrlich, op cit, note 1, 1070, n. 226.
89. (1964) UNSCOR 19th year 1097th m'ting, 28.
90. Id, 32.
91. Id, 1098th m'ting, 12.
92. Id, 1097th m'ting, 30.

It is significant to note that the other Powers and the United Nations Security Council have never accepted the Turkish interpretation.[93]

The valid interpretation of Article IV of the Treaty of Guarantee

The varied interpretations underscore the ambiguity of the provisions of Article IV and raise the urgent need to clarify the precise scope of its provisions. This is particularly so, in view of the possible consequences of a unilateral use of force by any of the Guarantor Powers to reverse the UDI.

If one assumes that the drafting committee intended that Article IV precluded the use of force, then the issue would be quite simple: a forceful intervention by any of Powers to abolish the TRNC cannot be justified under the Treaty of Guarantee. If on the other hand one assumes that the drafters may have intended "action" to include force, this would lead to the issue as to whether Article IV is consistent with Article 2(4) of the United Nations Charter. Article 2(4) prohibits "the threat or the use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the Purposes of the United Nations". On the face of it, it could perhaps be argued that in the case of a partition such as the UDI or the TRNC, the interpretation of Article IV to include the use of force will not be a breach of Article 2(4) of the United Nations Charter because the use of force in such circumstances, i.e. to reintegrate the TRNC with the rest of Cyprus, will not be against the territorial integrity of the state. In fact, it will rather protect the territorial integrity of Cyprus. The difficulty with this argument is that it is based on a narrow interpretation of the provisions of Article 2(4). Article 2(4) has two parts; while the first part prohibits the use of force against the territorial integrity or political independence of a state, the second part imposes a more general prohibition viz: the restraint of the use of force "in any manner inconsistent with the Purposes of the United Nations". Under Article 1(1) of the United Nations Charter, it is one of the purposes of the organization "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of peace". In pursuance of this, all members accept under Article 2(3) to "settle their international disputes in such a manner that international peace and security and justice are not endangered." In view of the obvious implications of the unilateral use of force against the TRNC, on international peace and security in the region, any interpretation of Article IV of the Treaty of Guarantee to include the use of force will be inconsistent with Article 1(1) and a breach of Article 2(3) of the United Nations Charter. *A fortiori* it will be a breach of the second "limb" of Article 2(4) of the Charter. To summarize, a proper interpretation of Article IV of the Treaty of Guarantee, cannot include the use of force, by virtue of the United Nations Charter provisions. The use of force to abolish the TRNC in pursuance of Article IV will therefore be impermissible in international law.

93. (1964) 19 UNSCOR 1142th m'ting 12. In respect of the 1974 action see letter written by Turkish Premier Ecevit to the UN Secretary General (July 1974 UN Doc. S/1136).

Article IV of the Treaty of Guarantee and Chapter VIII of the United Nations Charter

It has been suggested by Thomas Ehrlich that the United Nations Charter is a "constitutive document of considerable generality designed to deal with new and changing circumstances" and that "the decline of the Security Council (in the 1960's) was motivated by the growth of the peacekeeping capabilities of the General Assembly through the Uniting for Peace Resolution and regional arrangements under Chapter VIII of the Charter".[94] In view of this he argues that an analysis of the terms of the Treaty of Guarantee and the vague intentions of the drafters raise the possibility that the Treaty and perhaps similar agreements may provide a third mechanism for the use of force consistent with the Purposes of the United Nations.[95] As a logical corollary to this, Ehrlich further argues that perhaps the parties to the Treaty "by a consensual arrangement (may have) expanded their unilateral authority to decide to use force beyond the confines of Article 51" of the United Nations Charter.[96]

Ehrlich's speculations are hardly acceptable. In the first place, there is no clear evidence that the parties intended to make force an aspect of Article IV. In fact, if the statements of the Greek representative at the 1964 Security Council debates[97] on Cyprus are anything to go by, it would seem correct to say that the parties did not intend to make force a feature of Article IV. Secondly, in analyzing the scope and validity of Article IV, what is relevant, is not so much a speculation as to what the drafters intended but the validity of any such intention as expressed in the Treaty. In this regard, it is submitted that assuming Ehrlich's speculations are correct, then any intention of the parties to arrogate to themselves the power to use force beyond Article 51 of the United Nations Charter was inconsistent with the Charter Provisions and inadmissible in international law.

In contemporary international relations there have been several instances of the use of force beyond the scope of Article 51 of the Charter and outside the authority of the Security Council under Chapter VII of the Charter. Some such cases, particularly those sponsored by the Organisation of American States (OAS) have been justified under Chapter VIII of the Charter. Article 52 of Chapter VIII provides that regional arrangements may be used "for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action." On the basis of this, could it not be said that the parties to the Treaty of Guarantee can use force as a form of "regional action" to abolish the TRNC if its creation threatens regional security? The answer to this question must necessarily be "no" because the Treaty of Guarantee is not a regional arrangement. One can therefore not impute a "regional authority" to its parties to enable them to undertake such regional action even if it was permissible in international law.

94. Op cit, note 1, 1073.
95. Ibid.
96. Id, 1074.
97. Note 82.

Even if one imputes regional authority to the parties by virtue of Article 52 of the UN Charter, they can still not use force as a form of "regional action" under the Treaty of Guarantee because the use of force under such circumstances would amount to "enforcement action". Under the Charter, "enforcement action" is the prerogative of the Security Council. Under Article 53, it is provided that

> "The Security Council shall, where appropriate utilize . . . regional arrangements or agencies for enforcement action *under authority. But no enforcement action shall be taken without the authorization of the Security Council* . . ." (emphasis added)

The question as to what may amount to "enforcement action" is controversial. The UN Charter does not define the phrase. However a careful reading of the Charter suggests that enforcement action comprises any methods (with the exception of the provisional measures under Article 40) in pursuance of Chapter VII which the Security Council may employ to give effect to its resolutions relating to the preservation of peace and security. Article 41 of the Charter provides that the Council "may decide what measures not involving the use of armed force are to be employed to give effect to its decisions." Article 42 provides for action by air, land and sea where the measures taken under Article 41 are inadequate. It can be inferred from both Articles that enforcement action, involves both military and non military measures.[98] While there is some dispute as to whether non military measures adopted by regional bodies could amount to enforcement action,[99] there is considerable support for the view that the use of military measures by such bodies may constitute enforcement action requiring the prior authorization of the Council under Article 53.[1]

The creation of the TRNC and the Treaty of Alliance

Under the Treaty of Alliance signed between Cyprus, Greece and Turkey,[2] the High Contracting Parties undertake to resist any attack or aggression, direct or indirect, directed against the independence or territorial integrity of Cyprus (Article II). Could the parties use force under this provision to abolish the TRNC? The answer would seem to be negative. This is because the objective of the Treaty of Alliance is not the use of force against sections of Cyprus as such. Under the Agreement for the application of the Treaty of Alliance,[3] the word

98. Kelsen, *The Law of the United Nations* (1951) 724; Akehurst, op cit (note 72) 180.
99. See for instance the U.S. arguments in Defense of OAS sanctions against the Dominican Republic in 1960 and against Cuba in 1962 in UNSCOR 15th year July, August, Sept. Supp. (1960) and UNSCOR 17th year, January, February, March Supp. (1962) respectively.
1. Halderman, "Regional Enforcement Measures and the United Nations" (1963) 52 Georgetown LJ, 18–119; Akehurst, "Enforcement Action by Regional Agencies with Special Reference to the OAS, (1967) 42, BYBIL 175; Macdonald "The Developing Relations Between Superior and Subordinate Political Bodies at the International Level: A note on the Experience of the U.N. and the OAS". (1964) Canadian Yearbook IL 21–54. Macdonald however indicates that the requirements of Article 53 are of relative significance today. There is also the view that regional "peace-keeping measures such as the U.S. invasion of Grenada in October 1983 are not directed against a government as sanctions, but instead are focused on restoring order and orderly processes of self-determination. They are therefore not enforcement actions (Moore "Grenada and International Double Standard" (1984) 78 AJIL 145, 155, 163). But see also Joyner "The United States Action in Grenada, Reflections on the Lawfulness of Invasion", id, 131–144.
2. Note 39.
3. Quoted in Evrivades, op cit, note 1, 252.

attack in Article II of the latter is explained as an "attack by sea or air". The phrase "indirect or direct" is also explained as "not only an attack conducted by an external enemy but also the internal subversive activities directed against the independence and the territorial integrity of the Republic of Cyprus." On the face of it, it could perhaps be argued that the High Contracting Parties could take action to abolish the TRNC because after all, the UDI impinges on the territorial integrity of Cyprus. However the issue is not that simple. Under the Agreement for the Application of the Treaty of Alliance, the use of force under Article II of the Treaty of Alliance is subject to a definite procedure: any decision in pursuance of the provisions of Article II can only be made by a Committee of Ministers from Cyprus, Turkey and Greece. Such a decision is then transmitted to the Operational Command of the Tripartite Headquarters which then authorizes the action to be taken. As indicated earlier, the Tripartite Headquarters comprises 950 Greeks and 650 Turks. Any measures taken have to be in consultation with Cyprus. On the basis of the procedural requirement for Article II of the Treaty of Alliance and the nature of the composition of the Tripartite Headquarters, it is submitted that the High Contracting Parties did not intend to apply the treaty to instances of *enosis* or cases of partition like the UDI that led to the creation of TRNC. This is because by its very nature, the chain of command required to make Article II operative breaks down in the event of either situation. The recent case of the UDI clearly demonstrates this: (1) the constitutional government of Cyprus comprises the Greek Cypriots and the Turkish Cypriots. Since the *de facto* partition of 1974 and the subsequent UDI of 1983, we now have only the "Greek government of Cyprus". As indicated earlier, any measures taken under Article II require a consultation with the Government of Cyprus. In the event of a partition and a subsequent withdrawal by the Turkish Cypriots such as the 1983 UDI, it is doubtful whether the Greek Cypriot government acting alone constitutes the "Government of Cyprus" for the purposes of the Treaty to assent to any measures to be taken under Article II. This is particularly so since the Treaty of Alliance was signed on behalf of Cyprus by delegates representing Greek Cypriots and Turkish Cypriots separately. (2) Turkey is an ardent supporter of partition; one can therefore not imagine a situation in which Turkey would agree to use its forces to resist the UDI.

That the Treaty of Alliance is clearly not meant to deal with *enosis* or partition is underscored by the fact that in the event of such crisis both Turkey and Greece, which have to commit their troops under the Treaty could have interests which would conflict with their treaty obligations. It is very unlikely that either Greece or Turkey agreed to accept in the Treaty to use force to suppress its own kin.

To summarize, even though the Treaty of Alliance appears to permit the use of force to protect the territorial integrity, it is doubtful whether the parties to the Treaty envisaged or intended its application in situations involving either *enosis* or partition. In any case, it seems logically impossible to use the Treaty as the basis of a possible use of force to abolish the TRNC.

Is the TRNC a State in International Law?

If one assumes that the UDI was a breach of the Treaty of Guarantee, then as an illegal creation, the TRNC is obviously not a state in international law due to the

maxim *ex injuria non oritur jus*. On the other hand, if one accepts our basic proposition that the Treaty of Guarantee was not valid as of November 1983 and so the UDI could not have been a breach of its provisions, several significant implications flow as to the exact status of the TRNC in law. Internally, (i.e. within the municipal law of Cyprus) the UDI may well have amounted to a revolution in the "Kelsenian" sense and consequently introduced a new *grundnorm* for the emergent legal system of TRNC.[4] For the purposes of international law however, the UDI in itself was of relative significance in that it neither created a state nor established a new order. At best it only constituted a desire for statehood.

Statehood is subject to definite criteria in international law. To be a state, an entity at the very least, must have a definite territory, a permanent population and a government exercising control and authority over the population in that territory. The entity must also possess the capacity to enter into international relations, be independent of other states and be recognized as a state by other states.[5] In the light of these criteria is the TRNC a state in international law?

(i) Definite territory and permanent population

The TRNC is without doubt located on a definite territory with precise boundaries and inhabited by a permanent population — the Turkish Cypriots. There is also no doubt that the territory has a government which has exercised exclusive control since 1974.

(ii) Capacity to enter into international relations

The issue as to whether the TRNC has the capacity to enter into international relations is of relative importance because capacity is not (in the strictest sense) a criterion or a condition for statehood because "it is a conflation of the requirements of government and independence."[6] In other words, where the latter are present in an entity, it can assume the capacity to enter into international relations.

(iii) Independence from other States

Even if the TRNC has established an effective government over a permanent population, is it in fact an independent entity? There is no precise definition of independence in international law; however a state of independence presupposes the separate existence of an entity and the absence of its subjection to the authority to another state or other states. Since the *de facto* partition in 1974, Turkey has always maintained a force of some 20,000 troops in Cyprus and propped up the separated territory with $20 million in aid annually. Economic aid in itself is not necessarily a symptom of political dependence in modern international relations. The Turkish grants are therefore immaterial in assessing the independence of the TRNC. On the other hand the presence of foreign troops

4. Kelsen, *General Theory of Law and State* (1946) 220; *Pure Theory of Law* (1967) 209. See however Finnis "Revolutions and the Continuity of Law" in Simpson (ed), *Oxford Essays in Jurisprudence* (1973) Chap. III.
5. On the criteria for statehood see generally Crawford, *The Creation of States in International Law* (1979) Chap. 2 particularly.
6. Id 48.

in a territory without the consent of the territory will derogate from independence and provide a *prima facie* basis for questioning any allegations of independence. In the case of the Turkish troops in Cyprus however it has been noted that they were stationed in the territory prior to the UDI. Following the UDI, there is no doubt that the constituted authority in the TRNC supports the presence of the troops since they constitute a sure guarantee against any external attempts to abolish the entity. If the Turkish troops were to remain in the territory without the consent of the TRNC government, the situation would then of course undermine any claims of independence by TRNC. In conclusion, the relationship between Turkey and the TRNC does not afford proof of any lack of independence on the part of the new entity.

Doubts over the TRNC's independence could however arise in respect of its relationship with "Greek Cyprus". In international law, a *de facto* separation does not necessarily sever the legal bonds between the entity and its parent community. The bonds are also not affected by a *de facto* temporary loss of control over the territory by the state. In the case of Biafra and Katanga, for instance, both territories were separated from their parent states for several months. For all practical purposes, the parent states lost control over the territories during the period of separation. Nevertheless, the general view is that both territories never became independent states at any point in time.[7] In all these cases the test as to whether a separating entity is independent or not appears to be whether the parent state is attempting to exercise its control over the territory or not. In other words, where the parent state is engaged in efforts to regain the control of the separating territory, the latter cannot lay claim to independence. In effect, a *de facto* separation such as the partition leading to the creation of TRNC must be accompanied by some clear evidence of the parent state's incapacity to reintegrate the territory or the absence of any efforts on its part to do so. In the case of the 1971 separation of Bangladesh for example, the defeat of Pakistan by India and the subsequent withdrawal of Pakistani troops from East Pakistan effectively established the incapacity of the Pakistani government to reintegrate the territory and opened the way for the successful secession of the territory.

Even though the TRNC is separated from "Greek Cyprus" for all practical purposes the Cyprus government is currently engaged in an international diplomatic effort to reintegrate the territory. The Cyprus government has vowed not to use force in its efforts. But the use of force or non-use of it is not material. What is relevant is whether the intention of the parent state to regain a separated territory in such circumstances is accompanied by concrete efforts of any kind — be they military or diplomatic. In view of the persistent diplomatic efforts of the "Cyprus Government" to reintegrate it, the TRNC is not an "independent" entity and is thus not a state in international law. This proposition is supported by the often repeated statement by the TRNC officials that UDI is not irreversible and that if the Turkish Cypriots' demands for bizonal communities are met, the TRNC will willingly accept reintegration.[8] The significance of this statement is

7. In the case of Biafra see Ijalaye "Was Biafra at any time a State in International Law" (1971) 65 AJIL 556. In respect of Katanga see the *Expenses Case* ICJ Reports (1962) 177.
8. *The Times (London)*, 16th Nov. 1983, p.13, col. 2. This is further implied in the declaration establishing the TRNC: "The proclamation of the new State will not hinder but facilitate the establishment of a genuine federation".

that the Turkish Cypriots themselves seem to admit that the UDI is necessarily tenuous and that in the near future they may well give up their current status and rejoin the rest of Cyprus under a new arrangement. In this regard, the status of the TRNC in international law is one of a state *in nascendi* with the possibility that it may become an independent entity in the future depending on the outcome of the diplomatic efforts of Cyprus and the nature of any settlement. The tenuous status of the TRNC leads us to the relevance of recognition to the territory.

(iv) Recognition by other States

Since its creation, the TRNC has been recognized only by Turkey and Pakistan. If one adopts the constitutive theory of recognition, then the status of the TRNC is quite clear: an entity by all accounts requires more than two states to recognize it to become a state (even though the state of the law does not require a specific maximum or minimum number of recognitions.) In the absence of such recognitions, then, the TRNC is not a state. On the other hand, the declaratory theory would have it that the recognition by other states of the TRNC is not vital for the new entity. What is material is whether the TRNC meets other relevant criteria for statehood including independence. If it does then the recognition by states, if any, would only be declaratory and attest to its emergence as a state.

For our purposes, however, the contrasting approaches of the constitutive and declaratory theories are not important. What is important is the international obligation of states in respect of recognition or non recognition of the TRNC in view of its tenuous position. The generally accepted view is that there is no duty to recognize it in international law.[9] In other words, where an entity is adjudged to be possessed of the attributes of statehood, existing states are under no obligation to recognize it. On the other hand, the general position of the law is that where an entity lacks the essential attributes of statehood or where its creation is founded on an illegal act, there is a duty not to recognize it.[10] The duty of non-recognition also exists in respect of a rebel territory which the parent state is making efforts to regain.[11]

The *raison d'etre* of the duty of non-recognition is that even though recognition is a political act, it tends to have juridical consequences. Thus the recognition of circumstances such as that of the TRNC, may well validate its status in law or help consolidate its tenuous position and confer on it an international personality it could otherwise not have claimed.

Currently there would seem to be a duty not to recognize the TRNC for at least two reasons: the "government of Cyprus" is engaged in efforts to reintegrate it. Until the issue is settled and adequate evidence has emerged to demonstrate that the Cyprus Government is neither willing nor able to regain the territory, a recognition of the TRNC would frustrate the efforts of the parent state and constitute an illegal intervention in its internal affairs.[12] Secondly, in Resolution

9. Chen, *The International Law of Recognition* (1957) 239; Brown, "The Legal Effects of Recognition", (1950) 44 AJIL 617; Kelsen, "Recognition in International Law: Theoretical Observations." (1941) 35 AJIL 605, 609–610.
10. Fitzmaurice, *"Ex Injuria Non Oritur Jus"* (1957 II) Hague Recueil 117, 123–124; McNair, "The Stimson Doctrine of Non-Recognition", (1933) 14 BYBIL 65; Chen id 60.
11. Oppenheim, op cit (note 9), 127–128.
12. Ibid, for the view that where there is recognition of an insurgent group, the action would not only be premature but would also amount to intervention in the affairs of the parent State.

541 adopted after the UDI, the United Nations Security Council called on all states not to recognize any Cypriot State other than the Republic of Cyprus. Under Article 25 of the United Nations Charter, all Member States undertake to carry out all decisions of the Security Council. Ths issue is whether in view of Article 25, Security Council Resolution 541 is legally binding on states or whether it is merely recommendatory. Opinion is divided as to whether all decisions of the Security Council are legally binding. On the one hand, there is the view that resolutions of the Council are only binding if made under Chapter VII of the United Nations Charter and preceded by a determination that an existing situation constitutes a threat to international peace and security.[13] On the other hand, there is the view that all Council resolutions are binding by virtue of Article 25 irrespective of whether they are made under Chapter VI or VII.[14] Of the two views, the former is preferable for a number of reasons: Article 24(2) of the United Nations Charter stipulates that "the specific powers granted to the Security Council for the discharge of (its) duties are laid down in Chapters VI, VII, VIII and XII." Article 25 provides that United Nations members "agree to accept and carry out the decisions of the Security Council in accordance with the . . . Charter". Since it is the acceptance and the carrying out of the decisions which must be in accordance with the Charter, "decisions" in Article 25 means such decisions as taken by the Council in pursuance of its powers in Article 24(2) and other relevant sections of the Charter under which Members may or may not have legally binding obligations. Thus in exercising its powers, the decisions of the Council become legally binding only if under the appropriate sections that it is acting, such decisions are binding and *vice versa*. Under Chapter VI for instance, an analysis of the provisions indicates that the powers of the Council are recommendatory in nature. The *travaux preparatoires* on the Charter further supports the view that the Chapter VI powers of the Council are meant to be recommendatory.[15] It would then follow that Council resolutions under Chapter VI are not legally binding. As Judge Fitzmaurice noted in his dissenting judgment in the *Namibia Opinion,*[16] to interpret Article 25 to mean that all Security Council resolutions including those adopted under Chapter VI, are legally binding, will bring the "language used in such parts of the Charter as Chapter VI for instance, indicative of recommendatory features or only . . . into direct contradiction with Article 25 — or Article 25 with them".[17]

Judge Fitzmaurice was however in the minority in the *Namibia Opinion.* In fact the majority interpreted Article 25 to mean that all Council resolutions are legally binding. In the history of the International Court of Justice, the *Namibia Opinion* constitutes the most substantial treatment of the scope of Article 25. The

13. Dugard, "The Simonstown Agreement: South Africa, Britain and the United Nations" (1968) 85 South African LJ 142, 148; Devine. "The Status of Rhodesia in International Law" (1973) Acta Juridica, 1, 155–157. Fawcett, "Security Council Resolutions on Rhodesia" (1965–6) 41 BYBIL 103, 120–1.
14. See for instance the International Court statement in the Advisory Opinion on the *Namibia Opinion* ICJ Reports 1971, p. 3, particularly at para. 113–114 and the conclusion drawn in para. 115.
15. See for instance UN Doc. XII, UNCIO, *Report of the Rapporteur of C'ttee III/2,* Doc. 1027 111/2/31(1), 4.
16. ICJ Reports 1971, p. 3 at 208.
17. Id, 293.

case therefore deserves attention in any analysis of Article 25. In the case, the Security Council requested an advisory opinion on the "legal consequences for States for the continued presence of South Africa in Namibia notwithstanding Security Council resolution 276 (1970)".[19] In resolution 276, the Council had declared that "the continued presence of the South African authorities in Namibia is illegal, and that . . . all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid". The Council had then called upon "States . . . to refrain from any dealings with the Government of South Africa" which were inconsistent with the declaration in that resolution. In submissions to the Court in pursuance of Article 66 of the Court's statute, South Africa argued that resolution 276 was not a binding decision under Article 25 because it was not adopted by reference to Chapter VII enforcement measures.[20] The Court rejected this view noting that "it is not possible to find in the Charter any support for (it)" and that Article 25 is not confined to decisions in regard to enforcement action but applies to "decisions of the Security Council adopted in accordance with the Charter".[21] This proposition was premised, partly on the rather strange logic that, Article 25 is placed, "not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council (and that) if Article 25 had reference solely to decisions of the Security Council concerning enforcement action under Article 41 and 42 . . . then Article 25 would be superfluous, since this is secured by Articles 48 and 49".[22] The appropriate interpretation of a clause in the Charter does not necessarily depend on the position of that clause in the instrument. In any case, the fact that Article 25 comes within the section dealing with functions and powers of the Council does not mean that all decisions by the Council under Article 25 are legally binding. The question whether or not all decisions under Article 25 are legally binding must depend on the language of Article 25 rather than its position in the Charter.

Surprisingly, the Court shied away from an analysis of the language of Article 25. In its concluding remarks on the issue the Court simply noted:[23]

> Thus when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for the member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.

As indicated earlier, the phrase "in accordance with the Charter" relates to the acceptance and the carrying out of the decisions and not their adoption. It would have been very useful if the Court had explained what is meant by the phrase "in

18. The few cases in which the International Court has discussed the issue of Article 25 include: *Expenses* cases, ICJ Reports 1962, p. 151, *Competence* case, ICJ Reports 1950, p. 4, the *Corfu Channel* case, ICJ Reports 1948, 4.
19. S.C. Res. 284 (1970).
20. Note 14 above.
21. Ibid.
22. Id, para 113.
23. Id, para 116.

accordance with the Charter''. But it did not. In fact, for all practical purposes, the Court's concluding remarks amounted to a wrong restatement of Article 25 and is therefore of little help in analysing the scope of the Article.

In the Majority Opinion, the Court itself admitted that:[24]

> ''the language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case having regard to the terms of the resolution to be interpreted, the discussions leading to it, the *Charter provisions invoked* and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council''.

It is submitted that if, as the Court would have us believe, all resolutions adopted under Article 25 are legally binding then the foregoing statement is a contradiction to the Court's general position. This is because the very language used in the passage indicates that the binding character of a resolution under Article 25 will depend on *inter alia* ''the Charter provisions invoked'' and under which the Council may purport to be acting. In other words if the Council purports to act under Chapter VI for instance, one would have to examine the relevant provisions to see if they create binding obligations.

Throughout the Opinion, the Majority made no reference whatsoever to the provisions of Chapter VI which are generally accepted to be recommendatory and resolutions in pursuance of which cannot create legal obligations. More significantly the Court made no reference to the earlier decision in the *Corfu Channel* case[25] in which it was noted that a Security Council resolution recommending a specific form of settlement was not legally binding.[26]

It is of interest to note that in the separate opinions, at least two Judges rejected the Majority's interpretation of Article 25. Judge Petrén for instance noted that the Court was divided on the issue, and then observed:[27]

> ''personally I share the opinion of those who think that Article 24 and 25 cannot have the affect of evading the conditions which Chapter VII lays down for the Security Council to be able to order with binding effect for States, the kind of measures involved here.''

In the absence of satisfying such conditions as laid down in Chapter VII, Judge Petrén noted, Security Council recommendations cannot be anything but recommendations which as such obviously have great moral force but which cannot be regarded as embodying legal obligations.[28] Judge Dillard on the other hand impliedly rejected the Majority Opinion with the observation that the exact scope of Article 25 has never been determined by the Security Council.[29]

Generally, existing juristic opinion does not favour the Court's interpretation of Article 25. After an exhaustive analysis of the powers of the Security Council,

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24. Id, para 114 (Emphasis added).
25. ICJ Reports 1948, p. 4.
26. See the separate opinion of Judges Basdevant, Alvarez, Winarski, Zoricic, de Vissher, Balawi and Krylov (id, 31–32).
27. *Namibia* opinion, ICJ Reports 1971, p. 5, at 136.
28. Ibid.
29. Id, 165.

Goodrich and Hambro for instance conclude: 'it would seem reasonable to limit binding ''decisions'' under Article 25 to those decisions by the Council which by the terms of the articles under which they are taken create obligations for members'.[30] Authorities with similar views include Oppenheim,[31] Greig,[32] Fawcett[33] and Kelsen.[34]

The fact that not all Security Council resolutions are legally binding does not of course settle the issue as to whether Council resolution 541 is legally binding on states or not. It has been indicated above that in customary international law premature recognition of an entity in the circumstances of the TRNC is prohibited. It could therefore be argued that to the extent that resolution 541 restates the customary law position, it is ''binding''. It follows that with or without the resolution the duty of non-recognition would exist for states with respect to the TRNC. The obvious difficulty with this approach is that it avoids a discussion of the ''intrinsic'' status of the resolution as such and thus offers little help in our inquiry on the legal status of resolution 541.

To ascertain whether resolution 541 is binding on states in its own right one must examine the language of the resolution and the relevant section of the Charter under which it was adopted. The relevant operative sections of resolution 541 states that the Security Council:

> ''*Concerned* at the declaration by the Turkish Cypriot Authorities on 15 November which purports to create an independent state in Northern Cyprus.
>
> *Considering* that this declaration is incompatible with the 1960 Treaty concerning the establishment of the Republic of Cyprus and the 1960 Treaty of Guarantee . . .
>
> 1. *Deplores* the declaration of the Turkish Cypriots of the purported secession of part of the Republic of Cyprus,
> 2. *Considers* the declaration referred to above as legally invalid and *calls for* its withdrawal . . .
> 7. *Calls upon all* states not to recognize any Cypriot state other than the Republic of Cyprus.'' (Emphasis added)

For our purposes, the most significant phrase in the resolution is ''calls upon''. The issue then is whether a Security Council *call upon* all States not to recognize that TRNC constitutes a legally binding decision under Article 25. The answer would seem to be ''no''.

It is not clear whether the resolution was adopted under Chapter VI or VII. It seems to contain articles that cross both Chapters. The call upon members appears to come within Article 41 under Chapter VII by virtue of which the Council ''may decide what measures not involving the use of armed force are to be employed to give effect to its decision, and . . . call upon the members of the United Nations to apply such measures.'' However, Article 41 must be read in combination with Article 39 of the Charter which stipulates that ''The Security

30. Goodrich and Hambro, *The Charter of The United Nations, Commentary and Documents* (1949) 209.
31. Op cit, note 9, Vol. II, 107.
32. Greig, *International Law* (1976) 742–751.
33. Note 13 above.
34. Kelsen, *Principles of International Law,* Tucker (ed.) (1966) 50.

Council shall determine the existence of any threat to the peace, breach of peace or act of aggression and shall make recommendations or decide what measures shall be taken in accordance with Article 41 . . .''. In this regard, resolution 541 contrasts sharply with an earlier council resolution in Southern Rhodesia in 1966.[35] In that resolution the Council specifically determined that ''the . . . situation in Southern Rhodesia constitutes a threat to international peace and security'' and consequently decided that all United Nations Members ''shall prevent'' trading with the rebel regime in respect of a list of commodities. More significantly, the resolution further noted that ''the failure or refusal (by Member States) to implement the . . . resolution shall constitute violation of Article 25 of the Charter.''

The essential determination of a threat to peace and security — a condition precedent to invoking measures under Article 41 and 42 — and the mandatory language in the 1966 resolution on Rhodesia are all absent from resolution 541. Without these elements, resolution 541 in itself (that is as opposed to being a pronouncement defining the pre-existing customary law rule on non-recognition) is more of a political directive lacking the judicial function of a binding decision of the Council. However, this does not mean that the resolution has no significance whatsoever. At the very least each United Nations Member has an obligation to consider even the non-legally binding decisions of the Council and indeed the Council Assembly in good faith.[36] This obligation is even greater in the special circumstances of the UDI in Cyprus where the failure of states to abide by the decision would contribute towards the creation of an illegal state of affairs or where it would amount to interfering in the internal affairs of another state.

The TRNC and the Question of Self-Determination in the Post-Colonial Context

In its independence declaration, the TRNC assembly indicated that ''the exercise of the right of self-determination has become an imperative for the Turkish Cypriot People''.[37] Since the UDI amounts to a secession from an established state the reliance of the TRNC on the principle of self-determination bears directly on the issue of the validity of claims of self-determination in the post-colonial context. Today, there is considerable juristic support for the view that self-determination is a principle of law.[38] But this description only relates to

35. S.C. Res. 232 (1966).
36. *Voting Procedure Case* (1955) ICJ Reports 67, 118–191. Judge Fitzmaurice advances the view that ''action in good faith is an international obligation . . . accordingly action not in good faith must be considered as a breach of international law''. (''Hersch Lauterpacht — The Scholar as Judge'', (1962) 38 BYBIL 9).
37. TRNC Public Information Officer, *Why Independence* (Mimeo) (1983) 22.
38. Nawaz ''The Meaning and Range of Self-Determination'' (1965) Duke University LJ 99; Brownlie, *Principles of Public International Law* (1979), p. 257; Higgins, *The Development of International Law Through the Political Organs of the United Nations* (1963) 103. Espiell (Special Rapporteur), *Implementation of U.N. Resolutions Relating to the Right of Peoples Under Colonial and Alien Domination to Self-Determination* (Study for the sub-commission on Prevention of Discrimination and Protection of Minorities) U.N. Doc. E/CN. 4/ Sub. 2/390 New York (1977) 17–19. See also a similar study by the same author U.N. Doc. E/CN 4/ Sub. 2/403 Rev. 1 12–13. But see Pomerance, *Self-Determination in Law and Practice* (1982), Chap. XI; Stone, *Israel and Palestine: Assault on the Law of Nations* (1981) Chap. 5.

the operation of the principle in decolonization.[39] The status of the principle in the post-colonization (i.e. post-colonial) context is unsettled.

On the one hand, there is the view that after decolonization, the room left for self-determination is very slight.[40] In other words, once a territory exercises self-determination, and sheds its colonial status to become a state, its constituent peoples cannot legitimately claim a separate right of self-determination in the future. The logical corollary of this view is that self-determination is not a continuing right and that once it is exercised, it is exhausted. According to this view then, Turkish Cypriots, cannot have a right of self-determination since they, as part of the Republic of Cyprus exercised the right in 1960. For the purposes of this paper the proponents of this view will be referred to as the "conservative school".

On the other hand, there is a fast growing number of authors who argue that self-determination has or ought to have a continuing validity in the post-colonial context.[41] This school sees self-determination as applicable to the constituent sections of a territory after decolonization subject to certain conditions. The proponents of this view will be called the "liberal school" for the purposes of this paper.

The conservative school's approach to the issue of post-colonial self-determination is founded on political pragmatism and the desire to meet the demands of the unified state system. It assumes that existing states will rationally not accept a rule of law that allows sections of their territories to secede as a right. The conservative school also considers post-colonial self-determination claims objectionable on the grounds of world public order. In this regard, the basic thesis is that unrestricted secession through post-colonial self-determination claims could lead to chaos and cause the dismantling of the existing international state system which is based largely on plural communities.

Despite the appealing rationale of the conservative school's position, the liberal approach to the question is preferable for a number of reasons. Firstly, in modern times, self-determination is generally regarded as an aspect of human rights.[42] Given the increasing worldwide concern on human rights for all peoples, it will amount to an international double standard to accept self-determination for

39. Sureda, *The Evolution of Self-Determination, A Study of United Nations Practice* (1973) 261.
40. The leading exponent of this view is Emerson. See his following works: *Self-Determination Revisited in the Era of Decolonization,* Harvard Occasional Papers in International Affairs (1964); "Self-Determination" (1971) 65 AJIL 459. See also Van Dyke, *Human Rights, the United States and the World Community* (1970) 102.
41. Nayar, "Self-Determination: The Bangladesh Experience" (1974) 7 Revue des Droits de L'homme 258; "Self-Determination Beyond the Colonial Context: Biafra in Retrospect" (1975) 10 Texas Int LJ 321; Sukovic, "The Principal of Equal Rights and Self-Determination of Peoples:, in Sahovic (ed.) *Principles of International Law Concerning Friendly Relations and Co-operation* (1972) 323 at 344; Nanda, "Self-Determination Under International Law, Validity of Claims to Secede" (1981) 13 Case W Res J. Int L 257; Suzuki, "Self-Determination and World Public Order" (1975–76) 16 Va J Int L 790; Chu Chen "Self-Determination as a Human Right" in Reisman and Weston (eds) *Towards World Order and Human Dignity* (1976) 198–261; Buchhiet, *Secession* (1978), passim.
42. Chu Chen, ibid; Fawcett, "The Role of the United Nations in the Protection of Human Rights — is it misconceived?" in Eide and Schou (eds), *International Protection of Human Rights* (Nobel Symposium 7) (1968) 95, 97–98; Ofuatey-Kojoe, *The Principles of Self-Determination in International Law* (1970) 188.

colonial peoples but to reject it for other peoples subject to gross deprivation of human rights or to conditions that may well be similar to those under colonial rule.[43] Secondly, the conservative school's attempts to restrict self-determination to only colonial peoples appears to be based on a misconception of the very nature and evolution of self-determination. Before decolonization, self-determination was applied extensively in Europe. In its evolutionary stages the beneficiaries of the principle had been distinct minorities or peoples who were *non-self governing* or subject to rule by other nationalities. With the emergence of colonialism and the subsequent need for decolonization, colonial peoples came to be identified as a new category of beneficiaries. As a result of the focus of self-determination on decolonization since 1945, international lawyers have tended to dwell only on the relevance of the principle to colonial peoples. They have thus glossed over the essential similarity between the significance of the principle (as applied to minorities and nationalities) in the pre-1945 era on the one hand and the post-1945 era on the other hand. More importantly, they have ignored the teleological basis of self-determination over the years as a right which has applied *mutatis mutandis* to nationalities, minorities, occupied territories and colonial units to remedy situations of subordination.

The application of self-determination to these diverse groups is evidence of the flexibility of the principle. It also lends weight to the view that in the post-colonial context, self-determination ought to be regarded as a dynamic principle applicable to different beneficiaries in different circumstances. Just as the principle was used to "rectify" cases of political subordination in previous stages of its evolution, so can it be applied to similar situations in the post-colonial context.

In modern times, the United Nations has impliedly admitted the dynamic application of self-determination by recognizing its relevance to the Palestinian Arabs,[44] and the non-white races of South Africa,[45] none of whom are under colonial rule. Any prescriptions on self-determination must necessarily take account of these evolutionary trends.

The liberal school's approach is further preferable because claims of self-determination in the post-colonial era have become a recurrent conflict-generating phenomenon that calls for a more realistic appraisal of the role of the principle and the formulation of appropriate prescriptions to regulate its application. In fact given the persistence of claims evidenced by the Katangans, Bengalis and Biafrans in the past, and the Eritreans, Tamils, the Sikhs, the Quebecois the Turkish Cypriots, the Basque and the Catalans in the present, the focus of the debate on post-colonial self-determination should not be whether self-determination ought to be admissible in the post colonial context or not. It should rather be how best international law can regulate the application of the principle to accommodate present and future claims.

A comprehensive discussion of how best self-determination can be applied in the post-colonial context is not intended in this paper. It may however be noted

43. See comments in this regard by Fawcett, *The Law of Nations* (1968) 37; Fitzmaurice, "The Future of Public International Law" *Livre du Centenaire, Institut de Droit Int* (1972) 235.
44. G.A. Res. 2535B, G.A. Res. 2672B, G.A. Res. 2649.
45. G.A. Res. 2396 (XXII): G.A. Res. 2671F (XXV).

that any prescriptions in this regard would need to draw a balance between the demands of the centralized state system and the need to safeguard the human rights of the constituent members of the state. In view of this, a claimant group cannot be granted post-colonial self-determination simply because it is ethnically distinct and it demands a separate existence. The dictates of territorial integrity simply necessitate the rejection of ethnic, linguistic or religious parochialism as the determining basis for granting self-determination in the post-colonial context. However as a matter of international public policy, claims of self-determination ought to be supported where the fact of cultural distinction is used as a basis for human rights violations against a group. In such situations self-determination could serve as a remedial right to safeguard the human rights of the claimant group. In each case the issue as to whether the group merits a grant of self-determination, will of course depend on the gravity and extent of violations.

Whatever the merits of the recognition of a right of post-colonial self-determination might appear to be, the United Nations Security Council has declined to accept the validity of the principle in respect of the TRNC. At a glance, the Council's rejection of the UDI reinforces the view of the conservative school that in the post-colonial context there is no room for self-determination. The Council's rejection of the TRNC must however be treated with caution. This is because even though the TRNC advanced several reasons in support of its claims, the Council did not consider the merits of the claims as such in rejecting the UDI. Secondly, it did not purport to lay down a rule on post-colonial self-determination. Above all, the Council did not profess to be following an existing rule or policy prescription on the issue. It only rejected the UDI on the basis of the narrow context of the international obligations of Cyprus under the Treaty of Guarantee. The Council's reaction can therefore not be taken to be in support of the conservative school's position on post-colonial self-determination. At best, it is only good authority for the proposition that the Council will not admit a claim to self-determination (and indeed any other claim) where such a claim is in breach of an existing international obligation of the claimant. But then this will just be consistent with the well established maxim *ex injuria non oritur jus* rather than an affirmation of the invalidity per se of self-determination in the post-colonial context.