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British Base Areas in Cyprus

THE BRITISH SOVEREIGN BASE AREAS

Alain Pellet¹

My companionship with Cyprus is an old story. It began years ago when Claire Paley asked me to participate in several workshops relating to the international legal issues linked to the Turkish invasion or the actions in the European Court of Human Rights. Later – but seven years ago or so – Constantinos Lycourgos asked several personal or collective Legal Opinions for the Attorney-General of the Republic and about at the same time my good and respected friend, Judge Loukis Loukaides was good enough to invite me to participate to several sessions of the most stimulating series of lectures on human rights he used to organize. And, more recently, I have been contacted by an illustrious citizen of this country, Minister Lillikas, whom however, I had never met. He had sent a mail to very kindly invite me to give this lecture – an offer which I accepted heartily; and I indulged myself to suggest some kind of reciprocity. To my surprise – he is quite an important and busy man... – he generously accepted to lecture my students in the Université de Nanterre. I would hope – but probably not expect! – that you will be as interested by mine as my postgraduate students were by Yiorgos Lillika's lecture. Then, very spontaneously, we have become friends.

Now, Minister Lillikas has not left me any choice regarding the subject-matter of this lecture: it had to be on the so-called British '*sovereign bases*'; but it was understood that I would expose my own views in all freedom. It might have been quite imprudent: after all, this is quite a controversial matter and rather sensitive in this country. Well – these are the risks of the academic freedom – but I suspect that I tend to share what probably is the dominant view in the Republic: the British bases are not sovereign, they are an anomalous remnant from the colonial past...

THREE BRIEF CAVEATS BEFORE GOING TO THE HEART OF THE MATTER:

First, I'll - as you have noted... - speak English; I would certainly have preferred the Aeschylus' language but, unfortunately, I don't speak Greek and I'm afraid that the ancient Greek that I learnt at school is not of great help to discuss the '*Sovereign Base Areas*'; and Yiorgos Lillikas and myself thought that it might be preferable to use the actual *lingua franca* - before

¹ Professor of International Law, University of Paris. Speech delivered on 8 March 2011 in a seminar organised by the former Minister of Foreign Affairs of the Republic of Cyprus Yiorgos Lillikas.

the time of Chinese comes - than the now more provincial language of Molière or de Gaulle...;

Second, even though I am conscious that my topic has a heavy political and emotional charge in this country, I will exclusively place myself from the point of view of law and, more precisely, of public international law; better than English, international law is the only language I really know; and I have to say also that I am not an EU lawyer and that I might miss some aspects or recent developments in European Law in relation with my topic; and,

Third and last warning: I have yielded to my friend Yiorgos' request to speak on this sensitive topic, but I am also conscious that I probably am in this room the one who is the least knowledgeable about it and that you'll probably think that I will more often than not state what you deem to be the obvious and line up commonplaces. My excuse might be that I have no message; I have thought about this all without preconceived ideas; and all I'll say now is genuine.

It goes without saying that my purpose is not to describe the history or the legal status of the British bases in Cyprus (although I've tried to understand both when preparing this modest presentation). Let me however, explain what I have precisely in mind when I name the '*British Military Bases in Cyprus*' (BMBCs or BMBs in the rest of my speech except when I'll try to reflect the British views, in which cases I'll mention the '*SBAs*').

As indicated as early as Article 1 of the Zurich/London Treaty of Establishment, the BMBCs are what the signatories called '*the Akrotiri Sovereign Base Area and the Dhekelia Sovereign Base Area*' - which are formally '*subtracted*' from the sovereignty of the Republic of Cyprus and '*shall remain*' - please note the wording, I'll come back to this - '*shall remain then, under the sovereignty of the United Kingdom*'. And, in Article III of the Treaty of Guarantee, the Republic of Cyprus, Greece and Turkey declare that they:

'undertake to respect the integrity of the areas retained under United Kingdom sovereignty at the time of the establishment of the Republic of Cyprus, and guarantee the use and enjoyment by the United Kingdom of the rights to be secured to it by the Republic of Cyprus in accordance with the Treaty concerning the Establishment of the Republic of Cyprus signed at Nicosia on to-day's date'.

The precise status of the SBAs (and it is in effect quite precise even if it leaves open quite a wide range of issues), their limits and the status of the British forces, are specified mainly in Annexes A, B and C to the Establishment Treaty. Their legal regime is completed by the British Declaration regarding the Administration of the SBAs which is appended to the Treaty and, internally, by the British Order in Council made on the 3rd of August

1960 together with Royal Instructions of that same date. But I would suggest that, when discussing the BMBCs, we should have a broader approach since, besides the 'sovereignty' (I'll discuss the word later) over the territories of the BMBs, the Annexes to the Establishment Treaty grant to the UK a variety of rights and facilities regarding for example the use of Cyprus roads or ports or overflight in Cyprus airspace or the establishment of lights and aids to navigation on the territory of Cyprus etc. notwithstanding the right to use '*additional small Sites as the United Kingdom may ... consider technically necessary for the efficient use of its bases areas and installations in the Island of Cyprus*'. To be noted: there were 40 such '*small sites*' in 1960; they have now been reduced to 10 (including if I am right the radar on Mount Olympus or the fresh water source at Kissousa in the Limassol district). From my point of view these ancillary rights are parts and parcels of the global issue raised by the BMBCs.

This being said, let me discuss three main questions: (1) what is the legal significance of the situation I have just very broadly described? (2) is that situation lawful when assessed in international law terms? (3) whether legal or not, what are the means to put an end to that situation?

First, then, and still in the sole perspective of international law, how do the BMBCs qualify in international law? As we have just seen, Article 1 of the Establishment Treaty expressly provides that the SBAs '*shall remain under the sovereignty of the United Kingdom*' and they are expressly named '*Sovereign Base Areas*' in Article 2, while in Article III of the Treaty of Guarantee, Cyprus and the two other guarantors '*undertake to respect the integrity of the areas retained under United Kingdom sovereignty*' together with the other rights secured to the UK by the Treaty of Establishment. Then, sovereignty... However, things are far less clear for two main reasons.

In the first place, the Treaties themselves - or say more precisely the Treaty of Establishment limits the British rights to far-reaching rights indeed, but, nevertheless limited rights. Generally speaking, the rights belonging to the UK under the Treaty are not inherent rights linked with sovereignty and simply recognized by Cyprus; they are functional rights linked with the purpose of the establishment of the BMBs: that is their defence (or more generally their military) object. Without entering into too great details, let me list the main limitations:

a) Not only the rights enumerated in Annex B (on the small sites) are '*accorded*' to the United Kingdom by the Rep of Cyprus (Art. 2(1)), but also the duty to cooperate under paragraph 2 of Article 2 is limited to '*the security and effective operation of the military bases*';

b) And this is so: the bases are 'military' and the British rights on them are exclusive but for military purposes only;

c) Appendix O of Command Paper 1093 of 1960 (which if am not mistaken was the object of an Exchange of Notes between Cyprus and the UK and is therefore a binding treaty instrument); by this Declaration; in particular, Her Majesty's Government 'declare that their intention will be (I) Not to develop the Sovereign Base Areas for other than military purposes' (and the next paragraphs of this provision specify the main consequences of this essential commitment; while Section 3 lists under not less than 19 rubrics the commitments of the UK towards Cyprus and the rights recognised to Cyprus and citizens in relation with the SBAs and the duties that the Republic 'is invited to perform' in the Bases – all outside the military sphere;

d) Last but not least (and, in fact there are quite a number of other restrictions to the exercise of rights of the UK in and on the Bases), it is interesting that Appendix P to Command Paper 1093 (also the object of an Exchange of Notes between the two States) provides for an obligation upon the UK to transfer the SBAs to the Republic of Cyprus in all or in part '*if in the event ... that the Government of the United Kingdom, in view of changes in their military requirements, should at any time decide to divest themselves of the aforesaid sovereignty or effective control*' (an expression which might deserve some comments if I had more time).

But the conclusion is already clear enough: the UK cannot be considered as having 'sovereignty' over the BMBCs. According to the celebrated *dictum* of the Swiss Arbitrator, Max Huber, in the 1928 Award in the case of the *Island of Palmas* between the Netherlands and the United States, '*sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State*'; this is usually accepted as stating that the sovereignty of the State has two 'components': completeness and exclusivity; in other words, a State enjoys on its territory all the competences recognized in international law and has an exclusive right to exercise or delegate them. In the case of the BMBCs, it is undisputable that the UK enjoys exclusive rights (say can claim exclusive rights, subject to the validity of their establishment – a topic to which I'll come next); but as indisputably the rights in question are limited, military exclusive, functional - sovereignty is just inimical to functionalism: it is a global concept, implying global rights, unlimited within the framework of international law - that is subject only to the respect for general norms of international law (whether peremptory or not) or for the treaty obligations freely accepted by the State in question (a principle to which I will also turn back when I discuss the legality of the BMBs; but, for this moment my problem is not whether or not the

British Bases are legal, but how they can be defined in international law - only afterwards can their legality be assessed).

There is a second reason why our Bases cannot be legally qualified as being sovereign. You will recall that through Article 1 of the Establishment Treaty the UK claims to retain sovereignty over the SBAs (the '*areas shall remain under the sovereignty of the United Kingdom*') – again the fact that this has been accepted is irrelevant for the moment; although it will of course be relevant to ask later whether Cyprus could accept such a claim – but the question here is different; it is: could the UK make such a claim? The clear answer to this later question is definitely 'no'. To cut a long story rather short:

a) Since 1925 and until its independence in 1960, Cyprus was a Colony of the British Crown;

b) It was treated as such by the United Kingdom both internally and at the international level; in particular, the British Government gave information to the Colonization Committee established under the UN Charter;

c) And it happens (and this is the important point) that [*t]he territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it*'.²

In other words, the Administering Power does not enjoy '*sovereignty*' over the territories of its '*non-autonomous territories*' (a prudish manner to name the colonies). It enjoys rights, territorial as well as personal rights; these rights are extremely extended but the limits are different and in some respects less extended than those of the State on its motherland territory. This is *not* sovereignty and I hope that I have made clear that the UK has not, and cannot claim, sovereignty over the BMBCs. But then, we know what they are not. But what are they then?

No doubt they are military bases, but, here again, it does not take us much further since you have quite a variety of such bases subject to quite different status. Does it help to say that they are Colonies of the British Crown? Yes and no. Yes in that first it does coincide to the official status of the BMBs in British Law. Dr Theodoulou in his excellent book (in French – even better!) on the military bases in international law – the Cyprus case,³ cites the Chapter on Commonwealth and Dependencies du

² 1970 Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations. A/RES/2625 (XXV).

³ Theodoulou, S., *Bases Militaires en Droit International: Le Cas de Chypre*, Peleus, Studien zur Archäologien und Geschichte Griechenlands und Zyperns, Band 34, Möhnese-Wamel, 2006, 146.

Halsbury's Laws of England which explains at Section 1047) that the SBAs:

'consist of those portions of the colony of Cyprus which were not established by the Cyprus Act 1960 as the independent sovereign Republic of Cyprus, and which remain within Her Majesty's sovereignty and jurisdiction. They are to be regarded [and this is what is important for us now], as constituting a colony acquired by conquest or cession as from 5th November 1914' (3rd ed., vol. 6).

Yes also in that it confirms that at best (or at worse...) the UK cannot claim full sovereignty (and this means 'sovereignty' *tout court* - since sovereignty is full or does not exist) over the BMBCs: Administering Powers do not enjoy full sovereignty over their colonies.

But, on the other hand, the BMBs are very special colonies. This is particularly so because e.g.:

a) Contrary to what they have usually graciously done (and still do) concerning their 'other' colonies, the British do not report on the BMBCs to the Decolonization Committee in the UN;

b) And for good reasons I would think: these very specific colonies have no population properly said; indeed they are inhabited, but only by two categories of persons: the British military and their families or Cypriot citizens - and reporting to the UN has been instituted with the view of protecting the population of the territories in question: both categories of inhabitants of the BMBs have their 'natural' protectors: the UK for their militaries, Cyprus for the Cypriots; in this respect - and still leaving Guantanamo apart - the only case of a territory without nationals is the Vatican - but the comparison does not lead us very far!;

c) More generally, it is obvious that in many respects the British Government does not treat the inhabitants of the BMBCs as British citizens whether in matters concerning nationality, or taxes or trade, etc.; and, in 2005, the British Court of Appeal in the case of *Saggar v. the Ministry of Defence* went as far as denying that the 1976 Racial Discrimination Act was applicable in the SBAs; in that occasion, Lord Justice Mummery (Justices Tuckey and Clarke agreeing) restated the usual British position according to which:

'Akrotiri [but this would hold true for Dhekelia as well] is outside Great Britain for the purposes of Part II of the 1976 Act. It came into existence as a Sovereign Base Area as a result of the Cyprus Act 1960 and the creation of the independent Republic of Cyprus. It is territory of the Crown. It has enjoyed the status of a British Overseas Territory since the British Overseas Territories Act 2002, having previously been a British Dependent Ter-

ritory. That status does not, however, make the Sovereign Base Area part of Great Britain for the purposes of the 1976 Act'.⁴

These are rather 'negative' conclusions: neither parts of Great Britain (nor of Northern Ireland I would think); nor 'real' colonies or, more politely, non-autonomous territories within the meaning of Chapter XI of the UN Charter...It is commonplace to consider that they are *sui generis* entities. I agree with this in that, to my knowledge, there are no other similar entities in the contemporary world (except maybe the US Base of Guantanamo – although there are differences, not the least the fact that the UK Government declared the European Convention applicable to this territory). But this *sui generis* qualification does not help much: generally speaking, *sui generis* is the unhelpful appellation that lawyers give to situation they cannot put into one of their usual boxes – and law is first of all a science (or, better, an art) of classification! But let's not be too pessimistic. We know some things about the BMBs and I can add some others:

First, they are not part of the British territory;

Second, they are 'military bases'; although this notion is extremely diverse this tends to show that even if the UK enjoys extremely wide exclusive rights for military purposes – not others, it does not possess over the Bases the global jurisdiction that a sovereign State has on its territory (and let me open a parenthesis here: this is one of the reasons why I do not share the view widely expressed by Cypriot lawyers that the BMBs have no territorial sea – I do think that they have one and the Republic itself has acknowledged this in several occasions; but the UK can certainly not claim a continental shelf and an exclusive economic zone on behalf of the BMBs: as formally provided for in the UN Convention of the Law of the Sea (which simply reflects general international law in this matter), coastal States only enjoy sovereign economic rights;

For the same reason and more generally, I have strong doubts that the UK could (or can...) take measures which are not related to the 'main object' of the British Government when it retained the 'sovereignty' over the areas; and, in particular, I would think that in the extremely important paragraph (2) of Section 3 of the British Declaration regarding the Administration of the SBAs, which provides that '[t]he laws applicable to the Cypriot population of the Sovereign Base Areas will be as far as possible the same as the laws of the Republic', the expression 'as far as possible' must be interpreted as meaning:

'as far as is compatible with the military object of the Bases';

⁴ Court of Appeal (Civil Division), *Saggar v. Ministry of Defence*, [2005] EWCA Civ 413, para. 14.

And this takes me to a last related remark: in the framework of the Anan's plan, the UK committed itself to restore half of the total territory of the BMBCs to the Republic; in this occasion, the spokesman of the Foreign Office declared:

'The [offered] area has no military infrastructure and therefore this would have no adverse impact on the function or operational capability of British forces'.

I suppose that what was true in 2003 is still true. If this is so, it legitimately raises the question: is the British presence on these parts of the BMBs (not less than 115 square kilometers), still not only legitimate, but simply legal. The Bases have always been explained as necessary for *'purely military purposes'* and this understanding was taken note of in several circumstances during the *travaux préparatoires* of the Treaty of Establishment. If they - or parts of them - are no more necessary or even useful to that purpose, the very object and purpose of the British Government retaining these areas vanish.

To conclude on this point, I would suggest that, being not parts of the UK, nor a British colony, the BMBCs cannot be said to be *res nullius* either. Therefore, the conclusion stemming from this is that they are parts of the Republic of Cyprus -but, of course, very special parts. One could think to define them as *'occupied territories'* within the meaning of the law of the war. I think that they are not - if only because of the initial Cyprus' agreement and because they are not the consequence of war operations.

Then, what? My view is that they are part of the Cypriot territory, with a very heavy servitude. At the risk of disappointing my colleagues in the audience who are specialists in public international law, I will not enter into the nice legal discussion on whether or not such a thing as a *'servitude'* exists in international law. Let me just say that I think it does exist - without the technicalities characterizing the notion in domestic laws - and that it can be defined as follows:

'State servitudes are those exceptional restrictions made by treaty on the territorial supremacy of a State by which a part or the whole of its territory is in a limited way made perpetually to serve a certain purpose or interest of another State'.⁵

And this clearly takes me to my second question (don't worry too much, I'll be briefer than on the first - but longer than on the third and last question): such servitude, instituted by a treaty - and, in the present case, the treaty which is said to have *'established'* the Republic of Cyprus. And I'll

⁵ Oppenheim, L., *International Law: A Treatise*, v. 1, 354 (3rd ed)

begin with this since I have noted in my readings on the topic and my discussions with Cypriot friends, colleagues or politicians, that this seems to be a major issue in their mind. IT IS NOT!

Whatever the official British story can tell, Cyprus has not been 'established by the Cyprus Act 1960 as the independent sovereign Republic of Cyprus', nor even by the 1960 so-called 'Establishment Treaty' - not more than Algeria has been 'established' by the change in the French Constitution in 1962 or the Agreement concluded in Evian with the Algerian freedom fighters contrary to what general de Gaulle maintained. This is not the way States are created!

As aptly explained by the Badinter Arbitration Commission for the Former Yugoslavia, 'the existence or disappearance of a State is a question of fact'.⁶ There are probably few domains where the maxim 'I know it when I see it' is more accurate than for appreciating statehood. A State is established when its existence is effective - the only criterion of statehood is 'effectiveness'. To put it otherwise (and to come back to the *Island of Palmas* Award that I have quoted some moments ago), if a Government exercises durably on a given territory with a given population all the functions of a State, that entity is a State.

There is no question that an independence agreement can deeply facilitate the establishment of the newly sovereign entity - and that this is a much more civilized way of creating a State than a war of liberation or secession. But from the point of view of international law this is that - and only that: the new State ('successor State' if you wish) is not 'established' by the gracious will of the former territorial State (the predecessor); it is established because it exists; because it performs exclusively the functions of a State on the territory in question.

Therefore - and, on this, I have not the slightest doubt - the wrongfully named 'Establishment Treaty' has established nothing (except, maybe the BMBs - to this I'll come back again) - and certainly not the sovereign/independent (both words are synonymous - one is only more pedantic than the other...) - and certainly not, the Republic of Cyprus as an independent sovereign State. I do not suggest that independence agreements in general - nor, for the moment, the 1960 'Establishment Treaty' in particular - are, or is, not valid. What I simply say (and, again, without the shadow of a doubt) is that this kind of agreements *never* create a State; they only can make its effectiveness possible or reinforce it. And the Zurich Treaty has not created Cyprus which is a fact, an effective reality (not more nor less than the Dayton-Paris agreement has created

⁶ Opinion No. 1 of the Arbitration Commission of the Peace Conference on Yugoslavia, November 19, 1991, *RGDIP* 1992, 265 (in French).

Bosnia and Herzegovina for example). And, of course, this is quite important for our problem: it means that the validity of the Establishment Treaty is of strictly no importance at all in respect to the existence of the Republic of Cyprus. And this also means that if we were to find that the Treaty is not valid, this would be of no consequence at all as far as the very existence and statehood of the Cyprus Republic are concerned.

Moreover - but this is more technical and I only mention it in passing - it can be sustained that the provisions in the Establishment Treaty concerning the SBAs are '*separable*' from the rest of the Treaty. According to Article 44 of the 1969 Vienna Convention on the Law of Treaties - which is, I dare say, part of the '*Constitution*' of the international society, three conditions must be met for "separating" one - or some - provisions from the rest of the treaty:

First the said clauses must be '*separable from the remainder of the treaty with regard to their application*'; in our case, this is clearly so: the question of the BMBs is clearly distinct from the other obligations accepted by the Parties in the Treaty;

I have no more hesitation to consider that the *third* condition is met: the '*continued performance of the remainder of the treaty would [certainly] not be unjust*' (it might be considered that it would be more just...);

Things are less evident in respect to the *second* condition mentioned in Article 44, paragraph 3, of the Vienna Convention since it might appear that acceptance of the provisions on the SBAs was an essential basis of the consent of the UK to be bound by the treaty as a whole; this, to say the truth, seems to have been the case. Even though I have not a complete knowledge of the drafting history of the Treaty, it seems that, in the mind of the British negotiators this was, from their side, the main element of the global *quid pro quo* on which their consent was given (and the Cypriot negotiators were aware of this).

But this leads me to one remark and one further question. The remark is just a reminder: even if the provisions on the BMBCs were seen as non-separable, the termination (even the '*retroactive*' termination) of the Establishment Treaty would not put into question the independence of Cyprus or the process of succession of States which has been agreed between the Parties. Now, the question is: even considering that the SBAs were an inseparable part of the synallagmatic agreement between the Parties, was the UK legally entitled to make an agreement on them a condition for granting independence to Cyprus?

Before trying to answer this question, let me make a brief '*excursion*' in the various motives which may justify the termination or invalidation of a treaty under international law (and, as I said before, in this matter, international law is reflected by the 1969 Convention on the Law of Treaties).

First, note that, according to Article 42, absent a special provision in the treaty itself the validity of a treaty may or of the consent of a State to be bound by a treaty and its termination may only be based on the grounds enumerated in the Convention. I must say that virtually all of them seem to have been invoked by Cyprus lawyers (or foreign lawyers sympathetic to the invalidity of the 1960 Treaty). Honestly, some of these arguments seem to me untenable (to put it politely).

This is the case for the putting into doubt of the capacity or the authority of the negotiators to conclude the Treaty. With respect, this is rubbish: if it were the case that Archbishop Makarios and Fazil Kutchuk had no capacity to commit the (future) Republic, then it would mean that no independence agreement could be valid. Freedom fighters can conclude treaties; this is *a fortiori* the case for democratic representatives of a not yet sovereign entity.

I am not much more impressed by the arguments based on the error or fraud (which are envisaged as a ground for the invalidity of the treaty by Articles 48 and 49 of the Vienna Convention): the British side had made no mystery of their intention concerning the BMBs and the Cypriot negotiators had perfectly understood what it was about. I know that those who invoke these grounds against the validity of the Treaty have in mind the non-fulfilment of their financial obligations toward the Republic under Appendix R. But I have two objections: the first one is that I am not that sure that the financial assistance from the UK to Cyprus which is provided for in this part of the Treaty (and I agree that it *is* part of the Treaty) is linked with the BMBCs; the second one is that, in any case, what is at stake here is not a question of error or fraud, but one of breach of the Treaty by the United Kingdom – and my considered view is that this is a more respectable ground for terminating the Treaty than the two others (I mean fraud or error).

Article 60 of the Vienna Convention provides that:

'2. A material breach of a multilateral treaty by one of the parties entitles: (b) a party specially affected by the breach [this would be the case of Cyprus] to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State.'

Apparently this would then be only a ground for suspending the 1960 Establishment Treaty; however, I wonder whether, in the present case, the Treaty should not be treated *as if* it were bilateral between Cyprus and the UK since clearly the *quid pro quo* is between the two of them only. But, I have another and more serious doubt. According to paragraph 3 of that same Article:

*'A material breach of a treaty, for the purposes of this article, consists in:
(b) the violation of a provision essential to the accomplishment of the object
or purpose of the treaty'.*

Honestly, I have some doubts that the violation of the UK's financial obligations under Appendix R meets this condition. But it is probably arguable; all the more so that Cyprus could also sustain that the UK has more widely breached the Treaty by not consulting it and cooperating 'in the common defence of Cyprus' as imposed by Article 3.

Maybe more convincing however, would be the argument based on what the lawyers call the *clausula rebus sic stantibus*, which is expressed in Article 62 of the 1969 Vienna Convention as follows:

'A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty'.

In the present case, there is little doubt that, even accepting that the BMBCs did answer a need in 1960, times have changed and, at least as they were conceived in the Treaty they have become anachronistic and the circumstances which induced Cyprus to accept their presence on its territory have disappeared. Consequently it can be reasonably argued that, maybe not the Establishment Treaty as a whole, but the BMBs provisions can be terminated on this ground.

Duress - or coercion - also is an argument which has some merit. According to Article 52 of the Vienna Convention, '[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations'. I think there is no need to insist on the fact that, clearly, the British side made it a 'this or nothing' bargain and that, except delaying for an uncertain future accession to independence and creating a very dangerous situation, the Cypriot negotiators had to 'buy' the bargain. This being said, it is not hundred per cent sure that an international court or tribunal would, for its part, buy the argument: after all, all international negotiations are based on a balance of negotiating power, backed on unequal military, economic, financial, diplomatic, etc, strengths. But what could be added here - and this, for

me is the main argument, is that in imposing that particular condition (that is the maintenance or creation) of the BMBCs, the United Kingdom was violating general international law.

I suppose that most of you, in this extremely select audience, are familiar with the notion of *ius cogens* or of 'peremptory norms of general international law'. But, after all, being a lawyer is not a peremptory requirement and ... nobody's perfect! Let me then, just briefly recall that, while States are free to reject in a treaty the application of 'normal' customary rules, they cannot adopt provisions which are in contradiction with such peremptory norms. Article 53 of the 1969 Vienna Convention on the Law of Treaties provides:

'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

While it would take me too much time to elaborate much - but this could be a full topic for another lecture! - I think that it can be confidently accepted that:

- a) All people have a right to self-determination;
- b) Concerning more particularly, colonial people, this right includes the right to accede to full sovereignty (that is to statehood) - since Cyprus was a colony in 1960, this confirms and reinforces my argument that the Republic does not hold its independence from the Establishment Treaty, but that it was as of right;
- c) And (and this is the most important for what I am discussing now), this accession to full sovereignty must be obtained *within* the colonial borders before the independence (that is the principle *uti possidetis iuris* - which applies in all circumstances whether colonial or not (but this too could be a topic for another lecture!)) and the colonial Power must respect the integrity of the territory in question.

Quite evidently the very existence of the BMBCs, as interpreted by the United Kingdom (and this is an important precision) is in clear contradiction with this principle:

- a) The 'retaining' of the BMBs was made a condition for the accession of Cyprus to independence;
- b) If it were accepted that the UK has 'sovereignty' over the SBAs, it would be a dismemberment of the territory of the former Colony of Cyprus;

c) And, at least both elements are incompatible with the principles I have briefly described one minute ago.

Are they *'peremptory norms'*? Today, I have no doubt that they are. The real problem is: were they *ius cogens* in 1960. I would think that they were already. The famous General Assembly Resolution 1514 (XV) was adopted in 1960; it very clearly includes these principles and I think, personally that they were *'recognised by the international community of States as a whole as [norms] from which no derogation [was] permitted'*. However, I accept that this is debatable.

Then suppose I am wrong and that they had not this character at the time. I think that it does not radically change my conclusion. In effect, it happens that besides Article 53, the Vienna Convention contains an Article 64, which provides that:

'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'.

Although I do not underestimate some underlying problems (including what lawyers call in their jargon, *'intertemporal law'*), I think that this provision could be applied. This being said, my personal conviction is that the Establishment Treaty is contaminated by its original sin; that it has been concluded in violation of existing peremptory principles in 1960; and that, for this reason, it can be considered as null and void. And, unfortunately - unfortunately because it might be seen as too radical a consequence - in such a case, there is no possibility to apply the system of separability (which is formally excluded in case of the application of Article 53 (separability *'works'* when Article 66 applies).

Another important issue is that, in several occasions (and notably when it became a Member of the European Union), Cyprus has *'accepted again'* the existence of the BMBCs. This certainly creates some problems. However, I would tend to consider that if a treaty is contrary, in whole or in part, to peremptory norm of general international law, this does not change the conclusion: it is not because you confirm rights and obligations which contradict *ius cogens* that they become legal.

And I come at last to my third and last question: what can be done? I'll be brief since this is less legal than political and, definitely, I am nothing else than a lawyer... But lawyers are still in their role when they expose various possibilities - being accepted that, then, it belongs to the politicians (and sometimes directly to the people) to decide. There are indeed several options. The first is to do nothing; after all the situation as it is has lasted for fifty years; it has created problems; but, after all, no major drama and everybody, including the Parliamentary Assembly of the Council of Europe,

recognizes that the *'the British authorities in charge of the administration of the SBAs, by and large, treat the local population with respect'*⁷ – and I must say that the presence here to-night of the British Ambassador and of high authorities of the Administration of the BMBCs is a mark of openness and care.

If things are to move, there are two main options: either both Parties renegotiate the aspects of the Establishment Treaty relating to the BMBCs or Cyprus acts unilaterally. Concerning the renegotiation of the Treaty, legally speaking the main issue is: what about the two other Parties? However, my view is that it is not a major problem. This solved (again another lecture!), there is no problem in the two Parties agreeing to some kind of British military bases (not sovereign) on the territory of Cyprus for a limited (but renewable) period of time. And such a renegotiation could be the occasion – which has not been seized when Cyprus became a Member of the European Union – to modernize the rules applicable to the Bases, to clarify some aspects (for example regarding the maritime rights of the British Party) and to fill some gaps. A good entry point to negotiations might be the proposed, then withdrawn, offer by the British Government to relinquish part of the BMBs having no use for military purposes. But, again, as a matter of principle, there is no legal objection against accepting some kind of military bases on a sovereign State territory.

The other possibility is for Cyprus to act unilaterally (I have, of course, excluded any plan to use force, whatever its form). On a purely legal ground, there are at least two:

First, there is a possibility for Cyprus to unilaterally lodge an Application to the International Court of Justice, on the basis of Article 66 of the Vienna Convention which provides that:

'If ... no solution has been reached [by other peaceful means] within a period of 12 months following the date on which the objection was raised...:

(a) any one of the parties to a dispute concerning the application or the interpretation of articles 53 or 64 [the provisions of the Convention on ius cogens] may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration';

the inconvenience of that solution is that it can only bear upon the conformity of the Establishment Treaty with peremptory norms of general interna-

⁷ Resol 1555 (2007), Situation of the inhabitants of the British Sovereign Base Areas of Akrotiri and Dhekelia, para. 4.

tional law and it is '*radical*': if Cyprus case prevails, the result will be that the Treaty, as a whole, will be declared null and void;

Second, Article 10 (b) of the Establishment Treaty provides for the constitution of an Arbitral Tribunal to decide on '*[a]ny question or difficulty as to the interpretation of*' the Treaty; contrary to what I have read here and there, there is no possibility for the United Kingdom to refuse such a binding settlement; the real issue is elsewhere; that provision provides that each of the Parties to the Treaty (this includes Turkey) may appoint a member of the Tribunal; I suppose that, in the present circumstances, it would be difficult - to say the least - for Cyprus to submit itself to an arbitral court comprising a Turk citizen (or even a non-Turk arbitrator but appointed by Turkey); if this is so, the only possibility would be to negotiate with the UK an alternative settlement; I must add that even if the existing provision were to be used, the tribunal could only be seized if an agreement cannot be reached by negotiations.

But I must say that, speaking of negotiations, I am very surprised that, while the Cypriot Party seems to be very upset by the issue of the BMBCs, it seems that, in reality, it has never tried to start negotiations - but I might be misinformed and I have not read the WikiLeaks Reports on the question if any! However, I have the feeling that things have come to a point where some kind of *bona fide* negotiations with a view to come to a result are necessary. From my point of view, this result should not be a total rejection of the Treaty since one should not throw the baby with the water of the bath and I must say that besides the BMBs, I do not see the Establishment Treaty as calling for total '*repudiation*'. But I am not sure that lawyers should expose their '*feelings*' (we are supposed to expose legal rules and principles, not feelings...) — and I have better stop.