THE LEGAL SUPPORT OF AN ILLEGAL UN PLAN[1] BY A UN LAWYER

By Loukis G. Loucaides2

Introductory

His name is Didier Pfirter, a Swiss diplomat who, at the material time, was serving in the Swiss Embassy in Lisbon. He was considered more of a diplomat than a distinguished lawyer. However he was chosen to be a legal advisor of the UN Secretary – General's good offices in Cyprus between March 2000 and April 2004 in respect of the UN efforts to assist in finding a solution to the Cyprus problem. The criteria for such an important choice are not known. The required legal work for the task assigned to Mr Pfirter was enormous. From such a lawyer it was expected to be very well conversant with international law, human rights, constitutional law and the principles of law of the European Union. Above all he was required to put the rule of law above any political expediency and guide those involved in the problem on the basis of legal principles rather than on the basis of any other considerations. In other words, he should be acting as a lawyer and not as a politician or diplomat. Whether he was the right person satisfying these requirements is a matter that may be judged on the basis of the work he has done or has not done as a legal advisor of the UN Secretary-General Koffi Annan.

The so called Annan Plan for the solution of the Cyprus problem which was rejected by the vast majority of the Greek Cypriot (G/C) population of Cyprus (76%) was the product of the UN Secretary-General's efforts based on the legal advice of Mr Pfirter. The latter has defended vehemently the Plan both by his interviews[3] and articles[4]. In all his public pronouncements regarding the plan in question he presented himself in his capacity as a legal advisor. In his last article in honour of Mr Wildhaber he speaks about the lessons he received from his professor Mr Wildhaber in the field of human rights and that in his legal work regarding the Annan Plan he has "*often felt inspired by the dedication to ethical principles and by the pragmatism that have distinguished LUZIUS WILDHABER's (sic) professional life*". Having read the legal writings of Mr Pfirter in support of the Annan Plan I must admit that I found no legal interest in them. I felt that they were not so much legal but an effort to defend a plan through non legal arguments possibly inspired by the "*pragmatism*" that has in fact distinguished Mr Wildhaber[5].

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[1] A reply to the Article of Mr Didier Pfirter, legal advisor of the UN Secretary – General's good offices in Cyprus between March 2000 and April 2004 in respect of the UN efforts to assist in finding a solution to the Cyprus problem, in "Human Rights, Democracy and the Rule of Law", Liber amicorum Luzius Wildhaber, 2007, p. 595 et seq.

2 Judge of the European Court of Human Rights

[3] See e.g. The Cyprus Weekly March 5-11, 2004, and interview, Kibris TV 20-3-2003

[4] See e.g. Cyprus – A UN Peace Effort under Conditions of ECHR Applicability in Human Rights, Democracy and the Rule of Law, Liber amicorum Luzius Wildhaber, 2007, p. 595 et seq.

[5] Mr Wildhaber was the former President of the European Court of Human Rights (ECHR). During his presidency the examination of the cases of G/C against Turkey relating to their property in the occupied part of Cyprus was

Indeed for any lawyer who has read the Annan Plan the impression given is that the Plan does not really have any relation with legal principles (international law, human rights, constitutional law etc). Judged on the basis of such principles it appears to many eminent lawyers as a monstrous structure aiming at reconciling just and unjust claims in a provocative manner that shocks legal conscience.

I was tempted to go in detail through all the arguments and points made by Mr Pfirter in his article in honour of his former professor Mr Wildhaber. However, it is sufficient to go through the main lines and some principal arguments as well as the general approach of the article.[6]

In his article Mr Pfirter takes the stand that the "accusations" that the Annan Plan does not respect human rights, does not uphold international law etc are "*unsubstantiated*", that he does not purport to defend the UN against them "*but rather aims to discuss recent developments in the interpretation of Human Rights that are relevant to the solution of many conflicts as well as some of the dilemmas that may arise*[7]*"* (whatever that may mean). However his whole article is nothing else than a defence of the compatibility of the plan, as much as possible, with relevant principles of law, mainly on the basis of "pragmatic arguments" and his personal interpretation of human rights presumably in the light -according to his own statement- of "*recent developments*" which he does not specify and remain unexplained thought-out the Article. The author continues with the statement that "*while the UN is bound to respect international law and human rights in all its peace efforts, the case of Cyprus is particularly interesting because the UN peace plan had to be conceived so as to withstand the scrutiny of an international human*

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suspended and in the end one of them (Xenides- Aresti) was used as a pilot case. Although violations were found in that case it deviated from the previous jurisprudence (eg Loizidou and Cyprus v. Turkey) and opened the way to what Mr Pfirter suggested at p.608 of his Article i.e. "The Turkish or Turkish Cypriot authorities to offer effective remedies". An application for the withdrawal of Mr Wildhaber from participating in any way in the examination of such pending cases, was made by the lawyers of a substantial number of applicants on the ground of lack of impartiality due to discussion by him of these cases with Mr Pfirter, the Turkish Permanent Representative (who requested an adjournment of all these cases) and the leader of the T/C community Mr Talat in the absence of the representatives of the applicants. Mr Wildhaber also prevented judges of the ECHR from participating in human rights seminars organised in Cyprus by a NGO although he has himself attended such seminar and expressed his satisfaction about its work. He tried to justify the change of his attitude on the ground that Turkey and the illegal regime in the occupied area (TRNC) objected to the participation of judges in such seminars. When he was asked to give more reasons for his objections he made the following unfounded statement "Because the President of Cyprus has lied to the EU regarding the acceptance of the Annan plan"!

[6] I would like to stress that, although I am a Greek Cypriot, I expect the reader to judge my points and arguments on their merit and not to draw the conclusion that because of my ethnic origin I felt bound to express the views I am setting out. Indeed what really matters is the strength or merit of an argument of a person and not whether he or she belongs to a category of persons who have an interest to hold views similar to those of the speaker. Therefore I will not reverse the childish innuendo made by by Mr Pfirter about Mrs Palley through his statement that she has been "a long time (Greek) Cypriot government employee." Following his line of thought one could draw attention to the fact that he has been the lawyer of the Annan Plan and therefore his arguments were made out of necessity in order to defend his role.

[7] P. 597 of the Article

rights court acting upon individual complaints". The question is whether the plan can withstand at all the scrutiny of human rights lawyers in general.

General comments

Before dealing with concrete aspects of Mr Pfirter's article I find it useful to make some general comments in respect of the article on the assumption that Mr Pfirter was acting strictly as a lawyer in his difficult task as a legal advisor to Mr Annan.

I have noticed that the author of the article hesitated to use proper legal descriptions on some matters; for example he does not describe correctly throughout his article the northern part of Cyprus as being an area occupied by Turkey. Most of the time, he prefers describing that area as being under "*Turkish-Cypriot administration*". In this respect it should be recalled that the European Court of Human Rights (ECHR) has expressly found that "*the respondent Government [Turkey] have acknowledged … the occupation of the northern part of Cyprus by Turkish troops*".[8] It is true that he does indirectly make a point about the Turkish occupation in a gentle manner at page 620 of his article when he deals with the question of settlers and speaks about *"effective control"* of the northern part of Cyprus by Turkey; but the reference to the Turkish occupation and its consequences is missing in many substantial aspects of the Cyprus problem such as the question of properties of the Greek Cypriots (G/C) and the right of return of the displaced persons.

For evident reasons Turkey is offended when it is described as an occupant country; but for a lawyer there should be no problem in calling a spade a spade, especially when that entails certain legal consequences.

The effort of the author to defend the Annan Plan in all respects throughout his article and to avoid offending Turkey is obvious. I believe that it is not fair for him to adopt inaccurate or misleading statements. Moreover on many occasions he puts forward arguments of his own which are not in line with the facts or the law.[9]

In footnote 5 of his article, he states the following: "*The international community and the United Nations recognize the government of the Republic of Cyprus as the only Cypriot government, even though the Turkish Cypriots have not participated in that government since 1963 (or, as they would say, been prevented from doing so).*" The words "*even though*" clearly imply that the UN recognition of the Government of the Republic of Cyprus might, in the opinion of the author, be wrong, such an opinion being irreconcilable with the principles of international law regarding recognition of governments; not to mention the omission of the author to say that all the states of the world, apart from Turkey, and all international organisations followed the UN's example.[10]

[8] Loizidou v. Turkey (Preliminary Objections) ECHR Series A No 310 (1995) 24 para 63

[9] See e.g the "rehabilitation of G/C" at p. 600 of the Article and the "bad faith general principle of law" at p 621

[10] Another omission of some significance is the non-reference that the T/C judges remained in their posts for some years after 1963, until they were forced by Turkey to abandon their posts in furtherance of the policy of self-

Omissions and inaccuracies

There are some major omissions or inaccuracies in the introductory chapter of the article under the title *"Historical, geographical and demographic facts"*. A UN lawyer recruited to advise on the solution of the Cyprus problem should at least go through the many UN resolutions and Reports regarding facts that explain the problem. For example, when he speaks about the events of 1963 which according to him triggered "*a civil war that led to ethnic cleansing which affected the Turkish Cypriots disproportionately and left most of them to live for the next decade under economically difficult conditions in small enclaves …*" one would have expected to quote from the UN Secretary-General's reports at the time according to which -

> "*The lack of movement of Turkish Cypriots outside their areas is also believed to be dictated by a political purpose, namely, to reinforce the claim that the two main communities of Cyprus cannot live peacefully together in the island without some sort of geographical separation."*[11]
>
> *"Indeed, since the Turkish Cypriot leadership is committed to physical and geographical separation of the communities, as a political goal, it is not likely to encourage activities by Turkish Cypriots which may be interpreted as demonstrating the merits of an alternative policy. The result has been a seemingly deliberate policy of self-segregation by the Turkish Cypriots"*[12].

Both reports were prepared by the UN Secretary U Thant, a person of high integrity and a man of principle.

Nevertheless Mr Pfirter disregarding the policy of separation or self-segregation asserts that "*ethnic cleansing affected the Turkish Cypriots disproportionately*". In this respect I wonder why once Mr Pfirter takes into account proportionality, he does not mention, in his following sentence, the disproportionate effects of the "*intervention*" by Turkey in Cyprus on the Greek Cypriot ("G/C") population, including the massive and organized ethnic cleansing, at least as reflected in the Judgments of the ECHR and the Reports of the Commission of Human Rights in the cases of Cyprus *v.* Turkey. These important legal documents are not given the right weight by the UN lawyer. The judgments of the ECHR are only mentioned by him in order to diminish their importance on the basis of unfounded comments and speculation.

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segregation of T/C in order to reinforce the claim that the two main communities of Cyprus cannot live peacefully together in the island without some sort of geographical separation. See below, the 1964 reports of the UN Secretary General.

[11] Report S/5764, para.113

[12] Report S/6426 para.106

The author of the article in question states that he "*feels professionally bound to use the correct terminology …*"[13] Yet, not only does he avoid using any legal terminology that may offend the Turkish side, but he also uses terms that do not correspond to the correct legal and factual situation. For instance he avoids using the correct phrase "*Turkish invasion*", but instead adopts the Turkish mild expression of "*Turkish intervention*".[14] He even gives wrong numbers when it comes to victims of G/C (e.g. 160.000 displaced G/C instead of more than 200,000[15]). He omits to state that about 1500 G/C were missing as a result of the Turkish invasion; that the G/C were displaced persons because they were not allowed by Turkish military authorities to return to their homes, while the Turkish Cypriots ("T/C") were not prevented by the Government of Cyprus (the G/C Government according to the UN lawyer) to do the same. He speaks about displaced T/C who were "*compensated by their authorities with properties left behind by G/C*" disregarding the fact that according to international law occupant countries, such as Turkey in this case, cannot confiscate property in the occupied area[16] and certainly cannot "compensate" people by giving them property that belongs to others and which the G/C lawful owners did not "leave behind" - a term that implies a voluntary abandonment of properties.

Taksim

He speaks about "*authorities of T/C"* being hesitant to mention that in fact it was Turkey which was in authority in the occupied part of Cyprus according to the findings of the European Commission and the Court of Human Rights. He speaks mainly about "*the T/C administration*" without clarifying right from the beginning of his Article that whatever administrative regime existed in the occupied area it was a "subsidiary administration"[17] of Turkey. He even goes as far as to state that "*political power remains however mostly in the hands of the native T/C"*[18] which is contrary to the reality as expressed also by many T/C. In another part of the article, he speaks about the occupied part of Cyprus as "*their part"* of the island, i.e. the T/C part.[19] Referring to the "*Turkish intervention"* which followed the coup in

[13] See footnote 14 of the article.

[14] See p. 5999. In fact, the author, throughout his article, avoids speaking about the responsibility of Turkey as an occupant country in Cyprus, according to the objective reports of the European Commission of Human Rights and the judgments of the ECHR.

15 See UNHCR 1998 Statistical Overview, July 1999, p9.

[16] See, *inter alia,* article 46 of the Hague Regulations annexed to the 1907 Hague Convention, P. Daillier and A. Pellet *Droit International Public* - 6th edition Paris Nguyen Quoc Dinh 1999) p.481 para 314 ; *Oppenheim's International Law II: Disputes, War and Neutrality* (7th edition Lauterpacht (ed), London Longmans 1952) 403, 619; judgment of the ECHR in the Intrastate case of Cyprus *v.* Turkey, 25781/94; and the joint opinion of Georges Abi-Saab, Dieter Blumenwitz, James Crawford, John Dugard, Christopher Greenwood, Gerhard Hafner, Francisco Orrego-Vicuna, Alain Pellet, Henry Schermers, and Christian Tomuschat, dated 30 June 1999 (http://www.attorney-general.gov.cy).

[17] See Loizidou v. Turkey (footnote 4) supra

[18] See footnote 26 of the article.

[19] See footnote 27 of the article.

1974, he says ironically that the result was a *de facto "Taksim"*, i.e. the Turkish term used by the Turks since 1955 for their objective of partitioning Cyprus instead of saying that the resulting situation was one of military occupation of the northern part of Cyprus by Turkey with thousands of victims and other catastrophic consequences for over 30 years until today.

These real facts should have been taken into account by a legal adviser to the UN Secretary General in dealing with the Cyprus problem. They are part of the problem. Other inaccuracies include the misnomer of the Turkish unilateral military attack and invasion of Cyprus in 1974 by the inappropriate terms of *"war"* or *"armed conflict";*[20] also the placing of the T/C displaced persons on the same footing as the G/C displaced persons without mentioning the fact that the T/C were not refused access to their homes and properties by the Government of Cyprus and that the displacement of the members of both communities was the result of a declared policy of Turkey to divide the island into two different areas populated by Greeks and Turks respectively. Turkey made no secret of this policy.

The "rehabilitation" of the G/C and the "newcomers"

Moreover, the statement to the effect that the displaced G/C were "*economically rehabilitated within roughly a decade*", is misleading inasmuch as no account is taken of the huge property of these G/C which was confiscated by Turkey (hotels, factories, businesses, houses, land, movables etc.). That property was by far more valuable than the property left behind by the T/C. Equally inaccurate is the statement in footnote 24 according to which *"More recently the remaining income and wealth gap between the displaced and their more fortunate compatriots has almost disappeared on the G/C side."* The UN lawyer must have been misinformed or relied on appearances of some persons or most probably on gossip. His conclusion presupposes an inquiry in depth which was never carried out.

The author speaks about an "*increasing number of mainland Turks settled in areas under T/C administration*". He states that many of them are "*temporary workers without permits*". These Turks are of course settlers brought into the occupied part of Cyprus by the occupant country in breach of the relevant rules of international law–and should have been so described right from the beginning of the Article- The UN lawyer deals with this situation later in his Article, albeit in a wrong and prejudiced manner as will be shown below.

In footnote 22 of the Article, Mr Pfirter states that "*the T/C authorities*" have recognised full ownership to the T/C as regards the properties of G/C given to them by these *"authorities"* and that this process was *"questioned by many T/C who allege that a certain arbitrariness and political favouritism was involved"*. The author avoids to state here anything about the flagrant illegality of this situation although in respect of many other issues, he does express straight away his own views or refers to other people's writings, e.g. footnote 20 of the article. He even speculates in favour of the T/C by saying that *"there is no reason to believe that the native Turkish Cypriots would have rejected the plan"* even though he admits that the "*newcomers*" (i.e. the settlers) constitute roughly half the population or more of the illegally proclaimed "TRNC" - the *"newcomers"* having every reason to support the Plan which would

[20] See e.g. p. 601 of the article.

secure them a permanent legitimate stay in Cyprus at the expense of the rights of the G/C and T/C alike.[21] Here Mr Pfirter expresses some concern about the effect of the voting of settlers in the referendum in respect of the Plan but he finds a way out as follows:

> *This issue also raised questions with respect to the referendum. It was clear that it would be highly problematic if it could be alleged that the majority of native Turkish Cypriots had voted different than the overall result of the referendum on the Turkish Cypriot side. The UN was however not in charge of organizing the referendum. This was clearly the task of each of the two communities*[22]. (Emphasis added)

It is difficult to accept that the UN was entitled to be indifferent as regards the way the referendum was carried out. One is inclined to believe that they chose to turn a blind eye regarding the participation of settlers in what was supposed to be the T/C referendum.

The "isolation"of the T/C

I must, at this juncture, say that the article is accommodating, on many occasions, the claims of Turkey, sometimes in a manner which shows that the author is prepared to accept them as correct without checking whether they are well-founded or not.[23] I believe that this approach is not appropriate for a UN legal advisor. I pause here for a moment to point out that the "*steady haemorrhage"* of emigration of the T/C side "*in the aftermath of the war"* referred in the Article was due more precisely to the self-isolation of the T/C resulting from the Turkey's policy of partitioning the island and the Turkish occupation with its oppressive policies[24] so the simple reference to "isolation" is misleading. The UN lawyer speaks about the "*isolation*" of the TC twice in his article.[25] He knows that the TC by this term they refer to the fact that they cannot make exports and generally act as a separate state -the so called Turkish Republic of Northern Cyprus ("TRNC") in the Turkish occupied part of Cyprus, declared illegally in 1983. The UN lawyer however should not have avoided mentioning the fact that the "TRNC" was condemned

[21] Mr Serdar Atai aT/C from Famagusta in a statement he made in a seminar on the question of settlers on 7/11/2003 he stated *inter alia* "However, the public opinion and conscience of Turkish Cypriots is restless. Because steady flow of Turkish Settlers has a nationwide destruction. Not only at the political level that Turkish Cypriots have been outvoted in the past elections and their self determination rights have been taken out of their hands but their all other civil rights have been overshadowed as well"

[22] See footnote 26 p. 6oo of the Article.

[23] See footnotes 19, 25, 26 of the article.

[24] Mr Serdar Atai (op cit) stated " When people came from the mainland who were ready to work at half wages or salaries without calling for any social securities and benefits Turkish Cypriots had to leave the island for London, Sydney, Toronto and Istanbul….Mainly the largest capital owners who were in close cooperation with the established regime opted for recruiting and thus exploiting the cheap labour force from Turkey in return of firing the Turkish Cypriots. And the others followed suit by saying that they had to do it to be competitive. My generation lost two third or our beloved friends in this way and we feel abandoned in the newly created and imposed environment. If we are to talk about 'crimes against humanity' here it is".

[25] Ff 25 and 27

by the UN Security Council as *"legally invalid"*, that the UN SC called *"for its withdrawal" and also "called upon all states not to recognise the purported state of TRNC and not to facilitate or in any way assist this secessionist entity"*[26]. Mr Pfirter as a UN lawyer and a student of Mr Wildhaber was professionally bound to mention these facts otherwise his statement about the "*isolation"* of TC might be misunderstood by the readers as being the result of "naughty" acts of the "bad" G/C.

Overstepping the limits of decency

A person may be misinformed and may, because of that make a wrong statement. However in the field of efforts to solve an international problem these mistakes are inexcusable because they may affect the life of many persons. However there are even worst situations which debase oneself. Such is the case when a person is ready to accept propaganda and insolently lies in order to further his objectives. This is exactly what has happened by the following completely unfounded statement of Mr Pfirter at p 603 footnote 34 of his Article-

> *"Indeed, in a television address towards the end of the campaign, when many arguments against the plan had been proven wrong by its Greek Cypriot defenders, President Papadopoulos told his people that even if the plan were a good thing, they took little risk by rejecting it: Cyprus would soon be a member of the European Union while Turkey would still be aspiring to become one. The plan would thus remain available and the Greek Cypriots could negotiate changes from a position of strength. This was indeed a most convincing argument to swing anyone in doubt!* [!!!]

I have been following all relevant television addresses of the President. He explained in his main address the reasons why he believed that the plan should be rejected but he never said any of the things attributed to him by the UN lawyer. The plan was so awfully bad that anybody who read it (really read it not bits and pieces here and there) would not need to invoke any arguments outside its text in order to convince the G/C that it was in all respects unacceptable. After all if the plan "*were a "good thing"* there was no reason to argue against it. Incidentally I wonder how Mr Pfirter found out that *"many arguments against the plan had been proven wrong"*. It seems that he either had special equipment recording wrong arguments or a translator who was twisting things in order to please the UN lawyer as regards his product. In any event I detect traces of malice in the statement of the UN lawyer and that is very bad. His personal attack on President Papadopoulos through this statement, if he believed what he writes to be true, could have been made through a more appropriate publication which could give the opportunity of an immediate and effective response by the target of his attack and not in a book in honour of his former professor which by definition precludes any such response. However it seems that in this respect Mr Pfirter failed to be inspired by *the "ethical principles… that have distinguished Luzius Wildhaber's professional life"*.

[26] See Resolutions of the SC nos 541 (1983) and 550 (1984)

The bi-zonal and bi-communal federation

In order to justify some important deviations from fundamental rules of international law and human rights through the Annan Plan Mr Pfirter relies on the "bi-zonal and bi-communal federation" agreed[27] by the leaders of the G/C and T/C communities. His approach is based on an interpretation of this agreement which is totally incompatible with such rules. In this respect he states that *"it seems clear that the creation of a bi-zonal, bi-communal federation implies that one of the zones would be predominantly inhabited by Turkish Cypriots and that in a country where the two ethnic groups had previously been scattered fairly evenly, this implied some displacement based on ethnic criteria"*. Mr Pfirter overlooks the fact that the relevant guidelines agreed by the leaders in question included the express condition that *"There should be respect for human rights and fundamental freedoms of all citizens of the Republic"*[28] this term does not allow the interpretation supported by the UN lawyer which it so happens that it coincides with that of the Turks.

He also invokes the UN Security Council ("SC") Resolutions which adopted the aforesaid agreement and in particular Resolutions 649 and 774.

The problem with these Resolutions is that I believe that the UN lawyer unfortunately has not interpreted them correctly. If one studies them carefully he will find that their express terms militate against the interpretation of the UN lawyer. The first one (649) speaks for *"the establishment of a federation that will be bi-communal as regards the constitutional aspects and bi-zonal as regards the territorial aspects"*. When this Resolution speaks about bi-communal as regards the *constitutional aspect*s, it refers to the structure of the state and not to the distribution of the population. More importantly, in the same Resolution the UN Security Council reaffirmed its previous resolutions and in particular its Resolution 367 (1975) according to which the Council called *"for the urgent and effective implementation of all parts and provisions of General Assembly resolution 3212 (XXIX)"*, which was endorsed by the Council through its Resolution 365 of 1974.

If the UN lawyer had a look at Resolution 3212, he would have seen the following sentence: *"Considers that all the refugees should return to their homes in safety and calls upon the parties concerned to undertake urgent measures to that end"*. On the other hand, in Resolution 774 the UN Security Council, again reaffirmed all its previous resolutions on Cyprus and noted *"that some progress has been be achieved, in particular by the acceptance by both sides of the right of return and the right to property"*.

In one of its previous Resolutions, (361), the SC called upon all Parties *"to do everything in their power to alleviate human suffering, to ensure the respect of fundamental*

[27] Agreed some thirty years ago (well before the unilateral declaration of "TRNC" condemned by the Security Council as illegal and invalid)

28 Para 3 of the agreement between the President of the Republic Mr Kyprianou and T/C leader, Mr Denktash on 19 May 1979.

human rights …" Further on, it is stated in the same Resolution, that appropriate measures should be taken "*…to permit persons who wish to do so to return to their homes in safety."*

A UN lawyer is expected to study carefully the UN Resolutions on Cyprus before embarking on any legal advice or in the interpretation of relevant documents. Besides, he is bound by the express terms of the Security Council's Resolution 1250, which was the basis on which the mission of the Secretary General was authorised, and which resulted in the Annan Plan. This Resolution expressly asks that there should be *"Full consideration of relevant United Nations resolutions and treaties"*.

Therefore, if the UN relevant resolutions were properly read and understood, the conclusions should be that the "bi-zonal and bi-communal federation" referred therein should not be applied in a manner inconsistent with the right of displaced persons to go back to their homes and properties and to have freedom of settlement. This is in line with the above mentioned agreed condition between the leaders of the two communities.

The agreement simply means that there will be two separate areas in Cyprus *governed* by G/C and T/C respectively. It does not mean that these areas should be populated mainly by G/C and T/C respectively. Such an interpretation entails ethnic cleansing, breach of the prohibition of racial discrimination, breach of the right to home, property and freedom of settlement. Therefore a lawyer is "professional bound" (to use the words of Mr Pfirter[29]) to avoid such interpretation. In fact the same lawyer in his effort to prove that the term "refugees" used by the G/C for the "victims of the conflict" was wrong he felt "professionally bound" to use the correct terminology (ie *internally displaced*) even though that was contrary to the terms of two UN Security Council Resolutions (649 and 774) as he himself admits *("The Security Council…has also wrongly used this terminology"*!).[30] Therefore he had the courage to state the correct legal position when he decided to do so. One is entitled to wonder about this apparent inconsistency. More importantly Mr Pfirter failed to apply the principle that he repeatedly claimed that it was part of his convictions*: "a settlement has to strive to do as much justice and as little injustice as possible in order to strike a compromise that people will be able to accept for the sake of peace"*[31] and *"Every effort has been made as is being made to make the plan as fair as possible"* [32][!]

Consequently the solution of "bizonal and bicommunal federation" must be interpreted as being subject to the safeguarding, as much as possible all relevant human rights

One may of course argue that any interpretation that may allow a possibility of a majority of G/C population in the area to be governed by the T/C and vice versa undermines the

[29] See footnote 13 of the article.

[30] ibid

[31] Cyprus Weekly March 5-11, 2004

[32] Ibid

condition regarding such governance. There is simple solution to that which is more compatible with the rules mentioned above: the right of voting and to stand for elections in the two areas may be confined only to those who have the local citizenship. Certainly, in such a case there may be a problem regarding the exercise of political rights of the two communities in their respective zones as regards the elected representatives in the local authorities, but they may be able to vote the elected representatives in the organs of the central government, and in any event, the deviation from human rights would be much less than the one ensuing from the interpretation supported by the UN lawyer.

The duties of a UN lawyer.

One could go further than that, and say that Mr Pfirter, who had the courage to criticise Security Council's resolutions for having wrongly used a terminology, should equally dare to draw the attention of all parties concerned, including the Security Council, to the fact that an agreement which entrenches ethnic separation and discrimination is incompatible with the *jus cogens* rules of international law[33] and therefore is according to the provision in Article 53 of the Vienna Convention on the Law of Treaties void..

This is the correct, in my opinion, approach and should be followed in every such agreement whether it is called "bizonal and bicommunal federation" "apartheid" "Dayton Peace Agreement" or any other name. However, that would have been too idealistic and too difficult to be done by Mr Pfirter whose experience was that of a junior diplomat rather than of an outstanding independent lawyer as required for the mission of a UN legal advisor for the Cyprus problem.

I believe that a UN lawyer should not hesitate to point out any contradictions with the legal principles, which were developed in order to help people reach viable solutions to their problems and achieve sustainable peace. Any agreement should be in line with these principles. The aim of a lawyer is not to see that an agreement is reached, irrespective of whether it is in line with the rule of law or not. This position is confirmed by all instruments of public international law. It suffices to recall that in the purposes of the UN the following is included:

> "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;" (emphasis added).

33 See Articles 1(3) 56 in conjunction with 55 and 103 of the UN Charter. In the Barcelona Traction case, the ICJ included as an example of erga omnes obligations an obligation to refrain from racial discrimination :Judgment of February 1970, ICJ reports,1970,p32, para.34; Brownlie, Principles of Public International Law, Sixth Edition, (Oxford University Press, 2003)p. 58-69 ; Shaw, International Law Fifth Editiion, Cambridge University Press 2003 pp116, 266; W. McKean, Equality and Discrimination under International Law (Clarendon Press, Oxford, 1985) pp 279-280, p. 283, Gro Nystuen, Achieving Peace or Protecting Human Rights? Martinus Nijhoff Publishers, 2005 pp 133-136.

On several occasions Mr Pfirter invokes the necessity of achieving peace through the solution of the Cyprus problem. However, peace can never survive unless it is founded on principles of law. The instruments of international law again confirm that.

It is pertinent in this respect to recall the general philosophy of the authors of the Charter of the UN as reflected in the Report to the President on the Results of the San Francisco Conference by the Secretary of State: [34]

> *"Only so far as the rights and dignity of all men are respected and protected, only so far as men have free access to information, assurance of free speech and free assembly, freedom from discrimination on grounds of race, sex, language, or religion and other fundamental rights and freedoms, will men insist upon the right to live at peace, to compose such differences as they may have by peaceful methods, and to be guided by reason and good will rather than driven by prejudice and resentment".*

In the preamble of the European Convention on Human Rights it is stated by the High Contracting Parties:

> *Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend*

I think that it would also be useful here to quote from the concluding remarks in the book of Ms Gro Nystuen,who acted as a legal advisor at the international Conference for the Former Yugoslavia and participated in the EU-delegation in the Dayton negotiations. The book is about the Dayton Peace Agreement.[35[Ms Nystuen states *inter alia* the following-

> *"In the peace negotiations pertaining to Bosnia and Herzegovina, the responsible mediators tended to regard the prospects of reaching a political settlement as so important that a thorough legal analysis of the human rights aspects of the BH Constitutions was not conducted. At the time of the negotiations, particularly because of the failed settlement 18 months earlier, it was regarded as highly hazardous to bring up concerns about the potential ethnic differentiation included in the constitutional system. It was feared that this, in itself, might ruin the prospects for agreement. In retrospect, however, and as a "lesson learned", it seems clear that it would have been a better solution to follow the parameters of international law through somehow making the ethnic "balancing" system temporary. This would have*

[34] 26 June 1945 : Goodrich, *The United Nations*, pp. 246-7.

[35] Op. cit.pp251-252

allowed for political development in Bosnia that eventually could have been directed towards a policy of integration instead of, as it has turned out, cementing the initial policy of disintegration.

…. The reluctance to address these human rights issues with regard to the Dayton Peace Agreement thus resulted in a legal framework which is inconsistent with international human rights law, and which has indeed been widely criticized on that account. But more importantly, it also resulted in a framework that impedes any political development towards a genuine multi-ethnic political system. …the constitutional system ensures that ethnicity will remain an essential characteristic of every person, and of every political party, in Bosnia in the foreseeable future. Ethnicity will be the driving force behind political arguments on almost every political issue. Continued disintegration will prevail.
The conclusion of this book therefore is that it seems preferable to tackle the potential human rights problems in peace negotiations, rather than ignoring them. Even if it might be tempting in the short term to disregard potentially contentious issues pertaining to human rights, there is greater hope of achieving full implementation of human rights in the long term if the issues are dealt with in an open and systematic manner. And it also seems preferable to reach settlements containing temporary human rights infringements, rather than to agree on settlements in which these issues have not been addressed, and therefore constitute permanent human rights infringements, as the case is with the Dayton Peace Agreement."

Specific legal issues

a)Refugees and displaced persons

I now turn to specific legal aspects of the article under consideration.

Under the title *"Treatment of refugees and internally displaced persons in international law and practice"* the UN lawyer purports to explain the treatment of refugees and internally displaced persons in international law. He also invokes "*international practice"*, although he should know that the practice by itself does not establish any rules of international law. It is only if the practice takes the form of custom and is not against rules of *jus cogens* that it may be invoked as an expression of international law. What the States do is not in itself international law, so the inhuman treatment of individual victims of armed conflicts, as in the examples given by Mr Pfirter, such as the *"massive displacement of people as a consequence of territory changing hands";* the leaving of *"millions of people on the 'wrong side'"* as a result of the First World War; the tragedy for over two million people as a result of "the *Greek-Turkish war of 1919-2…"; "the displacement of 20 million people from Eastern Europe",* do not establish principles of law. They are disasters resulting either from the non application or misapplication of existing rules of law or from the lack of any relevant rules of international law and I must say that I find it difficult to understand why Mr Pfirter refers to them.

Is it possible that the UN lawyer refers to the unjust treatment of individuals in the past in order to end up with the position that the Annan plan supported by him should not be criticised

because there were worse solutions than those adopted by the plan? This crossed my mind taking into account the whole tenor of the relevant part of the article in question, including a statement in footnote 48 according to which the reader of the article can *"appreciate that the UN plan for Cyprus … went much further in addressing past wrongs than any proposed solution has ever done in similar circumstances (both in terms of events and time having passed)"*. These, of course, are not the words of a lawyer. A politician might try to give a solution to an international problem in disregard of the rules of international law, but for a lawyer to do so basing himself on the argument that there have been worse solutions is, to say the least, disappointing. Equally disappointing is the assertion of the UN lawyer to the effect that historically international Law has had little regard for the individual victims of armed conflict[36]. In answer to that I think it would be useful to recall that individual victims of armed conflict in occupied territories were protected by international law as early as 1907 through the Hague Regulations annexed to the 1907 Hague Convention. The provisions of these regulations are part of the customary international law37 and are applicable not only in cases of occupation as a consequence of war, but also in cases of occupation as a result of any military operations including even those carried out by States in accordance with the UN Charter.[38.] These regulations contain specific clauses which protect the rights of the individuals in accordance with the legal regime which was in force before the occupation. For instance, Article 43 provides:

> *"The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."*

Article 46 provides:

> *"Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated."*

These provisions, if properly construed and applied by a lawyer, have the effect of prohibiting forcible displacement of individuals in an occupied territory, such as the one in the northern part of Cyprus, which has been occupied by Turkey since 1974, such occupation having been confirmed also by the ECHR in the Loizidou case mentioned above.

In any event, well before such occupation, in 1949, the Geneva Convention came into force.The provisions of this Convention, which were made in order to supplement the Hague Regulations in view of the experiences of the Second World War, are of special significance in

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[36] When referring to the exchange of population as a result of the Greek-Turkish war of 1919-22 he adds the following footnote which I repeat with astonishment and without any comment. *"This tragic episode of history very much shaped the thinking of both parties in Cyprus; The Turkish Cypriot leader Rauf Denktash in particular had difficulty understanding why the principles of "global exchange" applied then could not be applied in the case o f Cyprus today."*

37 Dailler et Pellet op cit

38 See JC Starke An Introduction to International Law (11th edn Shearer (ed) London Butterworths 1994) 500, 517-18

relation to the question under consideration. In particular, Article 49[39] of the Geneva Convention adopted on 12 August 1949 provides, in paragraph 6:

> *Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive …".*

I would have expected a UN lawyer to be guided by these principles, which forbid forcible displacement of individuals from occupied territories instead of him going through the history of past wrongs, presumably in order to justify the breaches of the rules in question by the Anan plan. Mr Pfirter is trying to explain the deviation from these rules by referring to the Security Council Resolutions which called for the creation of a "bi-zonal, bi-communal federation". I already referred to an interpretation of this formula in line with the rights of return, of protection of property, respect of home and the freedom of settlement, which is the kind of interpretation that a UN lawyer must support in order to maintain and protect as many human rights as possible. And this approach is in line with the statement of Mr Pfirter quoted above according to which a settlement "has to strive to do as much justice and as little injustice as possible in order to strike a compromise that people will be able to accept for the sake of peace" Yet he goes to a different direction to support an interpretation which would go against those rights, the pretext being, again ironically, to save peace[40]. But as he himself admits in footnote 53of his Article: "the now generally accepted view that a sustainable peace after serious violations of human rights is difficult and that there is an interdependence between peace and the protection of human rights; see UNSC Res 1272 (25 October 1999) UN Doc S/RES/1272…".

b) In search of legal principles

The author of the article in question proceeds to state that the *"legal and factual situation did not give clear guidance to the United Nations as to how the issues of individual rights of return and restitution of property had to be approached in its peace plan."* It is difficult to understand such statement. The legal principles were well known and could be found in the relevant international law instruments such as the Charter of the United Nations, the European Convention on Human Rights, the Reports of the European Commission of Human Rights in the interstate applications of *Cyprus v. Turkey*[41] and the judgments of the ECHR in the case of *Loizidou*[42] and the interstate case in the fourth application of *Cyprus v. Turkey*. There are also relevant articles and books on international law… In an effort to explain his statement, Mr Pfirter states that

> *…the population displacement had occurred thirty years earlier at a time when international law and practice were somewhat ambiguous; virtually all displaced Cypriots*

[39] "This Convention has been signed by Turkey and thus Turkey is bound by it for this additional reason."

[40] Mr Pfirter describes the UN efforts, for the solution of the Cyprus problem as peace efforts.

[41] Application no25781/94

[42] Series A no 310 and Reports of Judgments and Decisions 1996 VI

had in the meantime been rehabilitated - in many cases in the homes of displaced people from the other community; a new generation had grown up in the new homes; mainland Turks had settled in many formerly Greek villages and homes and their children had grown up there. People in the areas under Turkish Cypriot administration had been given titles to properties of displaced Greek Cypriots… - albeit in utter violation of international law - and had often resold these properties to others for good, honestly earned money. All these people had human rights of their own (even those who had settled in Cyprus as a result of a violation of the Geneva Conventions, see below) that entered into conflict with those of the displaced.

The international law was not ambiguous thirty years before the Annan plan was drafted. I already referred to the Hague Regulations which stipulated that an occupant country must respect the legal situation of individuals under the domestic law of the occupied territory. Reference has also been made to the Geneva Convention of 1949. Paragraph 6 of Article 49 of this Convention prohibits deportations of civilians from occupied territory. The Anan Plan prevented many of the displaced G/C from returning to their homes and properties and in this way it was sanctioning this grave breach of the Convention.

The problem of Mr Pfirter seems to have been all along that he never wished to take into account the fact that there was an ***occupation*** by Turkey in Cyprus resulting to certain rights of the people in the occupied area. This occupation should have been the premise on which a solution should have been worked out.

In any event if Mr Pfirter needed additional guidance as to the right of return of displaced persons, he could have resorted to the Guiding Principles on Internal Displacement which he himself refers to in footnote 52 of his article[43]. Paragraph 1 of Section V thereof clearly states that -

> "Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country."

This principle was expressly adopted by the ECHR in the case of *Dogan and Others v.Turkey*[44], in respect of displaced persons in Turkey; but if there was any doubt as to what international law provided as regards the individual rights of return and restitution of property, Mr Pfirter could also have had a look at the ECHR judgments in the cases of *Loizidou v.*

43 For these principles see "The International Protection of Internally Displaced Persons" by Catherine Phuong, Cambridge University Press 2004. The author stresses the importance of the principles and their "acceptance in a remarkably short period of time". She rightly points out that "Assistance to and protection of the internally displaced should remain the responsibility of each and every UN actor": pp 239,240. At p199 of the same book it is stated "Refugees and displaced persons have been strongly encouraged by international organizations to return to their pre-war homes. If they chose to return and requested assistance, they were strongly supported by international organizations, whether in terms of repairing or reconstructing their house and obtaining other means of support or in applying pressure on the municipality to obtain eviction of the current occupant.

44 ECHR 2004-VI

Turkey[45] and *Cyprus v. Turkey*[46], which clearly provided for the right of the displaced G/C to own, use and otherwise dispose of their property and for their right to return to their homes. That was an application of the European Convention on Human Rights on the concrete situation which provided the factual and legal basis for the correct legal solution almost 30 years after the commencement of the relevant violations of the rights to home and property.

c) The reference to the judgments of ECHR.

It is true that Mr Pfirter does refer to these judgments- even though he speaks of properties of G/C under the "Turkish Cypriot administration", and to a decision of the "Turkish Cypriot authorities" of preventing G/C from returning to their homes. He hesitates again to speak about occupation by Turkey and avoids referring to the refusal of *Turke*y to allow the return of any G/C displaced persons to their homes in northern Cyprus[47]. He makes it obvious that he is unhappy with these judgments to the point of trying to neutralise their meaning and effect, such effort becoming more than obvious in his following comments:

> *"It [ECHR] had avoided pronouncing on the conflict that the broad-scale realisation of these rights might create with the human rights of the current inhabitants.*
> *A closer scrutiny of the ECHR decisions made it clear that they were mostly based on the fact that the conflict remained unresolved and that Turkey had not provided legal remedies to address the grievances of the displaced. It was not clear how the Court would have decided in the case of Titina Loizidou if there had been a settlement agreed by the two sides and approved in separate referenda that would have limited her rights of return and restitution or if the Turkish or Turkish Cypriot authorities had themselves offered effective remedies ."*

These comments may even be described as scandalous. Why did Mr Pfirter state that the Court "*avoided*" pronouncing on the conflict? *Avoiding* an issue means that although it was properly raised it was not dealt with. This is *not* what happened before the Court, and evidently Mr Pfirter tries to support an interpretation which is neither substantiated nor fair. It simply furthers his objective of undermining the judgment. The same applies to the rest of his statements which are extreme manifestations of unfounded assertions based on his personal purposeful speculation. In his footnote 64 the author states that he "*has consistently held the view that the Court's decision in "analogues" [sic] cases might be different if a settlement was reached."* He does not indicate on what legal grounds or sources of information this is based. Moreover he disregards the fact that the Court is not bound by any agreement of the parties and that according to Article 37 of the Convention even if there has been such an agreement the Court "*shall continue the examination of an application if respect for human rights as defined in the Convention and the protocols thereto so requires". A fortiori,* when the agreement does not contain the express consent of the individual victim of the relevant violation. I wonder from

[45] ECHR 1996-VI

[46] ECHR 2001-IV

[47] See paragraph 95 of the judgment in the case of Cyprus v. Turkey op cit.

which authority or individual he got the assurance that this provision of the Convention will be applied in the way that he speculates.

He persists denying that he stated that he had a meeting with the judges of the ECHR, which was what Claire Palley wrote about in her book *An International Relations Debacle – The UN Secretary-General's Mission of Good Offices in Cyprus* 1999-2004[48]

The idea that the Turkish or Turkish Cypriot authorities should offer effective remedies was pursued by Turkey with the encouragement of certain jurists and other personalities. In fact the whole scenario is very well known. In this respect the judgments in the Xenides- Arestis case are very enlightening.

d) Ex injuria jus non oritur

The statements that the "*population displacements had occurred fifty years earlier*" and that "*a new generation had grown up in the new homes; mainland Turks had settled in many formerly Greek villages and homes and their children had grown up there"* sound as an argument in favour of the view *ex factis jus oritur* while the correct approach in terms of international law should be *ex injuria jus non oritur49*. This is confirmed as regards the displacement of persons by a rather recent report of Prof. Pinheiro, prepared on the authority of the UNHR Subcommittee, which states that persons who take up residence in a home after the home's rightful occupants have fled due to, *inter alia*, forced displacement are protected against arbitrary or unlawful forced eviction but "*in cases where evictions are deemed justifiable and unavoidable for the purposes of housing, land and property restitution, such evictions can be carried out in a manner which is compatible with international Human Rights law provided that states ensure that the safeguards of due process do not prejudice the rights of legitimate owners to repossess the housing, land and property in question in a just and timely manner."*[50] (Emphasis added)

Mr Pfirter also states that "*virtually all displaced Cypriots had in the meantime been rehabilitated*"-meaning thereby (I think judging from the context) that their-problems as a result of their displacement have practically been solved or substantially mitigated. However this statement is both unfounded and irrelevant. In this respect I must stress again that it is a misstatement in so far as no account is taken of the enormous financial and other losses that the

[48]Oxford and Portland, Oregon, 2005. These judges, according to Ms Palley, were Mr Wildhaber and Mr Caflisch. (The latter was another Swiss friend of Mr Pfirter who at the material time was a judge of ECHR for Liechtenstein and a member of the Section which decided the case of Xenides-Arestis) I do not know whether Mr Pfirter "met" with these judges, but not "meeting" them does not necessarily mean that he did not communicate with them. Mr Wildhaber knew about Ms Palley's statement, but he did not refute it when he was provoked to react in respect of it by the "Cyprus Weekly". Mr Caflisch told me, that he was asked to become one of the three foreign judges envisaged by the Annan plan! An objection for his participation in the examination of the Xenides- Aresti case was made by the applicants of other cases affected by the result in that case but this objection was never decided.

49According to Oppenheim op cit p.218 : *"ex injuria jus non oritur is an inescapable principle of law"*

[50] See §17.01 and 17.2 of the report.

G/C suffered as a consequence of their displacement and the refusal of Turkey to allow them to return to their properties, homes and businesses. The fact that the government of Cyprus has partly assisted these persons mainly by securing accommodation for them has neither solved their problem nor restored their situation to that which they enjoyed before their displacement. "Rehabilitation" has not occurred in respect of these people. Mr Pfirter dealt with this aspect in a very superficial- but it seems not unintended -manner. In any event the fact that a displaced person found accommodation or even work in another part of the island does not neutralise his right of return to his home and properties in the occupied part of Cyprus.

e) The "dilemma" of the ECHR and how to overcome its Judgments

Part of Mr Pfirter's "speculation"is the assertion that the ECHR would have reached a different decision if the Turkish or T/C authorities had themselves offered effective remedies. In that context he states in his footnote 66 the following-

> *"The huge backload of cases…pending before the Court that were mostly brought by Greek Cypriots against Turkey, represents a dilemma for the Court. It cannot be a substitute for the parties in conceiving the political compromises that are needed to solve this issue. It will be interesting to see, how the Court will appreciate the unilateral measures that the "Turkish Cypriot authorities have recently taken in the absence of any realistic prospect for an agreed solution in the near future. While these measures seem to be partly inspired by the UN plan, they cannot claim approval by a majority of Cypriots on both sides (such an approval would have certainly helped an implemented UN plan in passing the scrutiny of the Court). On the other hand, judge WILDHABER has indicated a possible way for the Turkish Cypriot authorities to yet gain an international legitimacy of their own, if a negotiated settlement continues to elude the Cypriots …"*

I think it is necessary to make some points in respect of these statements. Mr Pfirter was, as I said before, unhappy with the judgments of the ECHR evidently because they were an obstacle to his *political* approaches to the problem, and to the Annan plan in particular. He was feeling uneasy with the possibility of G/C pursuing their applications before the Court in order to see an end to the violations of their rights by Turkey. Such a procedure would have been approved by a lawyer, especially a UN legal advisor who is bound to support the rule of law. It was not approved by Mr Pfirter, who in this respect speaks about a "dilemma for the Court". I am aware of the inside story regarding his source of information about such a dilemma and about the "unilateral measures" that the Turkish authorities have recently taken. I do not think that they were inspired by the Annan plan. As I already stated above they were inspired and pursued by certain jurists and "personalities" in cooperation with Turkey[51]. In any event Mr Pfirter appears to know more about how the Court thinks than people like me who belong to the family of this Court.

[51] These "measures" are not only illegal. When one reads the relevant "law" on the basis of which they were taken, it will become more than evident that they do not offer any effective remedy by independent judicial bodies with regard to the right of return ,respect for one's home and property and for past violations of these rights.

The political thinking of the UN lawyer at the expense of a legal approach is apparent from his statement to the effect that the issue of the violations of the rights of G/C by Turkey is more a matter for *political* compromises or other extrajudicial remedies than a matter concerning the ECHR. In the same footnote the UN lawyer provides the interesting information that Judge Wildhaber has indicated *"a possible way for the TC authorities to yet gain, an international legitimacy of their own, if a negotiated settlement continues to elude the Cypriots."!*

The problem of Cyprus as it has developed in the last thirty-three years is the result of the Turkish occupation, the forcible eviction of G/C from their homes and land, and the confiscation of their properties, in order to achieve by force a solution which suits Turkey. This situation is unprecedented after the Second World War, and instead of a UN lawyer seeking to suggest solutions in line with human rights and international law, he speaks about *political* compromises. What political compromises? Compromises between the rights of the victims (G/C and T/C alike) and the arbitrary demands of Turkey?

f) Restitution of properties.

Mr Pfirter admits that the drafters of the Annan plan (which included him) had to rely upon their own judgment to resolve *"the conflict of competing human rights of displaced people and current inhabitants"*52. We have seen the result of that judgment which was adopted contrary to the legal principles pointed out above. And when we see the specific arrangement regarding restitution of properties supported by the "legal" reasons given by the UN lawyer the situation is equally incompatible with the relevant legal principles. I cannot accept that a lawyer who was supposed to have been chosen by the UN Secretary General for his exceptional legal qualifications does not advise the restitution of all properties of G/C in the occupied area to their lawful owners in line with the basic principle of international law that usurpation of private land by an occupying power either directly or through a subordinate administration is illegal and invalid whether it is accompanied by compensation or not or whether it ends up in a transfer of title deed in the name other persons or not. It is the more so if the purpose of such usurpation is the violation of peremptory norms of general international law or the commission of crimes against humanity such as the implementation of a plan of ethnic cleansing or persecution[53] or prevention of the exercise of the right to return of displaced persons to their homes and properties from which they were forcibly expelled by the occupying army or a breach of the rule against racial discrimination. Indeed, to hold otherwise would be tantamount to accepting that a wrongdoing State may be allowed, by the payment of compensation, to purchase the benefits of breaches of rules of international law having a status of *jus cogens* with the ultimate result of entrenching the original wrong and its consequences.

52 P. 610 of the Article.

[53] See Blaskic Trial Judgment of the ICTY paragraph 233. According to Article 5(h) of the Statute of the Tribunal persecutions on political, racial and religious grounds amounts to a crime against humanity punishable under the same Statute.

As I have already pointed out[54] this approach is also adopted by the eminent professors of International Law Georges Abi-Saab, Dieter Blumenwitz, James Crawford, John Dugard, Christopher Greenwood, Gerhard Hafner, Francisco Orrego-Vicuna, Alain Pellet, Henry Schermers and Christian Tomuschat in a joint opinion dated 30 June 1999[55]. This opinion was made known to the UN lawyer during the preparation of the Annan plan. Mr Pfirter admits that the "giving of titles to properties of displaced G/C to people in the area under Turkish Cypriot Administration was in utter violation of international law."[56]But in preparing the Annan plan the appropriate advice based on this correct legal position seems to have been forgotten.

I think that a lawyer, before trying to find the right legal solution or principle applicable to a particular situation, he must get to know the real facts of such situation. Mr Pfirter did not proceed in this way. Had he relied on the true facts of the Cyprus problem, he would have started on the premise that the northern part of Cyprus was occupied by Turkey, and therefore the correct legal principles to be resorted to so as to give a legal solution to problems such as deprivation of private land, etc., should be the principles applicable in occupied territories[57]. The result would have been that principles such as the one stipulated in Article 46 of the Hague Regulations according to which private property in occupied territory cannot be usurped by the occupying State, would have given the solution as regards those properties of the G/C the owners of which, according to the findings of the ECHR, were prevented to use them or otherwise enjoy them. The solution to this problem would have been the return of these properties to their lawful owners. This solution would have been in line with the principle set out in the previous paragraph, supported by eminent international lawyers, and the judgments of the ECHR referred to above. These judgments, unpleasant as they might be for Mr Pfirter, clearly found violations in respect of all GC properties in the occupied part of Cyprus.

As regards the subsequent transfer of such properties to third persons who retain possession thereof for a substantial length of time and or (as Mr Pfirter points out) "*resold*"(sic) them **"***to others for good honestly earned money"*[58] the principle supported consistently by

[54] Ff 14 op cit

[55] See p. 12 of the opinion entitled "Legal Issues arising from Certain Population Transfers and Displacements on the Territory of the Republic of Cyprus in the Period since 20 July 1974":www.attorney-general.gov.cy

[56] P.607 of the Article.

[57]As explained below Mr Pfirter tries to apply these principles (albeit wrongly) only in the case of settlers.

58 The reference to "*honestly earned money*" for buying the Greek –Cypriot properties in the occupied area ie stolen properties is, to say the least, a contradiction in terms. Mr Atai in his statement of 7/11/2003 referred to above said "But why the opposition is in line with the demands of Turkish Settlers? Because they are guilty as much as the right wing party leaders. They were the coalition partners when they passed the law for "reprinting the title deeds for Greek Cypriot owned property". Another 'crime against humanity' according to international law… it is not forgivable since most of these properties have been started to be bought and sold…I always refused to buy from my friends and relatives who offered to sell me cheap Greek Cypriot properties. But almost all other businessmen didn't. They laughed at the people like me as 'stupid men'".

international jurists, especially after the end of the Second World War, has been as Oppenheim puts it: "*There is little room for doubt that acts of deprivation of property in disregard of International Law are incapable of creating or transferring title*"[59]. More recently the independent expert Professor Pinheiro in his Report prepared under the authority of UN Sub-Commision on the Promotion and Protection of Human Rights stated that-

> *In cases where housing, land and property has been sold by secondary occupants to third parties acting in good faith, States may consider establishing mechanisms to provide compensation to injured third parties. The egregiousness of the underlying displacement, however, may arguably give rise to constructive notice of the illegality of purchasing abandoned property, pre-empting the formation of bona fide property interests in such cases.*[60]

g) The division of the landownership based on ethnic or racial criteria

Therefore the solution proposed by the UN plan for many displaced G/C to be deprived of their properties in the occupied area is contrary to the principles of international law and the human right of respect of property. In fact, the UN plan is not based on any legal principle. On certain matters some reference is made to principles[61], but then the principles are either disregarded or misapplied. The whole philosophy of the plan is not to arrive at a just or legal solution, but to reconcile the demands of Turkey, whom the drafters of the plan do not even dare to call an "occupying country" with the rights of the Cypriot population that suffered the consequences of the occupation. Sometimes instead of referring to human rights, Mr Pfirter mentions "prevailing interests"[62] and when the limitations proposed in the plan do not evidently accord with human rights, Mr Pfirter finds refuge in the formula of "bi-zonality". The UN lawyer goes as far as to invoke bi-zonality to justify the denial of property rights of G/C who have their land in the northern part of Cyprus under the Turkish occupation, using in this respect the following argument:

> "*The UN understood that the concept of bi-zonality in the Cypriot context required that one of the two zones be predominantly Turkish Cypriot not only population-wise, but also in terms of land ownership."*[63]

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[59] Op.cit. n. 6 p. 411.

[60] Paragraph 17.4

[61] Eg pp 607,608 of the Article

[62] See p. 615 of the Article.

[63] At p.615of the Article. The Reports of the UN Secretary General may provide useful information but otherwise they are administrative documents of no legal value. This applies also to the Report by Mr Perez de Guellar invoked by Mr Pfirter in his footnote 29 where Mr Guellar expresses his own views which after all go beyond the express terms of the relevant Resolutions of the Security Council. Mr Pfirter continues as follows: "Given the prolonged conflict in Cyprus and the fact that bi-zonality was deemed a central requirement for the viability of any solution, it [the UN] furthermore considered that this concept represented a legitimate public interest". To be in line with the

I do not know what Mr Pfirter means by the "UN". Does he mean that the Security Council or the General Assembly understood the concept of bi-zonality as entailing a distribution of land ownership on the basis of the ethnic origin of the land owners? I find it difficult to believe that. I cannot understand the logic of such interpretation. Neither the High Level Agreements nor the UN Security Council Resolution referring to them state or imply such a consequence. People can own property in foreign countries. Why should they not be able to own properties in another part of their country even in the case when that part is administered by persons belonging to a different ethnic group? And in event any arrangements implying racial discrimination should be interpreted, at least by lawyers, in a way as to limit as much as possible their racist effects. The concept of "bi-zonality" does not for any good reason entail prohibition of land ownership of G/C in the area governed to be by T/C and vice versa. The more so as the application of the interpretation supported by Mr Pfirter will have as inevitable consequence the deprivation of properties from their legitimate owners. And I agree with Palley, quoted by Mr Pfirter, that "bi-zonality is not a genuine public interest allowing for limitations on human rights". The reason of my position is not because I am a G/C but because "bi-zonality" itself connected with the concept of "bi-communality" is, however one looks at it, a racist regime. Mr Pfirter argues that -

> *"The existential link between bi - zonality and the viability of a solution to the longstanding Cyprus conflict on the other hand testifies to the magnitude of the public interest involved and makes it seem evident that this interest is clearly greater than the hardship that the one third restriction represents for the affected 40% of displaced Greek Cypriot owners".64*

The viability of the solution of the Cyprus problem depends on whether the principles which were developed by states after a bitter experience of wars and other conflicts of the past in order to be used as a recipe for avoiding similar problems in the future are the foundation of the solution. Principles, such as fundamental human rights. That is expressly stated in the text of the preamble to the Charter of the UN as follows:

> "*to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind…*" and then the text continues by reaffirming "*faith in fundamental human rights and establishing conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained"; "suppression of acts of aggression or other breaches of the peace,f bringing about by peaceful means, and in conformity with the principles of justice and international law…settlement of international disputes".*

Now I do not see how the deprivation of G/C owners of their property based on their ethnic origin promotes human rights or the objectives of UN. As to the "long standing Cyprus conflict"- assuming for the sake of argument that this is a correct description- I may remind the

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reality the terms "the prolonged conflict in Cyprus" should be substituted with the terms "prolonged Turkish occupation of Cyprus".

64 O.616 of the Article

reader that people who have been involved in wars against each other now live together peacefully on the basis of respect of human rights and international law.

h)The right of return and the freedom of establishment

Mr Pfirter is impressed by the fact that "*even very reasonable people who were generally in favour of compromises in the interest of a solution [meaning of course compromises of human rights in the interest of giving an end to the Cyprus problem regardless of the deviations of the solution from principles of human rights] felt strongly about these rights [the rights of return and the freedom of establishment]*"[65].

Yes; even these "reasonable people" found that the solution proposed inasmuch as it undermines substantially these two rights it goes too far.

Again the UN lawyer invokes bi-zonality, as interpreted in his Article, to justify the proposed interference with these two rights. As far as I know there is no country in the world, not even a country with a federal system, where any part of its population is prohibited to move to any other part of its territory in order to establish their domicile. A fortiori there cannot be in the modern world any state where the legitimate rights to a home should be given up by the lawful owners for the benefit of other persons who occupy their home illegally. The fear of ethnic strife is exaggerated. The inter-communal clashes which took place in Cyprus in 1963 (with victims on both sides) do not justify a permanent fear and a permanent deprivation of properties and separation of the G/C from the T/C. The G/C do not invoke the more recent continuing(for over 30 years) massive and serious violations of their human rights by Turkey to justify a fear necessitating extra guarantees in their favour. Moreover in other countries where there were warlike operations between ethnic groups, which were on a much bigger scale and lasted for longer than the clashes in Cyprus, people managed to live together in one and the same State on the basis of safeguards for human rights. The restrictions proposed in the Annan Plan for the right of return and the freedom of establishment are not in any way (apart from Turkey's policy of partitioning the island) justified. Even the concepts of "bi-zonality and bi-communality" do not presuppose the restrictions in question.

In his article, Mr Pfirter states the following:

> *"For Greek Cypriots, restrictions on their right to return, i.e. to re-establish permanent residence in their places of origin, or even restrictions on establishing residence in the future TCCS for people who did not come from there, were particularly painful, probably because they symbolised more than any other aspect of the plan the fact that a part of the island would be permanently `taken away' from them".*

The "restrictions" in question should normally be painful for any group of persons in any country in so far as they are not allowed to return to their homes and establish their residence in any part of their country on a permanent basis. The cause of the pain is the permanent violation

[65] P. 616 of the Article.

of elementary human rights. At the same time the "restrictions" would in the case of Cyprus contribute to the cutting of the island in two parts. In the context of the Annan plan which divides Cyprus in two parts populated by G/C and T/C respectively the restrictions become more intolerable and unacceptable because they entrench the partition of the island. Naturally this is another legitimate cause of serious pain.

It should be pointed out here that the explanations given by Mr Pfirter regarding the existence of "*a general right of return"* according to the Plan[66] and which may lead the reader to believe that all the displaced G/C will return to their homes are not accurate bearing in mind the following :

i) According to Article 3 § 7 of the Foundation Agreement a constituent state may limit the establishment of residence by persons hailing from the other constituent state. To this effect it may establish a moratorium until the end of the 5th year since the entering into force of the Foundation Agreement, after which limitations are permissible if the number of residence hailing from the other constituent state has reached 6% of the population of a village or municipality between the 6th and 9th years and 12 % between the 10th and 14th years and 18% of the population of the relevant constituent state thereafter until the 19th year or Turkey's accession to the EU whichever is earlier.

ii) After 19 years, every constituent state has a right to take measures so as to secure that at least 2/3 of the Cypriot permanent residents will have as a mother tongue the official language of such state. (Greek for the G/C constituent state and Turkish for the T/C constituent state).

iii) After the 2nd year, displaced persons over 65 and their companions and those displaced who are coming from any of the expressly defined villages may return. However such a right is theoretical so long as according to Article 17 of Annex VII the Property Board will not issue any order for the return of property to displaced persons before the lapse of 3 years after the Foundation Agreement enters into force if the property is vacant and 5 years in all other cases. Therefore, the displaced persons over 65 will not be able to return to their properties before the passage of 5 years or in the best possible case 3 years. How many of them will still be alive to exercise this conditional right?

iv) It should be noted that the particularly onerous prohibitions with reference to the return of the displaced persons in conjunction of the fact that the displaced will be entitled to regain only 1/3 of their land or the value of their property (after certain conditions are satisfied) weaken to an exceptional extent the possibilities of return of the displaced persons.

The above rules i) and ii) apply both to the right of return and to the freedom of establishment. The latter embraces the right of any citizen of a country (with a federal **system**

66 P.617 of the Article

e.g. Switzerland, or not) to establish at any time his residence in any part of the country. In this respect the UN lawyer relies again on the concept of "bi-zonality" according to his interpretation with which I have already dealt .He does not use any convincing argument as to how such interpretation can be compatible with the human right of freedom to choose one's residence under the European Convention on Human Rights or the other Conventions to which Cyprus is a party such as the Covenant of Civil and political Rights ("CCPR"). I do not think that the proposed interferences can be considered "necessary in a democratic society" a condition of legality imposed by the European Convention on Human Rights or "necessary to protect public order" as required by the CCPR(Art.12).. In this respect I should remind the reader that according to relevant jurisprudence, limitations or restrictions to human rights must be interpreted and applied strictly and narrowly[67].

However I believe that the above interferences with rights in question according to the proposed plan are wrongly referred to by Mr Pfirter as "restrictions" or "limitations" on these rights. In doing this it seems that he[68] disregards the distinction between measures which regulate the exercise of a right and those which suppress or interfere with the substance or core of the right itself.[69] The "restrictions" defended by the UN lawyer do in fact interfere with the substance of the rights in question.

After the 19 years prohibitions in the form of fixed quotas in respect of the right of return and the exercise of the freedom of establishment on the part of many Cypriots in their own country, no Cypriot would be allowed to establish his residence in the T/C constituent state if he is a G/C or in the G/C constituent state if he is a T/C whenever such establishment –even of a single person- exceeds 1/3 of the G/C or T/C population of the relevant state. This is the result of the requirement according to which 2/3 of the Cypriot permanent residents of each constituent state must have as a mother tongue the official language of such state (another way of saying that they must be Turks or Greeks depending on whether it is the T/C or the G/C constituent state). This provision amounts in fact to an absolute permanent abolition of the right in question depriving completely any Cypriot affected by the relevant prohibition of the possibility to exercise this right in extensive regions of his country.

Are these "restrictions" or suppressions of the relevant human rights of thousand of persons because of their ethnic origin? Mr Pfirter disapproved the characterization of this racial separation as "*Apartheid 'a la Turque in Cyprus"used by* Palley[70].. I tend to agree with him because I believe that once the plan was a UN plan for meeting Turkey's demands the precise characterization should have been "*Apartheid à la projet de Koffi Annan pour favoriser Turqie à l'egard de Chypre" or, taking into account Mr Pfirters legal Article, " Apartheid à la Pfirter"*

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66 Klass v. Germany ECHR Series A Vol. 28 p.214; see also the Sunday Times case ECHR Series B, vol 28 p.9

68 And any other co-drafters of the plan.

69 See Belgian linguistic cases in ECHR Series B, Vol 6, p. 32, para. 5;Golder Case. In ECHR Series A, Vol 18, pp. 18-19, para.38.

70 Referred in footnote 100 of the Article

It is not enough to speak about a united Cyprus being the objective of the Annan Plan. The human rights that are necessary for keeping Cyprus united should also be safeguarded.

i)The method of inventing legal solutions and the "demons of the past"

Mr Pfirter continues with other political arguments including the following:

> *"Conversely, the subject of Greek Cypriots (re-)establishing permanent residency in the future TCCS was the main concern of average Turkish Cypriots who were otherwise in favour of the plan, according to people who actively promoted the plan among the Turkish Cypriot population. This concern reflected both a fear of ethnic strife, i.e. the demons of the past, returning in the short run and of losing political and economic control over the TCCS in the long run."*[71]

This passage is indicative of the method that the legal advisor of UN has been inventing "legal" solutions inspired "by the pragmatism that have distinguished Luzius Wildhaber's professional life". During his direct meetings with his Turkish acquaintances he was hearing various stories about the "demons of the past" and he was adopting them in order to justify the deviations from legal principles. The real "demons of the past" were the Turkish military forces and their policy of partitioning the island. A policy which was being implemented by forcible evictions, confiscation of properties and prohibition of T/C to associate with G/C.[72] The "demons of the past" are those forces that caused an immense disaster misery and tragedy to the Cypriot population especially the G/C since 1974 and in actual fact continue to be the demons up to the present time. In spite of the tragedy caused to them by the Turkish "intervention" the G/C are prepared to live together with the T/C as they used to do so for centuries. There are good reasons for the T/C to have the same wish. This can be confirmed by many T/C beyond those who belong to the close circle of Mr Pfirter73. Moreover a UN legal advisor should not try to legitimise the products of the Turkish "intervention" and institutionalise separatist arrangements but should advise in favour of the application of human rights and fundamental freedoms without discrimination like the UN Mediator on Cyprus Mr Galo Plaza who in his report of 1965 has pointed out the following:

Commenting on the possibility of separation of the communities, he stated:

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[71] P.617 of the Article.

[72] See the judgment of the ECHR in the case of Djavit An (T/C) v. Turkey Application no 20652/92,20/2/2003 (violation by Turkey of Article 11of the Convention because the applicant was prevented to associate with G/C in bi-communal meetings in the south part of Cyprus

73 Thousands of T/C have continued to work in the government controlled area together with the G/C ever since the 1963 incidents and up to day.

"Such a state of affairs would constitute a lasting if not permanent, cause of discontent and unrest"[74].

Further on he stated:

"But I would think it essential for the Turkish Government and the Turkish-Cypriot, leadership to reconsider their contention that nothing short of the geographical separation of the two communities can ensure adequate protection".[75]

Then he added the following:

"One of the principles of the Charter which I regard as having the highest relevance to any settlement of the Cyprus problem is that of respect for human rights and fundamental freedoms, without discrimination".[76]

But this advice was coming from a person of the standing of Galo Plaza. His report was rejected by Turkey. Mr Pfirter would not have liked that. He preferred to compromise the illegal demands of Turkey with the rightful claims of the G/C.

Another method used by Mr Pfirter in order to mitigate the painful effects of the illegal restrictions of the fundamental rights of freedom of establishment and the right of return is a speculation that in practice the restrictions will not be as bad as they appear to be. The following is an interesting example from page 617 of his article

"It could easily be argued that Greek Cypriots would not very likely establish permanent residence in the TCCS as this would imply dealing with authorities, schools and neighbours who function in a language that very few Greek Cypriots speak and finding oneself in the unusual position of a minority, as well as – most probably - paying considerably higher taxes than in the GCCS" !

j) The "secondary residences"

In an effort to mitigate the negative effects of the restriction regarding freedom of establishment, Mr Pfirter invokes the fact that the G/C may according to the Plan establish "secondary residences" in the northern part of Cyprus to be administered by T/C. He states the following:

"Finally, it should be noted that the plan in its final form contains no time limitations for citizens of one constituent state to stay in the other as long as they do not establish formal permanent residence there (and thus acquire voting rights). In practice this

74 para. 153

75 Paragraph 156

76 Paragraph 158

means that Greek Cypriots could have immediately established secondary residences in the TCCS and de facto stayed there for as long as they desired .This provision essentially removed the pain caused by restrictions on establishing permanent residences for individuals and made it largely irrelevant for practical purposes".[77]

There is a great difference between a permanent residence and a secondary residence. First of all, a secondary residence cannot be used as a permanent home. Secondly, one must have the financial capacity to establish and maintain a secondary residence; for most people this is not feasible. Thirdly, and more importantly, a secondary residence cannot be equated with the home of a person. In other words a secondary residence cannot substitute a "home". The latter is not just a house. It comprises sentimental attachments (memories and feelings) as well as the natural environment and other conditions of life attached to the place of a home. Moreover a home represents in most cases the pain, effort and expense (the product of many years of labour and savings) required for constructing, improving and maintaining it. It is a pity that Mr Pfirter cannot understand the difference. His proposal for a secondary residence becomes even more irrelevant for all those G/C displaced persons who will be deprived of their permanent home where they lived in the occupied part of Cyprus and who, according to the Plan will not be allowed to repossess but may only look at it from a distance or from their "secondary residence"!

k) The settlers from Turkey

Finally Mr Pfirter deals with the problem of settlers from Turkey. In the beginning he describes them as *"Turkish immigrants"*, and then he talks about the fate of "*mainland Turks living in the Turkish Cypriot administrated area*". In the end he is forced to bring Turkey under the rules regarding settlement of civilian of the occupying country to the occupied territory according to international law which he does with the use of gentle terms such as the following:

"From an international legal point of view, Turkey is still to be considered to exercise effective control [not occupation from every legal aspect] … The furtherance of the establishment of Turkish citizens in the parts of Cyprus under Turkish Cypriot administration [!] by any Turkish Cypriot or Turkish authorities would thus constitute a violation of international humanitarian law and a crime under the Statute of the ICC ."78

He then exonerates the settlers from any criminal liability because they are merely the "*instrument of the relevant violations or crimes"*. This is of course wrong. The settlers are human beings with the possibility of understanding what they are doing. They are not objects. The Criminal Law –in civilised countries- attributes criminal responsibility not only to the persons who instigate a crime but also to all those who enable or aid another person to commit the offence. Without the cooperation of the settlers (who must have realised that the northern part of Cyprus came under the military control of the Turkish forces and that they were given houses

[77] P. 618 of the Article.

78 P 620 of the Article

that did not belong to them) no settlement in the occupied part of Cyprus would have taken place.

The UN lawyer continues by saying the following:

> *"In spite of the flawed nature of their establishment of residence in the relevant territory, it would seem that they and their children could not forever be prevented from enjoying certain human rights with respect to their place of residence: This obviously creates a dilemma between different aspects of international law in the form of 'triple conflict' that cannot be easily and simplistically resolved. The illegality of the establishment under humanitarian law and the human rights of the original population of the relevant territory enter into conflict with the human rights of the 'settler' and his/her descendants".79*

The effort of Mr Pfirter to downgrade the problem of settlers is obvious and the result of his effort is a complex and confusing presentation of the problem. In the end he admits that care should be shown

> *"…in recognising any rights of the settlers to remain in the occupied territory lest the relevant provisions of humanitarian law become largely declamatory as might the human rights of the original population. The international community cannot lightly accept that occupiers who have created facts in violation of international law will reap the benefits of their illegal acts by invoking the human rights of the people that were the instrument of those acts".80*

Then he develops a theory of his own that in resolving the problem two factors must be taken into account, time and the intentions of the persons concerned. He is excusing small children of the settlers as they cannot be considered to have acted in bad faith in remaining in the occupied territory. Finally he points out that his legal views on the question of settlers are only "*to some extent reflected in the Plan*" as "*the parties decided quite apart from [his] views or those of UN to talk about numbers than principles"*. However, he adds that the UN have offered their views that *"people [*settlers*] whose presence in Cyprus could be considered in doubtless good faith and who would be entitled to citizenship in most countries of the world (people having grown up in Cyprus or being married to or descendants of 'citizens')"* were entitled to remain in Cyprus

The views of Mr Pfirter on this subject reflected to some extent in the Plan are in my opinion legally unfounded for the following reasons:

Firstly there is no general principle of law to the effect that a person who has not acted in bad faith is excused from the effects of an illegality affecting him. If that was so the illegal immigrants, in other words those who enter or remain in a country without satisfying the

79 Ibid.

80 Ibid

necessary legal requirements could not be expelled on the ground of illegal entry or residence, if for one reason or another (mental incapacity, age, etc) they believed that there was nothing wrong in entering or staying in the country as they did. Mr Pfirter has invented the principle in question by using the following sophistry: he first stated a plausible but inexistent general principle of law according to which *"one cannot acquire rights in bad faith"* (the correct relevant principle being *ex turpi causa non oritur actio ie the principle that the courts may refuse to enforce a claim arising out of the plaintiff's own illegal or immoral conduct or transactions or the related principle "nullus commodum capere potest de injuria sua propria.)*[81] Then he reverses the invented principle so as to support the wrong conclusion that *a person who has not acted in bad faith is excused from the effects of an illegality affecting him!* These *bad faith* or *good faith* concepts are to be found in other legal contexts such as the law of contract. Even then they are not absolute principles. They apply under conditions. In any event they do not exist in any form in the context used by the UN lawyer. For a legal advisor of UN to make such a mistake is very disappointing.

Secondly, disregarding the fact that the settlers "in good faith" were the persons used with their consent to commit a war crime, and that they have settled in an occupied part of Cyprus over which the lawful government of Cyprus had no control and never tolerated their settlement the UN lawyer speaks about people who "would be entitled to citizenship in most countries of the world (people having grown up in Cyprus or being married to or descendants of *'citizens'*)". That is another legal mistake. The persons that could be given citizeship are aliens who enter the country lawfully or at least they have lived in the territory of the state concerned which falls within its actual control and not in the control of a foreign occupant state like the case of the Turkish settlers. Any rules which confer rights on aliens (e .g. against their repatriation) vis-a-vis a State presuppose that such State at all material times exercised actual jurisdiction over the area where these individuals have been; and it is precisely because of such jurisdiction that the relevant rights and the corresponding State obligations arise.

To accept that settlers in the occupied part of Cyprus acquire as a result of their stay (however long it may be) any legal right of stay in Cyprus would have amounted to a permissible indirect violation of the relevant international rules against settlements in occupied territories of individuals from the mainland of the occupying country. An occupying power could conveniently transfer any part of its civilian population to the area occupied by her contrary to the rules in question, feeling confident that such a situation would eventually be legalized as a result of the *de facto* stay or *bona fide* stay -as Mr pfirter would say- of such population in the occupied territory and the impossibility of the lawful government to repatriate them even after the cessation of the occupation.

In any event, even if we assume that the settlers may be considered as long term residents of Cyprus (contrary to what is the correct approach explained above) long-term residence is not by itself a sufficient factor to exclude expulsion. And this is so on the basis of Strasbourg case law.[82] The more so in cases of illegal entry or stay whether bona fide or not and of course a

[81] See *the judgment of the International Court of Justice in the case of Interpretation of Peace Treaties of 1947 (ICJ Reports 1950,221,24*

[82] See e.g. Uner v. Netherland Application No 46410/99 judgment 18 October 2006

fortiori when the original entry was the result of a war crime. Therefore all those Turks who were transferred from Turkey to the occupied part of Cyprus, and in respect of whom no special personal reasons exist (eg health, old age) that would justify a lenient approach in their case, may on the termination of the occupation be legitimately expelled.

International law taken as a whole cannot subject the occupied territories to two different conflicting legal regimes. It is not possible, on the one hand, to consider the transfer of foreign civilian population into an occupied territory as a grave breach of the Geneva Convention and as a war crime and, on the other hand, to apply and enforce at the same time in respect of such territory rules of international law which confer rights of stay to this population, i.e. to allow the continuation of a war crime at the expense of the State against which the crime was committed. Of course the settlers are not without a remedy for any humanitarian problems caused to them as a result of suppression of their illegality. They can always direct their claims against the occupant country that has instigated their settlement.

In light of the above there are good reasons to submit that the UN lawyer was adopting a legally wrong position in increasing the number of settlers that could remain in Cyprus as part of the solution of the problem by adding the people *"whose presence in Cyprus could be considered in doubtless good faith*[83] *and who would be entitled to citizenship in most countries of the world"*. His advice promoted the continuation of the war crime committed by Turkey. And certainly he cannot speak of *"a plan in conformity with human rights"* as he asserts in his Article[84]

l)The concluding remarks of Mr Pfirter.

The concluding remarks of Mr Pfirter contain certain odd and to a certain extent contradictory statements. On the one hand he admits that the situation in Cyprus is incompatible with human rights and that under normal circumstances it is virtually impossible to justify a drastic interference with human rights such as the one ensuing from the separation of two distinct ethnic groups. But on the other hand he proceeds to say that *"under the given particular circumstances there was a legitimate overriding public interest to justify the restrictions on the realization of certain human rights"* meaning evidently the interferences with the human rights of the Cypriot population through the Annan plan. He does not (and cannot) justify the interferences in question on the basis of the permissible grounds provided in the relevant Conventions or other legal instruments from which they originate. Yet at the beginning of his Article he states that the accusations against the plan for *"failing to respect human rights"* and for *"lack of concern for human rights"* and other accusations are *"unsubstantiated"*.[85]The reality

[83] In any case the Turkish settlers must have realised that they found themselves in a foreign country through settlement in an area occupied by Turkey. The houses in which they stay were not bought or constructed by them .All the surrounding circumstances were and are speaking clearly that the area is run by the military people of Turkey. The military parades, the armed posts, the claims of the Greek refugees etc, in a small island like Cyprus have been sending clearly and loudly the message of occupation.

[84] At p.621.

[85] See page 597 of the Article.

is that certain rights such as freedom of establishment, the right to return and the right of property are not simply restricted. For a great number of persons they are emasculated because these persons are prevented to exercise them effectively. On the other hand there is an effort to justify the violations of human rights on the basis of "a legitimate overriding interest"! He does not spell out clearly this legitimate interest but taking into account the context in which these words were used one may understand that this overriding interest is the achievement of a "solution" of the Cyprus problem and "…the reduction and repair as much as possible of the lingering suffering from acts of the past and to prevent further such suffering for future generations"[86]. Of course, it should be recalled here that a bad solution which is based on violations of human rights is doomed to collapse[87]and therefore there is an *overriding interest* to avoid it. In any event -as I already explained- he does not give any legally convincing reasons for the relevant "restrictions" provided by the plan.

The UN lawyer invokes again the "bi-zonality"and "bi-communality"88 in order to justify the breaches of human rights. I have already explained that the bi-zonality concept is incompatible with the jus cogens rule of international law whether the parties concerned accepted the relevant solution or not and that in any case it could be applied without affecting the right to property or the right of return and the freedom of settlement of the displaced persons. And this approach is in line with the statement of Mr Pfirter in his interview in the Cyprus Weekly of March 5-11 already referred to above, according to which a settlement *"has to strive to do as much justice and as little injustice as possible in order to strike a compromise that people will be able to accept for the sake of peace."*[89] He repeats the objective of peace[90]several times but he forgets that peace depends on respect of human rights, as even himself had admitted in footnote 53 of his Article.

From the whole text of the concluding remarks, if not the whole text of the Article I got the feeling that the author finds himself in the difficult position on the one hand to have to admit that the UN plan is not compatible with human rights and on the other hand to do his best to defend it because of his role as a UN legal advisor in respect of this plan. This is illustrated by his two following statements-

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[86] At p. 623.

[87] See above the references to international law instruments under the subtitle "The duties of a UN lawyer"; See also Gro Nystuen op cit p. 251 where she points out *inter alia* that departing from human rights obligations even in times of war or other emergencies can only be justified if these obligations were fully resumed as soon as the emergency ended.

88 At p. 623.

[89] P.9 above

[90] See in particular the interview in the Cyprus Weekly.

a) “From a human rights point of view, the geographic separation o f two distinct ethnic groups… is a highly problematic exercise that cannot be realized without interfering in very painful and drastic ways with the lives and human rights of the affected people… wherever this has happened the lives of the victims were by and large destroyed and only their children or further descendants were more or less able to grow roots elsewhere. Under normal circumstances, it thus seems virtually impossible to find a legitimate public interest which would be prevalent enough to justify such drastic interference with human rights”.

Then he tries to explain his role by stating that he found this state of affairs and he had to do his best to save as much as possible *ex nunc* .Thus he states

b) “… the question to be addressed is whether the restrictions were justified ex nunc (in 2004), i.e. thirty years after the two Cypriot communities had been geographically separated by force and two ethnically homogeneous zones had been created in a way that not only gravely violated human rights and international humanitarian law, but also resulted in an inequitable allocation of resources (i.e. left the over 80% G/C with less than two thirdsof the Republic and with less than half of its coastline).. .the UN team struggled with the dilemma that this[bizonality] created for the required respect for individual human rights . As this article shows, the UN concluded that under the given particular circumstances there was a legitimate overriding public interest to justify the restrictions on the realization of certain human rights. Every effort was undertaken to reconcile, in the details of the plan, the ultimately irreconcilable to the greatest extent possible.”

However Mr Pfirter’s problem is his failure to convince the reader that he really fought to improve the situation and/or to adopt those interpretations that would at least bring the plan nearer to the principles of Democracy, the Rule of Law and Human Rights. As I already pointed out he generally failed in his duty as a UN legal advisor.

CONCLUSION

The UN Secretary General’s good offices for the solution of the Cyprus problem were futile because no attention was given to the real situation existing in Cyprus at the material time, i.e. the occupation of the northern part of the island and the massive and organised violations of human rights of G/C as found by the ECHR. Moreover, no proper attention was given to the necessary prerequisites for a viable solution of the problem which were not other than the objectives of the UN, the Rule of Law, Democracy and human rights as formulated in the relevant legal instruments such as the European Convention of Human Rights. The efforts of the UN team were based on the illegal *faits accomplis* resulting from the Turkish occupation of Cyprus. The efforts instead of being directed to lift the illegal consequences of such occupation they were proceeding on the assumption that there were two different areas now populated by G/C and T/C respectively[91] and the UN plan should only aim at mitigating some negative consequences in the direction of G/C in exchange of legalising the results of the occupation by

91 This situation was the result of forcible movement by the Turkish forces of the T/C Cypriots into the occupied area and the prevention by the same forces of the G/C legitimate population of the same area to return to their homes after their involuntary displacement (see Cyprus v. Turkey op cit.) These acts of violence were carried out in order to prepare the way for the separation of the two communities in accordance with the established policy of Turkey for partitioning (Taksim) the island.

institutionalising the separation of the two communities, the eviction of many G/C from their homes, and properties, by granting Cypriot citizenship to the so called "bona fide" settlers (according to the description of Mr Pfirter) and by creating a new state of an unprecedented model based on undemocratic institutions and ethnic discrimination in every respect.

The plan had nothing to do with legal principles. Such principles were disregarded in spite of the true objectives of the United Nations. The plan can be described as being the product of political manipulations and expediency to accommodate the objectives of Turkey92. In these circumstances one cannot understand the role of a legal advisor to the UN Secretary- General who was agreeing with the plan in question. It appears that he must have been supporting an illegal plan through wrong legal advices. Mr Pfirter undertook to make suggestions as to how the illegal solutions would appear to be as painless as possible. It seems that he was carried away by the ambition to be considered as having contributed to a "solution" of the Cyprus problem regardless of the nature of such solution. I think, with all due respect, that as a lawyer who was expected to see that legal principles and the objectives of UN should be the foundation of the Cyprus problem, he was a complete failure. One could find mitigating circumstances for his failure, but the fact that he kept advocating in favour of the Annan plan, even after it was thoroughly explained by many jurists and was rejected by the vast majority of the Cypriot population as a whole (76% of G/C who compose the 80% of the Cyprus population) disentitles him of any leniency.

I have dealt with an Article that Mr Didier Pfirter published under the title "*Cyprus – A UN Peace Effort under Conditions of ECHR Applicability"*. I gave some indications of how Mr Pfirter was trying to explain, as a lawyer, the illegalities of the plan. There is more to be said on this subject. For example, in his interview with the *Cyprus Weekly*, he says that "*the Annan plan is harmonised with the European law system"*. Such a statement implies either that he doesn't know the basic pillars of the legal system of European law or that he makes an arbitrary effort to reconcile the Annan plan with the principles of the EU (Liberty, Democracy, Rule of Law, and Human Rights).The political support that he got from the legal service of the EU does not change the legal truth.The arrangements regarding ethnic separation or division and the other serious infringements of human rights (freedom of establishment, respect of home and property, and political rights without ethnic discrimination) are contrary to the principles of the EU and no derogations of the kind of Annan plan can be reconciled with these principles. Any derogations to accommodate the plan would undermine and discredit the whole legal foundation of the EU.

That the Annan plan is incompatible with these principles, especially with the protection of human rights, is also confirmed by Article 48 of the plan which provides that in the first two years after the implementation of the plan "*a constituent state may object to a particular treaty having been listed in the relevant Annex to the Foundation Agreement on grounds of incompatibility with the Foundation Agreement [of the plan]*". All the human rights treaties have been listed in the relevant annex. Evidently it was pointed out to the drafters of the plan,

92 In this respect we cannot by pass the widely published statement of Daniel Fried, Senior State Department Official at a public meeting in Washington D.C, on 26 June 2003 according to which *"When we were trying to persuade Turkey to allow the passage of our troops through its territory into Northern Iraq, we offered Turkey two incentives, several billion dollars in grants and loans and Cyprus in the form of the Annan plan" !!*

presumably by the UN lawyer, that as the arrangements of the plan are contrary to the principles of human rights a way out should be provided, through renouncing the Human Rights Treaties, to avoid "*the scrutiny of an international human rights court acting upon individual complaints*"[93] and achieve a disengagement from the human rights commitments of Cyprus. I wonder how Mr Pfirter explains that.

Mr Pfirter's Article ends with the following pathetic view that is completely incompatible with a lawyer's expected approach (let alone a human rights lawyer):

> *"It is likely that a solution will continue to elude the Cypriots as long as they do not reach a consensus on the fundamental question of whether the Turkish Cypriots should be entitled to live and partly govern themselves in an essentially Turkish Cypriot part of Cyprus, or whether they should live as a minority among the Greek Cypriots who would essentially govern them".*

This position reveals the real personality of its author and his actual political convictions about the Cyprus problem which, it so happens, are substantially the same as the objectives of the "*Taksim"* policy of Turkey in respect of Cyprus that is completely contrary to the principles of Democracy and Human Rights and the principles and resolutions of the United Nations and has caused so much misery and tragedies to the people of Cyprus both Greeks and Turks.

Mr Pfirter's position militates in favour of the geographic separation of the G/C and T/C communities in Cyprus. This reminds me of his condemnation of such solutions. "*History"* he said at p 622 of his Article *" is full of examples showing that wherever this has happened the lives of the victims were by and large destroyed …under normal circumstances, it thus seems virtually impossible to find a legitimate public interest, which would be prevalent enough to justify such drastic interference with human rights*"

It also reminds me that ethnic separation is contrary to peremptory norms of international law. It is against the prohibition of ethnic discrimination and contrary to Democracy, because it entrenches ethnic based structures or an ethnically based political system. It will also trigger a series of violations of human rights as prerequisites for the implementation of the geographic separation implied by the UN legal advisor-similar more or less to the model of the a Annan plan (discrimination in respect of political rights, infringements in respect of the right of property, home, freedom of settlement e.t.c)

Solutions of international problems with legal advisors with the beliefs, inadequacies and weaknesses of Mr Didier Pfirter cannot by definition bring the correct results.

The correct solution in accordance with the relevant legal principles of Human Rights, Democracy and the Rule of Law is the establishment of a non-ethnically-based political system in which every citizen of Cyprus will be entitled to vote the elected representatives and be himself/herself elected regardless of his/her ethnic origin and in which every such citizen should

[93] See page 597 of the Article

have the same human rights to be enjoyed and exercised without any distinction regarding ethnic origin, race, religion e.t.c.

If these principles are adopted they will have the result of bringing all ethnic groups together cooperating for the common good of their country instead of antagonising and being driven by ethnic motives or ambitions.

Ethnicity should play no role in the constitutional systems and therefore there should be no question of any ethnic group “governing” any other ethnic group in the country. This is what applies in most modern democratic states and this is what is required by the principles and civilization of the EU to which Cyprus belongs. Nowadays is the era of open multiethnic political systems and societies and not of cementing, creating or even encouraging ethnic antagonism or of legitimizing ethnic majoritarianism.