

Air Traffic with Non-Recognised States: the Case of Northern Cyprus

Stefan Talmon, M.A., D.Phil. (Oxon.), LL.M. (Cantab.)
Associate Professor, University of Tübingen
Fellow, St Anne's College, Oxford

I. Introduction

Despite numerous international appeals, on 24 April 2004 Greek Cypriots, unlike their Turkish Cypriot compatriots, voted against reunification and thus against joint accession by both communities to the European Union (EU). Whilst in the referendum 64.91% of Turkish Cypriots voted in favour of the plan proposed by UN Secretary-General Kofi Annan to end the 30-year division of the island, against the expressed wish of their leader Rauf Denktash, 75.83% of Greek Cypriots voted against the Annan plan. Both the United Nations and the EU expressed profound disappointment at that outcome and in particular at the attitude of the Greek Cypriot leaders, who had openly called for the plan to be rejected. The Turkish Cypriots, on the other hand, were widely praised for their 'yes' vote.¹

On 15 November 1983 Turkish Cypriots had declared independence in Northern Cyprus, which had been occupied by Turkish troops since July 1974, and established their own state, the Turkish Republic of Northern Cyprus (TRNC). Turkey recognised the new state the same day and opened diplomatic relations with it soon afterwards. The international community, however, has so far refused to recognise the TRNC, on the grounds that it was established in breach of international law, and instead continues to recognise the Government of the Republic of Cyprus, currently composed exclusively of Greek Cypriots, as the government of the whole of Cyprus, although in practice it controls only the south of the island. In Resolution 541 (1983), the UN Security Council 'deplored' the declaration of independence and called upon all states not to recognise any Cypriot state other than the Republic of Cyprus.² In Resolution 550 (1984), the Security Council reiterated 'the call upon all states not to recognise the purported state of the "Turkish Republic of Northern Cyprus" ... and ... not to facilitate or in any way assist the aforesaid secessionist entity'.³ States regard northern Cyprus as either a territory occupied by Turkey and/or a territory under the control of a Turkish Cypriot local *de facto* government. As a consequence of the non-recognition of their state, Turkish Cypriots are to a large extent politically and economically isolated. There are no direct flight connections or postal links with northern Cyprus, Turkish Cypriots are banned from taking part in international sporting events, they are denied access to the international financial markets, they cannot export agricultural products to the European Union and even some divorce decrees by Turkish Cypriot courts are not recognised.⁴

¹ See, for example, EU Commission statement following the outcome of the referendum in Cyprus, Press Release IP/04/537, 24 April 2004.

² S/RES/541 (1983), 18 November, para. 7.

³ S/RES/550 (1984), 13 May 1985, para. 3.

⁴ For details see Talmon, *Kollektive Nichterkennung illegaler Staaten*, 2005, Chapters 5-11.

By way of a reward for their vote in favour, the isolation of the Turkish Cypriots is now to end. The Council of the European Union adopted the following conclusions only two days after the referendum:

'The Turkish Cypriot community have expressed their clear desire for a future within the European Union. The Council is determined to put an end to the isolation of the Turkish Cypriot community and to facilitate the unification of Cyprus by encouraging the economic development of the Turkish Cypriot community'.⁵

The United States and other countries have also indicated that they wish to end the isolation of the Turkish Cypriots.⁶ UN Secretary-General Kofi Annan states in his report of 28 May 2004 on his mission of good offices to Cyprus:

'In opting for a settlement, the Turkish Cypriots have broken with the decades-old policies of seeking recognition of the 'state' they purported to create in 1983 ... this vote has undone whatever rationale might have existed for pressuring and isolating them ... I believe that the members of the Council should encourage the Turkish Cypriots, and Turkey, to remain committed to the goal of reunification. In this context and for that purpose and not for the purpose of affording recognition or assisting secession, I would hope they can give a strong lead to all States to cooperate both bilaterally and in international bodies to eliminate unnecessary restrictions and barriers that have the effect of isolating the Turkish Cypriots and impeding their development, deeming such a move as consistent with Security Council resolutions 541 (1983) and 550 (1984)'.⁷

As one of the most important steps in ending the isolation of northern Cyprus, the leaders of the Turkish Cypriot community are calling for the introduction of direct flights to northern Cyprus.⁸ Direct flights are crucial for the development of the tourist industry and thus the economic development of northern Cyprus. Although the TNRC Prime Minister announced that charter flights would be starting in June 2004,⁹ air traffic with northern Cyprus has still not begun despite the best intentions of the states. I shall discuss below whether – as the Greek Cypriots claim – international law precludes direct flights to and from northern Cyprus and how these could be organised in such a way as not to imply state recognition of the TNRC.

⁵ 2576th Meeting of the General Affairs Council in Luxembourg on 26 April 2004: 8566/04 (Presse 115), 26 April 2004, 9.

⁶ See for example US Department of State, Daily Press Briefing 17 June 2004, 18 June 2004 and 9 July 2004 ('We think it's time for the international community to find ways to fly in and out of their airports'); also 11 August 2004 ('In coordination with the European Union, we are examining our policies, including in aviation, in line with this goal [to eliminate barriers that have the effect of isolating Turkish Cypriots and impeding their developments]'), all obtainable on <http://www.state.gov/>.

⁷ UN Doc. S/2004/437, 28 May 2004, pp. 21-22.

⁸ See BBC News, 26 April 2004: <http://news.bbc.co.uk/1/hi/world/europe/3660171>. On the call for direct flights to Northern Cyprus, see the motion for a resolution on direct air flights to Northern Cyprus by the Council of Europe Parliamentary Assembly: 'The Assembly, 1. Believing fundamentally that all areas which come geographically into the scope of the Council of Europe should provide unfettered and easy access for bona fide European travellers and visitors. 2. Urges that direct air flights should be permitted to Northern Cyprus by any airlines wishing to undertake such a service ... 3. Calls upon the governments of the member states to promote such a concept'. (COE Assembly, Documents, 39th Ordinary Session (First Part), Doc. 5734 (6 May 1987).

⁹ See Cyprus PIO (Press and Information Office): *Turkish Press and Other Media*, 26 May 2004 (4).

II. Air traffic with northern Cyprus

Northern Cyprus has two airports. The Turkish Cypriots opened Ercan (Tymbou) airport, a former British Air Force airfield, on 13 February 1975.¹⁰ A second airport was opened near Geçitkale (Lefkoniko) on 7 March 1986,¹¹ but is used almost exclusively for military flights. It is only available for civil flights when Ercan is closed for maintenance or, as recently, for renovation.¹² Whereas 33 800 flights were recorded for the two airports in the south of the island in 1989,¹³ the figure for northern Cyprus was only 3 477, 9.5% of all flights on Cyprus.¹⁴ The picture was not significantly different 11 years later: in July 2000, at the height of the main holiday and travel season, the number of flights at Ercan airport was just 384.¹⁵ Thirty-four foreign airlines offer scheduled and charter flights to southern Cyprus,¹⁶ whereas the only airlines flying to northern Cyprus are two Turkish airlines.

Cyprus Airways, the national airline of the Republic of Cyprus (CAIR.CY), offers direct scheduled flights from Larnaca and Paphos to over 30 destinations in Europe, the Middle East and the Gulf region,¹⁷ as well as numerous leased and charter flights in the peak tourist season. Apart from destinations in Turkey, the Turkish Cypriot airline Kibris Türk Hava Yolları (CAIR.KTHY),¹⁸ on the other hand, only flies regularly to London,¹⁹ Belfast, Manchester and Glasgow.²⁰ There are also occasional flights to Frankfurt, Cologne, Nuremberg, Munich, Düsseldorf and Berlin. However, flights to all destinations other than Turkey are charter flights.²¹ The only scheduled flights are to Adana, Anjara, Ankara, Antalya, Istanbul and Izmir in Turkey. Flights from airports outside Turkey are not direct. All flights from the United Kingdom and Germany to northern Cyprus stop over in Turkey. Because of this 'touchdown', the flight from London to Ercan, for example, is legally two separate flights, London to Istanbul and Istanbul to Ercan, with two different flight numbers. For international air transport purposes, flights from Turkey to Northern Cyprus are officially domestic

¹⁰ Goulding, *Northern Cyprus*, 2nd edition, 1994, p. 5.

¹¹ BBC, *Summary of World Broadcasts*, ME/W1380/I, 11 March 1986.

¹² Goulding, *Northern Cyprus*, 2nd edition, 1994, p. 69; Wellenreuther, *Südosteuropa-Handbuch*, Vol. 8, 1998, p. 379.

¹³ Larnaca and Paphos.

¹⁴ Wellenreuther, *Südosteuropa-Handbuch*, Vol. 8, 1998, pp. 379-380. In 1982 only 585 aircraft flew to northern Cyprus. See Ures, *The Political and Economic Problems of the Turkish Community of Cyprus in the International Field*, 1986, p. 123.

¹⁵ *Kibris*, Vol. 8, No 10 (2000), p. 4.

¹⁶ Cyprus Tourism Organisation, *Cyprus Travellers Handbook*, 1995, p. 14; Cyprus Press and Information Office, *The Almanac of Cyprus 1994-95*, 1995, pp. 301-305. For flights to southern Cyprus see also UK Department of Trade and Industry, *Setting up Business in Cyprus*, 1994, p. 21.

¹⁷ For a list of flight destinations, see <http://www.cypriusairways.com/main/default.aspx?tabide=56>. See also *Greek Review International*, No 237 (April 1997), p. 17; Cyprus Tourism Organisation, *Cyprus Travellers Handbook*, 1995, pp. 5-20; Press and Information Office, *Republic of Cyprus. 30 Years 1960-1990*, 1990, pp. 103-104.

¹⁸ Often also known as Cyprus Turkish Airlines (CTA) or Kibris Turkish Airlines (KTA).

¹⁹ To Gatwick, Heathrow and Stansted airports. The first flight between the United Kingdom and northern Cyprus was on 5 November 1976 (BBC, *Summary of World Broadcasts*, 2nd series, ME/5359/C/2, 9 November 1976).

²⁰ See <http://www.kthy.net.kthyen/durations.html> and *Kibris*, Vol. 5, No 6 (1997), p. 6; *ibid.*, No 8 (1997), p. 6; *ibid.*, Vol. 7, No 3 (1999), p. 8; *ibid.*, Vol. 10, No 4 (2002), p. 11; *Munzinger-Archiv/Internationales Handbuch, Zypern, Anhang Nordzypern*, 10/95, p. 8.

²¹ See Darke, *Guide to North Cyprus*, 2nd edition, 1995, p. 13.

flights, although Turkey in fact treats them as international flights²² and they are shown as 'international departures' on the indicator boards at Turkish airports. In practice, charter passengers usually stay on board the aircraft during the 45 minutes or so of the stopover.²³ The stopover in Turkey adds nearly three hours to the flight from London to Ercan and makes it considerably more expensive than flights to southern Cyprus.²⁴ Not least for that reason, northern Cyprus is a less attractive destination for tour operators and package tourists.²⁵ Turkish airlines wishing to fly to Northern Cyprus from third countries, as well as the Turkish Cypriot airline, have to stop over in Turkey, whether they are operating scheduled or charter flights.²⁶ The total flying time on a scheduled Turkish Airlines flight from Stuttgart or Frankfurt to Ercan via Istanbul is about nine hours, which is out of all proportion to the distance.²⁷ Airlines of states that do not recognise the TRNC do not even fly to northern Cyprus with a stopover in Turkey.

In addition to the requirement to stop over or change planes in Turkey, other features of air traffic with northern Cyprus, based less on international law than on political and economic considerations, should also be mentioned. When identification tags with 'ECN' on them (for Ercan Airport) were attached to baggage at London Heathrow Airport, the Government of the Republic of Cyprus complained to British Airways. As a result Air France, which handles baggage for the Turkish Cypriot airline at Heathrow, for a time used an identification tag with 'CYN' (for 'Cyprus North') but reverted to 'ECN' in 1993. In Stuttgart and Frankfurt too, baggage for Turkish Airlines can be checked straight through to northern Cyprus and marked 'ECN'. Since 'officially' there are no direct flights from Heathrow to Ercan, the stopover airport in Turkey has to be shown on the departure screens, instead of Ercan airport. Interestingly, however, Ercan can be announced on the address system. To add to this picture of bewildering contradictions, it might be noted that Ercan is shown on the departure screens at London Gatwick and London Stansted airports.²⁸

III. Flights to northern Cyprus as breach of international aviation agreements

The international law grounds for the absence of direct flights to northern Cyprus will be discussed in more detail below. First it is necessary to look at the bilateral or

²² Wellenreuther, *Munzinger-Archiv/Internationales Handbuch, Zypern*, 17/96, p. 5.

²³ See *The Independent*, 8 June 1993, p. 22; *The Guardian*, 16 July 1994, p. 6. Cf. also Goulding, *Northern Cyprus*, 2nd edition, 1994, pp. 4-5, 69; Martin, in *The Political, Social and Economic Development of Northern Cyprus*, 1993, p. 361.

²⁴ According to Drevet, *Chypre en Europe*, 2000, 234, flying to Ercan therefore costs twice as much as to Larnaca. See also Ackermann, *Türkisch-Zypern*, 1997, p. 121.

²⁵ Northern Cyprus is in any case only in the programmes of tour operators specialising in Turkey, since the Republic of Cyprus and Greece prohibit tour operators who include trips to northern Cyprus in their programmes from the lucrative Greek and Cypriot business. Cf. Drevet, *Chypre en Europe*, 2000, p. 234.

²⁶ Charter flights to Northern Cyprus are also operated by the Turkish airlines Istanbul Airlines and Onur Airlines, and by SunExpress, a joint Lufthansa and Turkish Airlines undertaking. See *Handelsblatt*, 9 October 1990, p. 14; Sackman, *Südosteuropa-Handbuch*, Vol. 8, 1998, p. 429, Fn. 65; Ackermann, *Türkisch-Zypern*, 1997, p. 122.

²⁷ Preisinger, *Entwicklungschance des Tourismus in der türkischen Republik Nordzypern*, 1995, Chap. 3.2.2.2.

²⁸ Martin, in *The Political, Social and Economic Development of Northern Cyprus*, 1993, p. 363. See also Wellenreuther, *Südosteuropa-Handbuch*, Vol. 8, 1998, p. 379.

multilateral aviation agreements that may preclude them. These regularly distinguish between civil and state aircraft.

1. Civil aircraft

It is a general rule of international law that every state has full and exclusive sovereignty over its airspace (air sovereignty).²⁹ Any flight by a foreign aircraft in or through the airspace of a state, including landing at its airports, therefore requires permission from the government of the state concerned. In practice, the operation of commercial international flights between two or more states has to be approved by all the states concerned. The authorisations (the five 'freedoms of the air') have been negotiated between states in various multilateral and bilateral agreements.

(a) The Chicago Agreements

The basic agreement in this field is the Convention on Civil Aviation of 7 December 1944 (the Chicago Convention).³⁰ The Convention recognises, in Article 1, the 'complete and exclusive sovereignty' of states over the airspace above their territory (i.e. both land areas and adjacent territorial waters), and it allows *non-scheduled* international civil flights to fly across the territory and to land *for non-traffic purposes*. *Scheduled* international flights, however, require special permission to exercise such rights (Article 5, Article 6). That is granted either in bilateral aviation agreements or by the Chicago International Air Services Transit Agreement (Transit Agreement),³¹ also signed in Chicago on 7 December 1944. According to Article I, Section 1, No 1 of the Agreement, each contracting state may designate the airports that scheduled international flights are allowed to use for non-traffic purposes. In addition, any landing by a foreign civil aircraft for *traffic* purposes (i.e. taking on or discharging passengers, cargo or mail for remuneration or hire) requires special permission from the country in which it lands.³² Under the special permission, foreign aircraft may be required to use particular routes and airports (Article 68). Generally the permission is regularly granted in bilateral aviation agreements,³³ but ad hoc permission may also be granted in specific cases. In Article 10 of the Chicago Convention, which is particularly relevant to the present case, any aircraft wishing to land in the territory of a contracting state

'shall, if the regulations of that State so require, land at an airport designated by that State for the purpose of customs and other examination ... Particulars of all designated customs airports shall be published by the State and transmitted to the International Civil Aviation Organization³⁴ ... for communication to all other contracting States.'

²⁹ Cheng, *Studies in International Space Law*, 1997, pp. 3-5; same author, *Encyclopedia of Public International Law*, Vol. 1, 1992, p. 67; Zyllicz, *International Air Transport Law*, 1992, pp. 58-59; Milde, *Encyclopedia of Public International Law*, Vol. 4, 2000, pp. 521-522; Rink, *Wörterbuch des Völkerrechts*, Vol. 1, 1961, p. 427.

³⁰ The Convention entered into force on 4 April 1947 and on 31 December 2003 had 185 contracting parties. For the Republic of Cyprus the Convention entered into force on 16 February 1961.

³¹ For the Republic of Cyprus the Agreement entered into force on 12 October 1960. On 31 December 2003 it had 101 contracting parties.

³² Arts. 5, 6 of the Chicago Convention.

³³ Cf. Art. 2(1)(c) of the agreement between the Federal Republic of Germany and the Republic of Cyprus on scheduled commercial air traffic, 18 October 1967 (BGBl. 1969 II 982). The agreement entered into force on 5 January 1970 (BGBl. 1970 II 48).

³⁴ On the International Civil Aviation Organisation, see Part II of the Chicago Convention.

In addition, aircraft flying into the territory of a State must comply with the air traffic, customs, radio and other regulations of the state in which they land and may be investigated by the competent authorities for that purpose.³⁵

Only a few days after the Turkish Cypriot airline started regular flights between Ercan airport and airports in Turkey, the Permanent Representative of Cyprus at the United Nations wrote to the UN Secretary-General:

'The Government of the Republic of Cyprus wishes to inform all Member States of the United Nations that this so-called 'Ercan Airport' is not an approved aerodrome under Cyprus legislation nor is it a designated customs airport in accordance with the Convention on International Civil Aviation. Consequently, all flights operated between Turkey and such 'Ercan Airport' are illegal and run contrary to all principles and objectives of the ICAO [International Civil Aviation Organisation] ... The Government of the Republic of Cyprus requests that all countries should ... take all necessary measures so that their designated carriers and all other airlines registered and licensed by them should refrain from operating any air services whether scheduled or non-scheduled to the so-called 'Ercan Airport' ... and from having any dealings whatsoever with the illegal so-called 'Cyprus Turkish Airline'.³⁶

The Government of the Republic of Cyprus takes the view that flights to Northern Cyprus are in breach of the Chicago Convention, since Ercan and Geçitkale airports are not legally authorised designated customs airports within the meaning of Article 10.³⁷ According to Republic of Cyprus rules, only the airports at Larnaca, Paphos and Nicosia (in the UN-controlled buffer zone) have been identified as international airports.³⁸

The crucial question is whether, under international law, the Government of the Republic of Cyprus can bindingly prevent parties to the Chicago Convention flying to the airports in northern Cyprus by expressly not designating them customs airports. That would require, firstly, that the Chicago Convention was still applicable in northern Cyprus and, secondly, that the Government of the Republic of Cyprus is entitled also to exercise rights arising from the convention for the northern Cyprus airports, although they are currently outside its *de facto* control.³⁹

Only the Republic of Cyprus is a party to the Chicago Convention; the TRNC is not. The Convention contains no provisions on its application to territory or airspace

³⁵ Arts. 11-16, 24, 30 of the Chicago Convention.

³⁶ UN Doc. S/11644, 26 February 1975. A similar letter had already been sent to the UN Secretary-General on 10 February 1975, before regular flights started; see UN Doc. S/11619, 12 February 1975.

³⁷ Interestingly, the Government of the Republic of Cyprus does not base the prohibition on landing at airports in northern Cyprus on the absence of permission to overfly or land. Since, as a general rule, such permission was mainly granted by agreements, it can also only be revoked in accordance with the provisions of the agreement or by terminating the agreement. See Arts. 54, 56 Vienna Convention on the Law of Treaties. However, such a process would have been too complex and time-consuming.

³⁸ See Arts. 54, 55 of the Air Navigation Order and AD 1.4 of the Department of Civil Aviation International Flight Information Manual. According to the latter, 'Larnaca and Paphos are the two international aerodromes, in the Republic of Cyprus, of entry and departure for international air traffic, where all formalities concerning customs, immigration, health, animal and plant quarantine and similar procedures are carried out and where air traffic services are available on a regular basis' (letter from the Embassy of the Republic of Cyprus, ref. no. 7.2.04, annexes 1 and 3).

³⁹ That is separate from the issue of whether the TRNC authorities are bound by agreements (such as the Chicago Convention or other aviation agreements) entered into by the Republic of Cyprus before the island was partitioned.

controlled by a belligerent occupying power or a local *de facto* government. The Vienna Convention on the Law of Treaties also does not regulate the question.⁴⁰ State practice shows that belligerent occupation of the territory does not automatically lead to the termination or suspension of agreements entered into by the occupied state;⁴¹ the effect of the occupation on the agreement has to be considered in each individual case. Treaties requiring action by state bodies in the occupied territory are generally deemed to be fully or partially suspended on the grounds of temporary impossibility of performance.⁴² Article 89 of the Chicago Convention, which concerns 'war and emergency conditions', indicates that war (including belligerent occupation) does not automatically lead to suspension of the Convention. The Chicago International Air Services Transit Agreement concluded in conjunction with and supplementing the Convention is also instructive on the question of application of the Agreement to areas under military occupation. Under the Agreement, for the purposes of scheduled international air traffic each contracting state grants the other contracting states the privilege of flying over its territory without landing and landing in that state for non-traffic purposes. According to Article I Section 1(2), sentence 2, of the Transit Agreement: 'In areas of ... military occupation, the exercise of such privileges shall [also] be subject to the approval of the competent military [occupation] authorities.' From that it may be inferred that the Chicago Convention is in principle also applicable to areas under military occupation. The mere designation of airports for customs clearance purposes does not require any action by the state bodies of the Republic of Cyprus in the occupied area. That is a decision that can also be taken by competent bodies outside the occupied area, even in exile. Nor does the publication and notification of the decision to the International Civil Aviation Organisation (ICAO) in accordance with Article 10, sentence 3, of the Chicago Convention require any action in the occupied area. It can thus be assumed that the Convention or the Convention provisions that are relevant in this case are also applicable to the occupied area of a contracting state. The same also applies to the area under the control of a local *de facto* government, which is still regarded as the territory of the mother state. For all contracting states that regard the TRNC solely as a local *de facto* government or consider the northern part of the island to be under belligerent occupation, the Chicago Convention and the other aviation agreements entered into by the Republic of Cyprus therefore still apply to northern Cyprus. It need only be pointed out that, in the absence of aviation agreements with the TRNC, it could only be those agreements signed with the Republic of Cyprus that grant foreign aircraft the right to fly across airspace over northern Cyprus⁴³ – a right that 250 (mainly non-Turkish) aircraft have been exercising every day since the mid-1980s.⁴⁴

If it is assumed that the Chicago Convention is applicable to northern Cyprus, the question then arises whether the Republic of Cyprus can exercise contractual rights arising from the Convention for airports in northern Cyprus that are outside its control. State practice shows that the exercise of contractual rights not requiring any

⁴⁰ See Art. 73 Vienna Convention on the Law of Treaties. For questions not regulated by the Convention, paragraph 9 of the preamble to the Vienna Convention refers to the rules of customary international law.

⁴¹ Talmon, *Recognition of Governments*, 1998, pp. 136-137.

⁴² Cf. also second sentence Art. 61(1) Vienna Convention on the Law of Treaties.

⁴³ See Art. 5 Chicago Convention; Art. I Section 1(1) No. 1 Transit Agreement; Article 2(1) of the Germany-Cyprus agreement of 18 October 1967 on commercial aviation. The TRNC is not a party to those agreements and has not signed any other air traffic agreements.

⁴⁴ See *North Cyprus Almanack*, 1987, p. 143.

territorial control only requires recognition of the authority exercising those rights as the *de jure* government of the contracting state.⁴⁵ As already mentioned, mere designation as a customs airport does not require control of the airport. It is therefore at the discretion of the (Greek Cypriot) Government of the Republic of Cyprus whether or not to declare the airports in northern Cyprus customs airports.⁴⁶ In a letter dated 29 December 1986, ICAO refused to name Ercan airport an international airport, on the grounds that:

'ICAO recognises the government of the Republic of Cyprus as the only legitimate government of that State ... (and) the government of the Republic of Cyprus has not requested the inclusion of Ercan Airport in the ICAO Regional Plan and, as such, it is not and cannot be considered an international airport in ICAO terms'.⁴⁷

The ICAO view is shared by, *inter alia*, the Federal Republic of Germany⁴⁸ and the United Kingdom.⁴⁹ On 20 December 1980, the British Government spokesman stated in the House of Lords on the question of air traffic between the United Kingdom and northern Cyprus:

'The position is that the Cyprus Government have declared that they do not consider Ercan Airport to be an approved airport under Cyprus legislation, nor a designated customs airport in accordance with the relevant provisions of the Chicago Convention of 1944. Since Her Majesty's Government recognise only one government in Cyprus – that of the Republic of Cyprus under President Kyprianou – we are obliged to prohibit both private and scheduled flights between that airport and the United Kingdom'.⁵⁰

It is clear from that statement that not only do the contracting states have to comply with the Chicago Convention, they are also responsible for ensuring that the Convention is not violated by their national aircraft.⁵¹

The Government of the Republic of Cyprus has several ways to ensure compliance with the Chicago Convention and Article 10 in particular:

(1) If disagreements arise between the Government of the Republic of Cyprus and another contracting state on whether that state's aircraft are allowed to land at airports in northern Cyprus, it may, if the matter cannot be resolved through negotiation, seek

⁴⁵ Talmon, *Recognition of Governments*, 1998, pp. 137-140.

⁴⁶ On 18 March 1987 the Foreign Minister of the Republic of Cyprus, George Iacovou, stated to the British Parliament's Foreign Affairs Committee: 'As regards the airport, it is true that according to the ICAO Convention we have the mandate from all countries to observe the International Civil Aviation Organisation Convention and have done so' (*House of Commons, Foreign Affairs Committee, Third Report*, 1987, 86). According to the Attorney-General of northern Cyprus, Ercan Airport is 'not accepted by the ICAO as an international airport, because it is not approved by the "Government of Cyprus"' (Nedjatigil, *Setting the Record Straight on Cyprus*, 1979, p. 46).

⁴⁷ Sayed/Kanti, *The New Nation*, 24 June 2004: http://nation.ittefaq.com/artman/publish/article_10170.shtml.

⁴⁸ See Dentash, in: *The Political and Economic Problems of the Turkish Community of Cyprus in the International Field*, 1986, p. 32: '... the German Government ... verbally chastises the pilot "for not landing at an international airport, for landing at an airport not recognised by the Government" ...'

⁴⁹ *House of Lords Debates*, Vol. 389, Col. 909, 8 March 1978 (Lord Peart): '... under international agreements the use of Ercan Airport is not allowed because it has not been designated by the Government of Cyprus. It is British practice to uphold these agreements to which we are a party'. See also *House of Commons Debates*, Vol. 56, Written Answers, Col. 221, 15 March 1984.

⁵⁰ *House of Lords Debates*, Vol. 405, Col. 796, 20 February 1990 (Lord Trefgarne).

⁵¹ See Milde, *Encyclopedia of Public International Law*, Vol. 1, 1992, p. 87; Zyllicz, *International Air Transport Law*, 1992, p. 75; Kirgis, in: *United Nations Legal Order*, Vol. 2, 1995, p. 845.

a decision from the ICAO Council in the formal dispute settlement procedure.⁵² An appeal may be lodged against that decision in an arbitral tribunal or the International Court of Justice (ICJ),⁵³ whose decision is final and binding. If the airline of a contracting state does not comply with such a binding decision, all contracting states are required under Article 87 of the Chicago Convention to prohibit it from operating in their airspace. The ICAO Assembly may suspend the voting power in the Assembly and the Council of a contracting state that fails to fulfil that obligation.⁵⁴ The formal dispute settlement procedure, on the other hand, is more of a theoretical possibility; it has so far been applied in only three cases, in none of which the Council took a decision on the merits.⁵⁵ However, only the possibility for the Government of the Republic of Cyprus to seek a final decision in the formal dispute settlement procedure, with its far-reaching consequences, can make the other contracting states and airlines comply with the Convention.⁵⁶

(2) Under the informal dispute settlement procedure the Government of the Republic of Cyprus can also refer the landing of aircraft from contracting states at airports not designated as customs airports in northern Cyprus to the ICAO Council (or its President). According to Article 54(n) of the Chicago Convention, the Council has to 'consider any matter relating to the Convention which any contracting State refers to it'. The Council can consider a dispute referred to it and then produce a report.⁵⁷ If the Council establishes an infraction of the Chicago Convention, it must report it to the contracting states and the ICAO Assembly.⁵⁸ The contracting states have occasionally made use of this informal possibility for resolving disputes in politically sensitive cases. One example is the flights allegedly made during the Nigerian civil war from the Portuguese colony of São Tomé to Port Harcourt Airport in the Nigerian province of Biafra, to supply the insurgents with military equipment. The Republic of Biafra declared independence from Nigeria on 30 May 1967. It was recognised by four states in 1968⁵⁹ and had *de facto* control over the province⁶⁰ until 12 January 1970. On 21 December 1967, Nigeria lodged a protest on the flights from São Tomé to Port Harcourt Airport with the Council against Portugal, which had not formally recognised Biafra. Nigeria claimed, *inter alia*, that these flights violated Articles 1, 2 and 10 of the Chicago Convention. The flights to Biafra stopped soon after the Council started dealing with the matter.⁶¹ Thus the informal dispute settlement procedure, 'law enforcement by mobilising shame', can also have a deterrent effect.

⁵² First sentence of Art. 84 Chicago Convention. On the formal dispute settlement procedure, see Milde, in: *Settlement of Space Law Disputes*, 1980, pp. 88-92.

⁵³ Third sentence of Art. 84 Chicago Convention, in conjunction with Art. 37 ICJ Statute.

⁵⁴ Art. 88 Chicago Convention.

⁵⁵ Kirgis, in: *United Nations Legal Order*, Vol. 2, 1995, p. 843; Milde, in: *Settlement of Space Law Disputes*, 1980, p. 90.

⁵⁶ See Milde, in: *Settlement of Space Law Disputes*, 1980, p. 94.

⁵⁷ Art. 55(e) Chicago Convention.

⁵⁸ Art. 54(j) and (k) Chicago Convention.

⁵⁹ Biafra was recognised by Tanzania on 13 April 1968 (*NY Times*, 14 April 1968, p. 5), Gabon on 8 May 1968 (*ibid.*, 9 May 1968, p. 5), Ivory Coast on 14 May 1968 (*ibid.*, 16 May 1968, p. 17) and Zambia on 20 May 1968 (*ibid.*, 21 May 1968, p. 3). For the secession of Biafra, see Edgell in: *Civil Wars and the Politics of International Relief*, 1975, pp. 50-73; Ijalaye, *AJIL* 65 (1971), pp. 551-559; Nwankwo/Ifejika, *The Making of a Nation: Biafra*, 1969.

⁶⁰ See Haverland, *Encyclopedia of Public International Law*, Vol. 4, 2000, p. 356.

⁶¹ Kirgis, in: *United Nations Legal Order*, Vol. 2, 1995, p. 847; Milde, in: *Settlement of Space Law Disputes*, 1980, p. 92. According to Milde, in that case action by Nigeria in the formal dispute settlement procedure under Chapter XVIII of the Chicago Convention would also have been justifiable.

(3) However, the Government of the Republic of Cyprus can take action not only against the Chicago Convention contracting states but also directly against individual civil aircraft flying to airports in northern Cyprus. By exercising its air sovereignty over Cyprus, it can order aircraft to land at an airport in southern Cyprus (although not compel them to do so by force), as soon as they enter Cypriot airspace.⁶² The Republic of Cyprus air surveillance exercised that right on 22 July 1984, when it asked a West African airline transport plane, which a Turkish Cypriot commercial company had chartered to carry grapes from northern Cyprus to the United Kingdom, to land at Larnaca Airport in southern Cyprus.⁶³

(b) Bilateral aviation agreements

In addition to the Chicago Convention, bilateral aviation agreements might also preclude flights to northern Cyprus. The Republic of Cyprus has signed such agreements with over 30 states,⁶⁴ including the Federal Republic of Germany.⁶⁵ However, it has no agreement with Turkey. Whilst the contracting parties for such agreements do not recognise the TRNC as an independent state, the agreements are in principle applicable to the whole of Cyprus. In the agreements, the contracting parties regularly grant each other overflying and landing rights and the right to take on or discharge passengers, mail and cargo for traffic purposes at fixed points. The routes on which the airlines designated by the contracting parties are allowed to operate international air traffic are laid down in a route plan to be agreed by the governments of the contracting parties. An airline designated by a contracting party may only start operations when the other contracting party has given the designated airline permission.⁶⁶ That can be revoked if the airline does not conform to the laws and other rules of the contracting party or the provisions of the aviation agreement.⁶⁷ Since the airports in northern Cyprus are not in the air routes plan, it is not permitted to fly to them under the aviation agreement. An airline flying to the northern Cyprus airports in contravention of the route plan risks having its permission to operate flights revoked by the Government of Cyprus. When an aircraft chartered by the Deutsche Lufttransportgesellschaft (DLT) wished to land at Ercan Airport on 11 November 1977, Republic of Cyprus airspace surveillance threatened the captain that all DLT aircraft would be banned from landing in southern Cyprus if he continued his approach to Ercan.⁶⁸

Whilst a general landing ban for German aircraft in Cyprus would be incompatible with both the Germany-Cyprus aviation agreement⁶⁹ and the Transit Agreement,^{70 71} the Republic of Cyprus can revoke its permission to operate economically important scheduled and charter flights for traffic purposes between Cyprus and Germany, after

⁶² Art. 3bis of the Chicago Convention. The provision, which merely codified existing customary law, was added by the Protocol relating to an amendment to the Convention on International Civil Aviation of 10 May 1984, which entered into force on 1 October 1998. On the validity of the provision in customary law, see S/PRST/1996/9, 27 February 1996, and Milde, *Encyclopedia of Public International Law*, Vol. 4, 2000, p. 523; Kirgis, in: *United Nations Legal Order*, Vol. 2, 1995, p. 828; Cheng, *Encyclopedia of Public International Law*, Vol. 1, 1992, p. 68; Frowein, *ZaöRV* 49 (1989), pp. 789-790. Cf. also first sentence of Art. 5(1) and Annex 2 Chicago Convention; Art. I Section 2 Transit Agreement.

⁶³ BBC, *Summary of World Broadcasts*, 2nd series, ME/7703/C/2, 24 July 1984, and *ibid.*, ME/7705/C/3. 26 July 1984. Another example appears in UN Doc. A/32/392-S/12458, 21 November 1977, p. 2.

consultation with the German Federal Government, if an airline fails to comply with the laws and other rules of the Republic of Cyprus or the provisions of the Germany-Cyprus aviation agreement (e.g. the air routes plan).⁷² In view of the lucrative tourist air traffic with southern Cyprus, this is an effective potential sanction that prevents airlines from flying to the northern Cyprus airports.⁷³

2. State aircraft

The bilateral and multilateral air traffic agreements concluded by the Republic of Cyprus apply only to civil aircraft⁷⁴ and therefore can only stand in the way of flights to northern Cyprus by such aircraft. Other criteria apply in the case of state aircraft.

Geçitkale (Lefkoniko) Airport was originally intended for use by a NATO rapid reaction force for operations in the Middle East. Since the Turkish Government, anxious not to jeopardise its good relations with the Arab world, was unwilling to make an airport in Turkey available to NATO for such operations, it offered the northern Cyprus airport by way of a substitute.⁷⁵ Since Geçitkale Airport came into operation, the presence of foreign military aircraft has been reported on numerous occasions.⁷⁶

Foreign military aircraft and other state aircraft⁷⁷ are only allowed to overfly or land in the territory of a state with that state's express or tacit agreement.⁷⁸ That is a

⁶⁴ See Annex V to the UN Secretary-General's Plan for The Comprehensive Settlement of the Cyprus Problem, 31 March 2004 version (<http://www.cyprus-un-plan.org/>) and Aeronautical Agreements and Arrangements Registered with the Organisation, 1.1.1946-31.12.1990: ICAO Doc. 9460 LGB/382. 55-56 +Suppl.

⁶⁵ Agreement between the Federal Republic of Germany and the Republic of Cyprus, 18 October 1967, on scheduled commercial aviation: BGBl. 1969 II 982.

⁶⁶ On 15 March 1984, the Secretary of State at the British Ministry of Defence stated in answer to a question: '... we do not recognise the so-called "Turkish Republic of Northern Cyprus". British airlines that wish to land in Cyprus require permission from the Cyprus Air Transport Licensing Authority. It is contrary to the laws of the Republic of Cyprus for airlines to serve or make technical landings at points in northern Cyprus' (House of Commons Debates, Vol. 56, Written Answers, Col. 221, 15 March 1984).

⁶⁷ Cf. Art. 2, Art. 3(1)(b), Art. 4(1) of the Germany-Cyprus agreement.

⁶⁸ UN Doc. A/32/392-S/12458, 21 November 1977, Appendix.

⁶⁹ Art. 5(1) grants aircraft of the contracting states used for non-scheduled international flights the right to land in Cyprus for non-traffic purposes.

⁷⁰ Art. I Section 1(2) grants aircraft of the contracting states used for non-scheduled international flights the right to land in Cyprus for non-traffic purposes.

⁷¹ The Federal Republic of Germany has been a party since 8 June 1956 to both the Chicago Convention and the Transit Agreement; see BGBl. 1956 II 934.

⁷² Cf. Art. 4 of the Germany-Cyprus aviation agreement. On the other hand, it seems legally questionable for the Greek Government to threaten to withdraw landing rights from airlines flying to northern Cyprus, since no breach of the law has been committed in relation to Greece; however, see *Greek Review International No 24* (22.1.1983), p. 8.

⁷³ The First Secretary of the TRNC Representative Office in New York reports that in the early 1980s four European airlines stopped their services to Ercan Airport again after only a few flights, under pressure from the government in South Nicosia, and terminated the agreements with the Turkish Cypriot authorities; see Plümer, *Turkish Review*, Vol. 4, No 22, Winter 1990, p. 65.

⁷⁴ See Art. 3(a) Chicago Convention; Art. 1, Section 2, Transit Agreement.

⁷⁵ Choisi, *Wurzeln und Strukturen des Zypernkonflikts*, 1993, p. 372.

⁷⁶ On 17 January 1991 the Xinhua news agency reported that US fighter planes were stopping over at Lefkoniko military airfield. See also Meinardus, *Orient 28* (1987), p. 521.

⁷⁷ E.g. aircraft used by customs and police; cf. Art. 3(b) Chicago Convention.

corollary of the air sovereignty of states. The crucial question is whether transit stops by foreign military aircraft in northern Cyprus also require permission from the Government of the Republic of Cyprus, or whether – depending on the legal opinion – permission from the Turkish Cypriot authorities or the Turkish occupying authorities is sufficient. For the exercise of rights based on territorial or air sovereignty – unlike the exercise of treaty rights – it will have to be a requirement that the government of the state effectively controls the territory or airspace. Thus the Government of the Republic of Cyprus cannot prevent foreign military aircraft flying over the northern part of the island or landing at northern Cyprus airports simply by not granting overflight or landing permission. That is indirectly confirmed by United Nations practice: although the Government of the Republic of Cyprus regularly protests at violations of its (northern Cyprus) airspace by Turkish military aircraft⁷⁹ and has asked for their condemnation,⁸⁰ those protests have not been taken up by the Secretary-General in his reports on the United Nations operation in Cyprus or by the Security Council in its resolution on Cyprus.

The authority of a local *de facto* government or an occupying power to grant the necessary overflight and landing permission is derived from its *de facto* control of the airspace and airports.⁸¹ Seeking overflight and landing permission from the competent authorities cannot be seen as recognition as a state. However, states must avoid any action that might imply recognition as a state. That prohibits the arrangement of general landing and overflight rights for state aircraft under a military agreement. Requests for overflight and landing permission for state aircraft are generally dealt with by the military authorities on an ad hoc basis.

IV. Other reasons for the absence of flights to Northern Cyprus

1. *Non-recognition of the Turkish Republic of Northern Cyprus*

The non-recognition of the Turkish Republic of Northern Cyprus is not an obstacle to either scheduled or unscheduled flights to northern Cyprus. Air traffic can start operating between two territories without the technical contacts that that requires implying recognition as a state. For instance, Dutch, Austrian and Swedish airlines flew to airports in the German Democratic Republic long before those countries

⁷⁸ Cf. Art. 3(c) Chicago Convention. See also Weber, *Encyclopedia of Public International Law*, Vol. 3, 1997, p. 839.

⁷⁹ For protest by the Government of the Republic of Cyprus see, for example, UN Doc. A/56/476-S/2001/972, 17 October 2001; see also TRNC reply: UN Doc A/56/525-5/2001/1044, 5 November 2001 Annex.

⁸⁰ See, for example, UN Doc. S/PV.2729, 11 December 1986, pp. 14-15.

⁸¹ Cf. sentence 2 of Art. I Section 1(2) of the Transit Agreement. For the powers of the occupying power, see also Art. 43 of Regulations concerning the Laws and Customs of War on Land, Annex to Hague IV Convention respecting the Laws and Customs of War on Land.

recognised the GDR.⁸² There were also direct flights between German airports and Skopje before Germany recognised Macedonia.⁸³

According to some legal opinion, scheduled international air traffic is only possible with recognised states, since under Article 6 of the Chicago Convention it requires an inter-state treaty whose signature automatically implies recognition.⁸⁴ That view fails to take account of the fact that the Chicago Convention applies only to air traffic between contracting states. Furthermore, Article 6 of the Chicago Convention only stipulates that scheduled air services require 'special permission or other authorisation', not how such permission or authorisation is to be granted.⁸⁵ Certainly it is in practice regularly granted in bilateral aviation agreements,⁸⁶ but that is not necessarily the case, as the example of scheduled air services between Frankfurt Airport and the Eritrean capital, Asmara, shows. Eritrea gained its independence from Ethiopia on 24 May 1993 and acceded to the Chicago Convention on 17 October 1993.⁸⁷ For a number of years the German airline Lufthansa has been operating twice-weekly direct flights to Asmara without any aviation agreement between the Federal Republic of Germany and Eritrea.⁸⁸ The air traffic with the Republic of China (Taiwan), which is not recognised as an independent state by most countries, also shows that it is possible to operate air services without that necessarily implying recognition as a state.⁸⁹

2. *International Air Transport Association rules*

In the non-legal specialist literature, 'IATA rules' are cited as the reason for foreign airlines not flying to airports in northern Cyprus.⁹⁰ IATA, the International Air Transport Association, is a non-governmental organisation (NGO) set up in 1945 and based in Montreal. Its members are international airlines and certain charter companies, not states. According to its articles of association, its purpose is to promote safe, reliable and economical air transport, and cooperation between airlines and with ICAO. IATA's functions include agreeing flight safety regulations and terms

⁸² Zivier, *Die Nichtanerkennung im Völkerrecht*, 2nd edition, 1969, p. 203. On air traffic between the GDR and Austria, see *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 25 (1965), p. 30; on air traffic between the GDR and other countries in general, see Müller, *Deutsche Außenpolitik* 3 (1958), pp. 237-243.

⁸³ For instance, the German Foreign Office situation report on Macedonia of 15 June 1992 (514-516.80/3) states: 'Skopje Airport can be used for deportation by air. There are direct links with German airports'.

⁸⁴ Zivier, *Die Nichtanerkennung im Völkerrecht*, 2nd edition, 1969, pp. 203, 204.

⁸⁵ Weber, *Encyclopedia of Public International Law*, Vol. 1, 1992, p. 75; Badura, *Encyclopedia of Public International Law*, Vol. 1, 1992, p. 89.

⁸⁶ Bilateral aviation agreements can only be concluded with recognised states. For the reasons the United Kingdom did not sign such an agreement with the GDR, see *House of Commons Debates*, Vol. 743, Written Answers, Col. 311, 23 March 1967; *ibid.*, Vol. 657, Written Answers, Col. 90, 9 April 1962.

⁸⁷ See BGBl. 1993 II 2404.

⁸⁸ BMJ (ed.), *Fundstellennachweis B*, 2994, p. 40. See also *Frankfurter Allgemeine Zeitung*, 31.1.1996, 5 and *ABC World Airways Guide 1999*.

⁸⁹ See Section VII.2 below.

⁹⁰ See, for example, Wellenreuther, *Südosteuropa-Handbuch*, Vol. 8, 1998, pp. 379, 383; same author, *Nikosia-Nord (Zypern)*, 1996, p. 28; Hahn/Wellenreuther, *Orient* 37 (1996), p. 686. In some cases even the predecessor to IATA, the International Air Traffic Association, which has not existed since 1945, is held responsible for the lack of direct flights. E.g. Martin, in: *The Political, Social and Economic Development of Northern Cyprus*, 1993, p. 363.

of transport, coordinating flight plans, setting fares and standardising tickets and baggage tickets.⁹¹ It is clear from the Association's membership and from its aims and functions that it cannot take a decision on whether flights to airports in northern Cyprus are permitted. The legal adviser to the Association has thus stated, on the issue of flights to northern Cyprus: 'IATA is a non-political association, and does not seek to regulate the destinations to which our members may offer services. In particular, we have no regulations prohibiting direct flights to airports in Northern Cyprus'.⁹²

The non-recognition of the TRNC also does not preclude the signature of 'interline agreements' under the aegis of IATA. These are private law standard contracts between two airlines, at least one of which is an IATA member, allowing the parties to make bookings and reservations for each other and accept payments for the bookings.⁹³ The German airline Lufthansa and 84 other IATA members all over the world had already signed an interline agreement with Air Rhodesia before Southern Rhodesia unilaterally declared independence in November 1965.⁹⁴ That agreement was not considered to be incompatible with non-recognition of Rhodesia as a state; it was not until the Security Council adopted Resolution 253 (1965) on 29 May 1968 that such agreements were expressly prohibited.⁹⁵

Interline agreements allow the Turkish Cypriot airline to have bookings made through the Turkish airline or airlines of other states anywhere in the world. For instance, Turkish Airlines issues tickets from Stuttgart to Ercan under such an agreement, although the Istanbul-Ercan route is operated by the Turkish Cypriot airline.

3. Airports declared illegal border crossing points

The Government of the Republic of Cyprus has by law declared the airports in the north of the island illegal border crossing points. That is indicated in most guidebooks and Cyprus handbooks.⁹⁶ Like the legal closure of the seaports, such a declaration might have a deterrent effect on individual travellers, but, with no control over the seaports, it is not effective in international law. However, the Republic of Cyprus authorities can hold persons arriving in Cyprus via airports in the north criminally liable for breach of the entry regulations of the Republic of Cyprus if they later enter southern Cyprus.

⁹¹ Cf. Hailbronner, *Encyclopedia of Public International Law*, Vol. 2, 1995, 1047-1050; Kirgis, in: *United Nations Legal Order*, Vol. 2, 1995, p. 825.

⁹² Letter to author dated 7 December 1998 from David E. Short, Senior Legal Counsel, IATA.

⁹³ For information on interline agreements, see ICAO Circular 84-AT/14, p. 3.

⁹⁴ BT-PIPr. [*German Parliament record of plenary proceedings*] 7/109 of 19 June 1974, 7375 B-C. Despite S/RES/253 (1965) of 29 May 1968, Lufthansa did not cancel its interline agreement with Air Rhodesia until 31 December 1977 (BT-PIPr. 8/53 of 28.10.1977, p. 4141, A/Annex). The Dutch airline KLM signed a similar agreement with Air Rhodesia; see Kuyper, *The Implementation of International Sanctions*, 1978, pp. 115-116.

⁹⁵ BT-PIPr. 7/109 of 19 June 1974, p. 7375 D. After 1969, the General Assembly called for Air Rhodesia operations to be stopped; see A/RES/3116 (XXVIII) of 12 December 1973; A/RES/3298 (XXIX) of 13.12.1974; A/RES/3116 B of 16.12.1977; A/RES/31/154 B of 20 December 1976.

⁹⁶ 'All airports in the part of the Republic illegally occupied by the Turkish invasion forces have been declared by the government of Cyprus as prohibited ports of entry, and no visitor should enter or leave the Republic through these ports' (Cyprus Press and Information Office, *The Almanac of Cyprus 1994-1995*, 1995, 306). See also Cyprus Tourism Organisation, *Cyprus Travellers Handbook*, 1995, p. 20.

V. Legal status of the Turkish Cypriot airline

The Turkish Cypriot airline 'Kibris Türk Hava Yollari (CAIR.KTHY), in English Cyprus Turkish Airlines (CTA), set up on 4 December 1974, currently has five aircraft.⁹⁷ Aircraft always have the nationality of the state in which they are registered and, like ships, they may not be registered in several states simultaneously. Under international law, each state may lay down the conditions under which it registers aircraft, but the Chicago Convention contracting states must notify ICAO of the registration.⁹⁸ Thus there is in principle nothing to prevent registration of the aircraft of the Turkish Cypriot airline in the TRNC. However, the nationality of an aircraft determines its rights and obligations.⁹⁹ In order for KTHY aircraft to exercise the overflight and landing rights granted in the Chicago Convention and the Transit Agreement (and in other aviation agreements), they must be registered in a contracting state of those agreements. Due to its collective non-recognition as a state, the TRNC cannot be a contracting party to those agreements or sign bilateral aviation agreements.¹⁰⁰ In the absence of overflying and landing rights, aircraft registered in the TRNC would be restricted to flights between Turkey and northern Cyprus, within northern Cyprus and flights over certain maritime areas.¹⁰¹ That is one reason why aircraft of the Turkish Cypriot airline are registered not in the TRNC but in Turkey.¹⁰² Another reason is ownership: the Turkish Cypriot airline is a wholly owned subsidiary of the Turkish airline Türk Hava Yollari (CAIR.KTHY),¹⁰⁴ as indicated by the nationality code CAIR.KTHY.¹⁰⁵ In purely legal terms, therefore, KTHY is not the 'national Turkish Cypriot airline', but a private Turkish airline with its registered office in Istanbul.¹⁰⁶ Consequently there is little point in the call on all states by the Government of the Republic of Cyprus on 21 February 1975 to refrain from any contact with the illegal 'Turkish Cypriot airline'¹⁰⁷. Since KTHY is a Turkish airline in international law, it enjoys all the same contractually granted overflying and landing rights as any other Turkish airline. The allegation that the German and British

⁹⁷ <http://www.kthy.net/kthyen/fleet.html>. In 1997 there were still eight aircraft, see *Kibris*, Vol. 5, No 3 (1997), p. 5.

⁹⁸ See Chapter III Chicago Convention. See also Milde, *Encyclopedia of Public International Law*, Vol. 1, 1992, p. 86.

⁹⁹ Cheng, *Encyclopedia of Public International Law*, Vol. 1, 1992, p. 67.

¹⁰⁰ Cf. Arts. 91-93 Chicago Convention; Art. IV(2) Transit Agreement. See also Hailbronner, *Encyclopedia of Public International Law*, Vol. 2, 1995, p. 1071.

¹⁰¹ See Art. 38(2), Art. 53(3), Art. 58(1), Art. 87(1)(b) of the United Nations Convention on the Law of the Sea, 10.12.1982.

¹⁰² Turkey has been a party to the Chicago Convention since 4 April 1947 and a party to the Transit Agreement since 6 June 1945.

¹⁰³ In the Digest of Statistics, ICAO lists 'Kibris Turkish Airlines' under 'Non-Scheduled International Operators (NSI)' in part C under Turkey; see ICAO, Series FP No 48, *Digest of Statistics No 426: Fleet Personnel, Commercial Air Carriers 1994*, C-35. See also *ibid.*, 11.

¹⁰⁴ Darke, *Guide to North Cyprus*, 2nd edition, 1995, p. 13; Wellenreuther, *Nikosia-Nord (Zypern)*, 1996, p. 28.

¹⁰⁵ The nationality code for a national Turkish Cypriot airline would be 'CAIR.YK'. See Martin, in *The Political, Social and Economic Development of Northern Cyprus*, 1993, p. 161.

¹⁰⁶ On 25 September 1994 the TRNC and Turkey signed the 13th joint economic protocol, which provides *inter alia* that KTHY is gradually to become the state [Turkish Cypriot] airline, with the Turkish airline transferring its shares to KTHY (Zinhua New Agency, 26 September 1994, Item No 0926220). The Federal Supreme Court judgment of 24 March 2000 confirmed that KTHY is a Turkish company with its registered office in Istanbul; see BGH NJW-RR 2000, p. 1731.

¹⁰⁷ UN Doc. S/11644, 26 February 1975.

authorities turned a blind eye to 'indirect direct flights' to Ercan Airport via Turkey¹⁰⁸ is thus unfounded. There can be no complaint under international law about flights to Turkey from the United Kingdom and Germany. The destinations to which Turkish aircraft depart/fly on from Turkey are a matter that concerns only Turkey and the third country. The decision by the Irish Government in April 2002 to refuse an application from the Turkish Cypriot airline to start operating flights from Dublin to Antalya in Turkey, on the grounds that the final destination of the flights was the TRNC and they were therefore contrary to UN resolutions,¹⁰⁹ was thus based on political rather than international law considerations. The Minister for Trade, Industry and Tourism of the Republic of Cyprus in fact described the decision as a 'politically correct position [which] sends a positive political message'.¹¹⁰ Consequently the British Government also saw no reason to change its position on the basis of this Irish precedent.¹¹¹

A different question is whether an obligation to stop openly advertising these 'indirect direct flights' to northern Cyprus and displaying or announcing the destination airport in northern Cyprus at departure airports might arise from the non-recognition of the TRNC. Neither the British nor the German Government has so far taken any steps to prevent that.¹¹² An obligation to intervene cannot be derived from the non-recognition itself, since tolerance of such practices cannot be seen as recognition of the TRNC. In the absence of an obligation under international law to take action against the practices, the fact that they are tolerated can therefore, at most, be an act unfriendly to the Republic of Cyprus, but not a breach of international law.

VI. The opening of the airports in Nicosia and Northern Cyprus

1. *Confidence-building measures of the UN Secretary-General*

Until 15 July 1974, air traffic to and from the Republic of Cyprus operated solely via Nicosia International Airport (NIA), which was seen as a pivotal point between the Middle East and Europe. Since the Turkish intervention, the airport, still largely in operating order, lies abandoned in the UN-administered buffer zone between northern and southern Cyprus.¹¹³ Since August 1975 it has been used by the UN peacekeeping force (UNFICYP).¹¹⁴

¹⁰⁸ MEP Lord Bethell in a reader's letter to *The Times*, reprinted in *Cyprus News*, No 46 (1993), p. 4.

¹⁰⁹ See *Irish Times*, 26 April 2002, 5 (Flights to Cyprus Refused); *Kibris*, Vol. 10, No 5 (2002), p. 8. See also Sayed/Kanti, *The New Nation*, 24 June 2004: http://nation.ittefaq.com/artman/publish/article_10170.shtml.

¹¹⁰ Cyprus News Agency, *News in English*, 29 April 2002.

¹¹¹ See www.trnc.info.com for 10 May 2002: A Lesson by the British High Commission to the Greek Cypriots. See also Cyprus News Agency, *News in English*, 29 May 2002, Britain refuses to follow Irish precedent on flights to the north: 'A spokesman for the British High Commission in Nicosia said that while direct flights between the UK and the north were prohibited under international law, if flights first landed in Turkey, there was little reason to ban them'.

¹¹² Cf. Section II above.

¹¹³ The buffer zone is 180 km long and covers 3% of the island's territory. Its width varies between five metres (in Nicosia) and seven kilometres. See UN Doc. S/1996/411, pp. 1-3; United Nations, *The Blue Helmets*, 2nd edn., 1990, pp. 306-307.

¹¹⁴ The final communiqué on the third round of negotiations in Vienna, ending on 2 August 1975, contains the following: 'In addition the following was agreed [between the representatives of the two communities]. Both sides declared that the Nicosia International Airport, which has been repaired by the United Nations under the agreement reached at the first round, can be used, as a first step, by the United Nations for its needs. Practical arrangements, including the provision of liaison personnel, will

In 1993 Secretary-General Boutros Boutros-Ghali suggested that the airport be reopened for the use of both communities as a confidence-building measure.¹¹⁵ Both sides would have free access to the airport; foreign visitors who arrived on Cyprus at the airport would be allowed to travel between the two parts of the country unhindered during their stay on the island; the United Nations, in collaboration with ICAO, would be responsible for operations and security at the airport by arrangement with both sides; any costs would be borne jointly; both sides would undertake not to impede the freedom of movement of persons and goods at the airport in any way; in the event of a conflict, the United Nations would decide; the measures would in no way prejudice the overall solution to the Cyprus problem.

The Boutros-Ghali proposal was not a new idea. The leaders of the two communities had already discussed reopening Nicosia International Airport at the beginning of 1975.¹¹⁶ After the leader of the Greek Cypriot community, Archbishop Makarios, had initially rejected the Turkish Cypriot proposal to reopen the airport to international traffic under joint control,¹¹⁷ agreement to reopen it was 'in principle' reached during the negotiations in Vienna from 28 April to 3 May 1975.¹¹⁸ However, discussions by a joint committee set up for that purpose were unproductive.

The proposal to reopen the airport as a confidence-building measure under United Nations supervision and control was first put forward in the discussion basis by UN Secretary-General Pérez de Cuéllar for the talks between the leaders of the two communities planned for 8 August 1983.¹¹⁹ However, the talks did not take place, since on 15 November 1983 the establishment of the TRNC was declared. In his speech to the UN Security Council on 17 November 1983 the Turkish Cypriot leader, Rauf Denktaş, did also state, probably in order to avoid condemnation of the TRNC declaration of independence by the Security Council, that the Turkish Cypriot side was prepared to start immediate negotiations with the Greek Cypriot side, under the good offices of the Secretary-General, on reopening the airport to civil flights for the use of both sides under interim UN administration.¹²⁰

be worked out between UNFICYP and the two sides' (United States, Congress, Senate, Committee on the Judiciary, Subcommittee to Investigate Problems Connected with Refugees and Escapees, *Crisis on Cyprus: 1975*, 1975, p. 115).

¹¹⁵ On the reopening of Nicosia International Airport as a confidence-building measure, see Richter, *Thetis* 1 (1994), pp. 137-147.

¹¹⁶ Special report by the UN Secretary-General on development in Cyprus: UN Docs. S/11624, 18 February 1975, and S/11717, 9 June 1975. See also House of Commons Debates, Vol. 885, Col. 1380, 5 February 1975.

¹¹⁷ United States, Congress, Senate, Committee on the Judiciary, Subcommittee to Investigate Problems Connected with Refugees and Escapees, *Crisis on Cyprus: 1975*, 1975, p. 53.

¹¹⁸ The final communiqué of 3 May 1975 contained the following: 'Agreement was reached in principle on the reopening of the Nicosia International Airport ... A joint committee will be set up by the leaders of the two communities for the purpose of opening the airport for full civilian use (UN Doc. S/11684, 4 May 1975, Annex, and UN Doc. S/11717, 9 June 1975, para. 52).

¹¹⁹ Varvaroussis, *Deutschland und die Zypernfrage*, 1995, p. 251; Choisi, *Wurzeln und Strukturen des Zypernkonflikts*, 1993, pp. 343, 369; Tatli, *Der Zypernkonflikt*, 1986, p. 204.

¹²⁰ See UN Doc. A/38/594, 21 November 1983, Annex; UN Doc. 5/16519, 1 March 1984, para. 2. See also speech by Rauf Denktaş on the confidence-building measures proposed by the Turkish Cypriot side, reprinted in Alasya, *Kuzey Kıbrıs Türk Cumhuriyeti Tarihi*, 1987, pp. 142-148, 144.

Nine and a half years later, at the talks between the two communities at UN Headquarters in New York on 24 May 1993, UN Secretary-General Boutros-Ghali again proposed reopening the airport as a confidence-building measure, this time as part of a package with the resettlement by its former, predominantly Greek Cypriot, owners of Varosha,¹²¹ the uninhabited 'ghost district' of Famagusta which had been controlled and fenced in by the Turkish army since August 1974. Both measures were to be supervised by the United Nations.

Whilst the Varosha part of the package, the restoration of ownership, would have been particularly important for the Greek Cypriots, the main beneficiaries of the reopening of Nicosia International Airport would have been the Turkish Cypriots. In his report to the Security Council on 1 July 1993, the Secretary-General wrote: 'The opening of the airport would mean the lifting for all practical purposes of the economic obstacles that have been weighing so heavily on the [Turkish Cypriot] community, especially as regards overseas travel and trade and the development of a significant tourist industry'.¹²² An international team of experts estimated that the Turkish Cypriot gross national product would increase by 20% if the package was accepted.¹²³

For the Turkish Cypriots, however, placing Varosha under UN administration was such a major concession that turning Varosha into a special area for contacts between the two communities and joint trading establishments, even in conjunction with the reopening of Nicosia International Airport, was not sufficient compensation. They therefore initially rejected the package of confidence-building measures.¹²⁴ Shortly afterwards, Rauf Denktash suggested lifting the restrictions on sea- and airports in northern Cyprus as an appropriate *quid pro quo*. In particular the Turkish Cypriot airline should be allowed to fly direct to Western European destinations from Ercan Airport.¹²⁵ The Greek Cypriots agreed in principle with the proposals by the UN Secretary-General, provided that no provisions were added that signified direct or indirect recognition of the Turkish Republic of Northern Cyprus.¹²⁶ They rejected the supplementary Turkish Cypriot proposals, seeing them as a first step towards recognition of a separate state in the occupied area.¹²⁷ Despite numerous efforts by the

¹²¹ Varosha is sometimes also called Maras.

¹²² UN Doc. S/26026, 1 July 1993, Annex I, p. 13, para. 47. See also UN Docs. S/26050, 7 July 1993; S/26438, 14 September 1993, p. 12, and Richter, *Thetis* 1 (1004), pp. 140, 143.

¹²³ *The Cyprus Weekly* (17-23 December 1993), p. 8. For report by the international team of experts, see also S/RES/889 (1993) of 15 December 1993, para. 9, and UN Doc. S/1994/262, 4 March 1994, Annex I.

¹²⁴ In his report to the UN Security Council, he states: 'I am obliged to report that the Turkish Cypriot side has not yet shown the goodwill and cooperation to achieve an agreement on the package' (UN Doc. S/26438, 14 September 1993, p. 8). See also Security Council response: UN Doc. S/26475, 20 September 1993.

¹²⁵ See UN Secretary-General's report to the Security Council on his mission of good offices, 14 September 1993 (UN Doc. S/26438, 14 September 1993, p. 5) and letter from Rauf Denktash to the UN Secretary-General dated 25 April 1994 (UN Doc. S/1994/525, 2 May 1994, p. 4).

¹²⁶ *Ibid.*, pp. 3, 5. See also *Cyprus News* No 45 (1993), pp. 1, 3; *ibid.*, No 47 (1993), p. 3.

¹²⁷ *Cyprus News* No 45 (1993), p. 1. On 3 November 1993, the government spokesman for the Republic of Cyprus stated that the government would not discuss implementation of the confidence-building measures proposed by the UN Secretary-General 'before the Turkish side abandons every effort to include such arrangements as would imply recognition of a separate state'. In the opinion of the Government of the Republic of Cyprus, that includes opening Ercan (Tymbou) Airport and the seaports in the occupied area (*Cyprus News* No 51 (1993), p. 1).

UN Secretary-General and his special envoys, no agreement had been reached on the package of confidence-building measures by the summer of 1994.¹²⁸ After the judgment by the Court of Justice of the European Communities in the Anastasiou case on 29 August 1994 in practice significantly impeded and in some cases prevented imports of agricultural and textile products from northern Cyprus to the EU Member States,¹²⁹ the TRNC Parliament decided to call an immediate halt to the negotiations with the Greek Cypriot side under the auspices of the UN Secretary-General.¹³⁰ Further mediation attempts by the United Nations were unsuccessful. In his report to the Security Council on 19 October 1994, the Secretary-General noted that 'matters were close to an impasse both on the substance of the Cyprus problem and on the confidence-building measures'.¹³¹ Further informal talks on the confidence-building measures have so far been unproductive.

I shall discuss below the extent to which the reopening of Nicosia International Airport is precluded by international law and whether there are any legal arrangements that would enable the Northern Cyprus airports to be opened to international flights without one of the parties in the conflict being forced to alter its position on the political (and international law) status of the other side.¹³²

2. *Reopening Nicosia International Airport*

(a) Administration by the UN Secretary-General

Under the proposals by UN Secretary-General Boutros Boutros-Ghali, Nicosia International Airport would be opened for civil passenger and cargo traffic under UN administration until the Cyprus problem was resolved. A United Nations Temporary Administration (UNTA) headed by a UNTA airport administrator was to be responsible for the day-to-day administration of the airport, in cooperation with ICAO.¹³³ The possibility of the ICAO Council manning, maintaining and administering an airport in the territory of a contracting state if that state so requests is expressly provided for in Article 71 of the Chicago Convention. However a request by the 'contracting state', i.e. its government, is necessary in order for the ICAO Council to become involved. That cannot be replaced either by a request from the leaders of the two communities or by a Security Council resolution. Given that the Turkish Cypriots and Turkey do not recognise the Government of the Republic of Cyprus as the government of the whole of Cyprus, it will scarcely be possible to agree on a formal request to ICAO by that government. Since the leader of the Greek Cypriot community and the President of the Republic of Cyprus are the same person, a joint

¹²⁸ See UN Secretary-General's reports to the Security Council: UN Docs. S/26777, 22 November 1993; S/1994/262, 4 March 1994; S/1994/380, 4 April 1994; S/1994/629, 30 May 1994; S/1994/680, 7 June 1994. For details of the reasons for the breakdown of negotiations, see Richter, *Thetis* 1 (1994), pp. 141-145.

¹²⁹ *The Queen v Minister of Agriculture, Fisheries and Food ex parte S.P. Anastasiou (Pissouri) Ltd* and others, case C-432/92, ECR 1994, p. I-3087.

¹³⁰ *Archiv der Gegenwart* 64 (1994), p. 39273 A.

¹³¹ UN Doc. S/1994/1229, 29 October 1994, para. 5.

¹³² That condition appears to underlie all confidence-building measures proposed by the UN Secretary-General. Cf. Secretary-General's report to the Security Council on his mission of good offices, 14 September 1993, UN Doc. S/26438, 14 September 1993, pp. 4, 12.

¹³³ UN Doc. S/26438, 14 September 1993, p. 12.

request by both leaders could at the same time be seen as a request by the Republic of Cyprus as a contracting state. It would also be possible for the Security Council to request ICAO's assistance with the administration. According to Article VII of the Convention of 30 September 1946 between the United Nations and the International Civil Aviation Organisation,¹³⁴ in which ICAO was granted the status of a United Nations specialist agency, ICAO undertook to provide assistance to the Security Council.¹³⁵ Details of the assistance could be set out in a special agreement between the two organisations.¹³⁶

The details of UNTA administration was to be determined in an agreement on confidence-building measures to be signed by the leaders of the two communities. However, the powers and functions to be exercised by the UNTA airport administrator in that respect were not to be based on that agreement but on a resolution of the UN Security Council endorsing the agreement. According to the report to the Security Council by the Secretary-General on 4 March 1994:

'The precise manner in which the powers and functions of the Administrator are to be conferred on him or her will also need to be agreed. In this connection, it is clear that agreement would *not* be possible on the basis of delegation of powers or functions to the Administrator *by existing structures on the island*. The answer to this question may need to flow from an agreement that would be reached by the leaders of the two communities in their representative capacities and *endorsed* by the Security Council'.¹³⁷

This somewhat unorthodox arrangement was deemed necessary in that the UNTA, in administering the airport, was to exercise sovereign rights of the Republic of Cyprus. However, sovereign rights can only be transferred by the government representing the state, not by two community leaders (unless the two community leaders are considered to be the government of the whole of Cyprus, but that would undermine the sole representation claim of the Government of the Republic of Cyprus). The transfer of sovereign rights by the Government of the Republic of Cyprus, i.e. by the 'existing structures on the island', is, however, rejected by the Turkish Cypriot side, since it does not recognise the existing Government of the Republic of Cyprus, consisting solely of Greek Cypriots, as the government of the whole of Cyprus.¹³⁸ For that reason the negotiations and agreements under the UN Secretary-General's mission of good offices also take place not between the Government of the Republic of Cyprus and the Turkish Cypriot community, but between the leaders of the two

¹³⁴ 8 UNTS 324; entry into force 13 May 1947.

¹³⁵ Art. VII: 'The International Civil Aviation Organisation agrees to cooperate with the Economic and Social Council in ... rendering such assistance to the Security Council as that Council may request, including assistance in carrying out the decisions of the Security Council for the maintenance and restoration of international peace and security'.

¹³⁶ See Art. XX of the agreement.

¹³⁷ UN Doc. S/1994/262, 4 March 1994, para. 20 (my italics); See also UN Docs. S/1994/785, 1 July 1994, Annex, pp. 6, 11; S/26438, 14 September 1993, p. 12.

¹³⁸ In a letter to the UN Secretary-General on 7 June 2001, the TRNC representative in New York wrote: 'Any recognition ... of the Greek Administration as the government of the entire island would mean the colonisation of the Turkish Cypriot people' (UN Doc. A/55/987-S/2001/576, 8 June 2001, p. 3). See also UN Secretary-General's report on his mission of good offices to Cyprus: 'The Turkish Cypriot leadership ... point to the disparity between the outcomes of the referenda as evidence that the Greek Cypriot leadership does not speak for the Turkish Cypriots' (UN Doc. S/2004/437, 28 May 2004, p. 21, para. 89).

communities participating on an equal footing.¹³⁹ Contrary to the view of the UN Secretary-General, it would not therefore be sufficient in international law for the Security Council to endorse an agreement by the two community leaders on the powers of the UNTA airport administrator; if the powers were not transferred by the Government of the Republic of Cyprus, it would have to authorise their exercise. However, the effective creation of United Nations administrative powers by the Security Council in a sovereign state requires a binding resolution under Chapter VII of the UN Charter,¹⁴⁰ not least because the Government of the Republic of Cyprus could otherwise withdraw those powers from UNTA at any time. Such a resolution requires that the existence of a threat to or breach of the peace has been determined within the meaning of Article 39 of the UN Charter. In the light of most recent practice, interpreting the concept of a threat to the peace in a broad sense, that would certainly be quite possible; however, in view of the wider political and legal implications the Security Council would probably seek to avoid such a finding.

(b) Traffic rights for Turkish airlines

The original proposal by the UN Secretary-General in May 1993 stated: 'Traffic rights at the Airport would be limited to *foreign* airlines that have traffic rights in Cyprus. Such rights would be enjoyed by airlines registered in the Republic of Turkey'.¹⁴¹ The draft submitted to the two parties by the Secretary-General's Cyprus envoy on 21 March 1994 ended: 'Traffic rights at NIA [Nicosia International Airport] will be enjoyed by airlines that have traffic rights in Cyprus and by an agreed number of airlines registered in Turkey'.¹⁴² Underlying this new wording were two substantial alterations, which were rejected by the Turkish Cypriot side.¹⁴³ Firstly, the deletion of the word 'foreign' extended the group of airlines that would enjoy traffic rights for Nicosia International Airport to include Cyprus Airways, the (domestic) national airline of the Republic of Cyprus. In the original wording in May 1993, that airline would still only have been able to fly to airports in the south of Cyprus, whereas the Turkish Cypriot airline registered in Turkey, as an officially foreign airline, would have been able to use Nicosia International Airport. Secondly, the addition of the

¹³⁹ Already mentioned in S/RES/367 (1975), 12 March 1975, and A/RES/3212 (XXIX), 1 November 1974. See also report by UN Secretary-General Pérez de Cuéllar, 17 March 1991: 'My mission of good offices in Cyprus is with the two communities; the two communities participate on an equal footing in the process of defining the solution of the Cyprus problem ...' (*Turkish Review*, Vol. 5, No 23, Spring 1991, pp. 105-108 at p. 106).

¹⁴⁰ For establishment of the administrative powers of the United Nations Interim Administration Mission in Kosovo (UNMIK) under Chapter VII, see S/RES/1244 (1999), 10 June 1999, paras. 10, 11(b). UNMIK is also responsible for the administration of Priština airport and has been issuing 'Notices to airmen' (Notam) for the airport since 24 December 1999 (AFP, 10 January 2000).

¹⁴¹ See UN Secretary-General's report to the Security Council on his mission of good offices, 14 September 1993 (UN Doc. S/26438, 14 September 1993, pp. 6 and 12) (my italics). Raul Denktash accepted that proposal 'in principle' in a letter to the Secretary-General dated 28 January 1994 (UN Doc. A/48/860-S/1994/111, 2 February 1994, Enclosure II). At the beginning of March 1994, the text then read as follows: 'The package provides for *foreign* airlines that have traffic rights in Cyprus and for airlines registered in Turkey to have traffic rights at Nicosia International Airport' (UN Secretary-General's report to the Security Council on his mission of good offices, 4 March 1994 (UN Doc. S/1994/262/ 4 March 1994, para. 29).

¹⁴² See UN Secretary-General's letter to the President of the Security Council on 28 June 1994, UN Doc. S/1994/785, 1 July 1994, Annex, p. 12, and UN Secretary-General's report to the Security Council on his mission of good offices, 4 April 1994 (UN Doc. S/1994/380, 4 April 1994, para. 3)

¹⁴³ See UN Docs. S/1994/380, 4 April 1994, para. 4; S/1994/525, 2 May 1994, pp. 9-10.

words 'an agreed number' restricted the group of Turkish airlines that would enjoy traffic rights at the airport.¹⁴⁴

Both proposals make a distinction between 'airlines enjoying traffic rights in Cyprus' and 'airlines registered in Turkey'. That was necessary in that there is no aviation agreement between the Republic of Cyprus and Turkey in which the two states grant each other traffic rights in their territory.¹⁴⁵ Since opening the airports in northern Cyprus (on Turkish Cypriot conditions) did not appear to be legally possible without state recognition of the TRNC,¹⁴⁶ the reopening of Nicosia International Airport was to bring the Turkish Cypriots the same benefits as the opening of Ercan Airport,¹⁴⁷ but that would mean that the Turkish Cypriot airline would have to be granted full traffic rights at Nicosia International Airport. Since it was registered in Turkey, Turkish airlines would also have to be granted traffic rights at the airport.¹⁴⁸ It is not clear how the Turkish airlines were to acquire these traffic rights and in particular the economically important right for both scheduled and non-scheduled international flights to land at Nicosia International Airport for traffic purposes.¹⁴⁹ As explained above, all landings by foreign aircraft require the permission of the state in which they wish to land.¹⁵⁰ In practice, landing permission for traffic purposes is granted in bilateral air transport agreements signed by the governments of the contracting parties as their representatives under international law.¹⁵¹ However, the signature of an aviation agreement between Turkey and the Republic of Cyprus – and any other way of granting permission – have been impossible, since Turkey does not recognise the Government of the Republic of Cyprus as the government of the whole of Cyprus. The two community leaders cannot grant permission because they are not authorised to represent the Republic of Cyprus.¹⁵² Accordingly, any agreement between the two community leaders on confidence-building measures cannot be seen as a unilateral granting of permission binding upon the Republic of Cyprus. Hence the Government of the Republic of Cyprus can only be considered to have given tacit permission. The Secretary-General's proposal that the UNTA airport administrator should have the authority to undertake measures as may be necessary to *implement* traffic rights at the airport¹⁵³ but not the right to *establish* such rights also seems to be based on that

¹⁴⁴ The explanation the UN Secretary-General gave for the amendments was that the failure to include Cyprus Airways in the first draft had been an editorial mistake and that the restriction of the number of Turkish airlines was consistent with international aviation rules (*Cyprus News* No 57 (1994), p. 3).

¹⁴⁵ Cf. Aeronautical Agreements and Arrangements registered with the Organisation 1 January 1946-31 December 1990; ICAO Doc. 9460 LGB/382, pp. 55-56 and Supplement. Such an agreement was, however, signed between the TRNC and Turkey on 19 September 2002. If the Annan plan had been accepted, this would have been binding upon the United Republic of Cyprus. See entry no 1002 in Annex V to the Foundation Agreement, with list of international treaties binding on Cyprus:

<http://www.cyprus-un-plan.org/>.

¹⁴⁶ See Section VI.3 below.

¹⁴⁷ See UN Secretary-General's report to the Security Council on his mission of good offices, 14 September 1993 (UN Doc. S/26438, 14 September 1993, p. 7).

¹⁴⁸ In anticipation of the reopening of Nicosia International Airport, the TRNC had a second airline registered in Turkey with Mediterranean Airlines (*GRI* No 224 (30 April 1994), p. 6).

¹⁴⁹ Turkish civil aircraft already have the right to land at Nicosia International Airport for non-traffic purposes under Art. 5 of the Chicago Convention and Art. I Section I No 2 of the Transit Agreement, both of which apply to Turkey and Cyprus.

¹⁵⁰ See Section III.1.

¹⁵¹ Also Dodd, *The Cyprus Issue*, 1994, p. 12.

¹⁵² See Section VI.2(a).

¹⁵³ See letter dated 28 June 1994 from the UN Secretary-General to the President of the Security Council: UN Doc. S/1994/785, 1 July 1994, Annex, p. 12 (my italics).

premise. However, an arrangement whereby permission is granted tacitly and unilaterally holds the risk for the Turkish Cypriot side that it could be withdrawn at any time, a fact that the Secretary-General also seems to have realised. Therefore his proposal for the agreement of confidence-building measures expressly includes a prohibition on any action by *the authorities* of both sides that would in any way impede or prevent implementation of the agreements contained in the package.¹⁵⁴ Since the leader of the Greek Cypriot community is also President of the Republic of Cyprus, the revocation of landing permission without justification might possibly be considered an abuse of legal right.¹⁵⁵

A further problem arose with traffic rights for the Turkish Cypriot airline. States normally only allow foreign aircraft to put down passengers, cargo and mail from their home state (the 'third freedom'), or to take them on for destinations in their home state (the 'fourth freedom'). Only in exceptional cases, and only when all the states concerned have given permission, can an aircraft exercise the 'fifth freedom' of air transport and carry passengers, cargo and mail between states other than their home states. Without the 'fifth freedom' right, the Turkish Cypriot airline registered in Turkey could only operate international flights between Nicosia International Airport and airports in Turkey, even with tacit permission from the Republic of Cyprus. Hence even the reopening of the airport would not have allowed the Turkish Cypriots the direct flight connections that they wanted with the countries of Western Europe. They would still have been excluded from the lucrative European tourist traffic. For that reason, the proposal by the UN Secretary-General provided that the UNTA Airport Administrator should have the power to *negotiate* traffic rights for *one* Turkish Cypriot airline between Nicosia International Airport and destinations in Europe.¹⁵⁶ Here again, however, the question arises how the Turkish Cypriot airline was to be granted such traffic rights. The fact that the power of the UNTA Airport Administrator was expressly restricted to the mere *negotiation* of traffic rights shows that the Airport Administrator was not to be allowed to *conclude* air transport agreements on behalf of the Republic of Cyprus. Hence European states could only have granted the 'fifth freedom' to a Turkish Cypriot airline unilaterally as a contribution to the Cyprus peace process.¹⁵⁷ However, it is not sufficient for third countries to grant the 'fifth freedom'. Since all the states concerned have to give their permission for the right to be exercised, here again permission (at least tacit) from the Republic of Cyprus would have been necessary.

This enjoyment of traffic rights at Nicosia International Airport for the third to fifth freedoms by an airline registered in Turkey still required that the rights be at least

¹⁵⁴ UN Doc. S/26026, 1 July 1993, p. 7, para. 26 (my italics).

¹⁵⁵ The question of whether the prohibition on abuse of rights is *de lege lata* part of international law is disputed: see Kiss, *Encyclopedia of Public International Law*, Vol 1, 1992, pp. 4-8; Schüle, *Wörterbuch des Völkerrechts*, Vol. 3, 1962, pp. 69-71. If a prohibition on the abuse of legal right is recognised, revocation of permission to land could give rise to compensation claims.

¹⁵⁶ UN Doc. S/1994/785, 1 July 1994, Annex, p. 43 (my italics). Having already had another airline registered with Mediterranean airlines in Turkey in anticipation of the reopening of the airport, the Turkish Cypriots rejected the restriction to *one* airline as discriminatory.

¹⁵⁷ The UN Secretary-General reported to the Security Council on 30 May 1994: '... countries that were important destinations for Turkish Cypriots and points of origin of tourists to Cyprus, [are] prepared to enter into negotiations with the UN administrator of NIA with a view of *granting* a Turkish Cypriot airline, registered in Turkey, air traffic rights to operate direct between them and NIA' (UN Doc. S/1994/629, 30 May 1994, p. 11 (my italics)).

tacitly granted by the Republic of Cyprus. Since traffic rights could only be granted by or with the agreement of the national government, it would not be possible for the Turkish Cypriot side to exercise the rights without thereby recognising the Government of the Republic of Cyprus, at least implicitly, as the government of the whole of Cyprus. On 30 September 1996, the then Attorney General of the TRNC and adviser to Rauf Denktash wrote:

'... the ICAO itself could not find a solution to the matter of traffic rights at NIA, as this would depend on the authorities of the recognised government to grant such rights. The stumbling block to solution of these issues was the recognition of the Greek Cypriot Government as the "Government of Cyprus"'.¹⁵⁸

Although the reopening of Nicosia International Airport would have brought the Turkish Cypriots numerous economic and other benefits,¹⁵⁹ they were not prepared to agree to an arrangement whereby they would have recognised the Government of the Republic of Cyprus, even if only implicitly, as the government of the whole of Cyprus.

(c) Customs clearance by the Turkish Cypriot authorities

A further impediment to the reopening of Nicosia International Airport was customs clearance at the airport by the Turkish Cypriot authorities. The Government of the Republic of Cyprus refused to allow the Turkish Cypriot customs authorities to collect import duties, since that would 'imply recognition'.¹⁶⁰ Instead it suggested that customs clearance and entry formalities¹⁶¹ should be undertaken by the UNTA. It is debatable whether the collection of import duties can imply recognition of the TRNC as a state. The Greek Cypriot side is very vague on that point and only talks generally about implied recognition. State practice shows that non-recognition as a state is not an obstacle to private trade relations.¹⁶² However, cross-border private trade is always linked to the collection of import duties and customs clearance by the authorities of the state not to be recognised. Accordingly, customs clearance at most implies that the clearing authorities exercise *de facto* control over the area into which the goods are to be imported. However, the community of states does not dispute that the TRNC is a local *de facto* government. The objection therefore seems to be aimed at excluding the TRNC from a lucrative source of revenue, rather than preventing it being recognised as a state in international law.

¹⁵⁸ Letter to the author from Mr Z.M. Necatigil, 30 September 1996, pp. 2-3. See also Dodd, *The Cyprus Issue*, 1994, p. 12, expressing the view that the question of recognition was the key issue in the reopening of Nicosia International Airport.

¹⁵⁹ Cf. UN Doc. S/26438, 14 September 1993, p. 12.

¹⁶⁰ See letter to the UN Secretary-General from the Greek Cypriot side, 21 June 1994; *Cyprus News* No 58 (1994), pp. 1, 3.

¹⁶¹ Foreign visitors arriving at the airport were to be able to travel between the north and the south of Cyprus without restriction during their stay on the island. To avoid the indirect recognition of the TRNC that the Greek Cypriots feared, travel documents were to be stamped 'NIA [Nicosia International Airport]' by the UNTA and not by the authorities of both sides (UN Doc. S/1994/785, 1 July 1994, Annex, p. 13).

¹⁶² See, for example, Hackworth, *Digest of International Law*, Vol. 1, 1940, p. 300. For Dutch Government statements that the non-recognition of the Republic of China (Taiwan) was not an impediment to private trade relations, see *Netherlands Yearbook of International Law* 15 (1984), p. 273; *ibid.*, 16 (1985), pp. 336-337.

3. *The opening of airports in northern Cyprus*

The Turkish Cypriot hope that airports in northern Cyprus would be opened for scheduled international flights came to nothing because the TRNC was not recognised. The Secretary-General's report to the Security Council on 15 September 1993 contained the following passage:

'In this connection, I and my colleagues conferred at length with the President of the Council of the ICAO and his Legal Counsel. It emerged that since international flights take place in the framework of air service agreements that are concluded exclusively between States, it did not seem possible, without recognising a Turkish Cypriot State, to envisage the kind of arrangements related to Ercan (Tymbou) airport and the Turkish Cypriot airline that had been requested by the Turkish Cypriot side'.¹⁶³

One can agree only with the final conclusion.¹⁶⁴ As explained above, scheduled international air services are not operated only under bilateral air transport agreements.¹⁶⁵ According to Article 6 of the Chicago Convention they always require special permission or other authorization from the *state* concerned. Any operation of scheduled international flights based on permission to another state from the TRNC alone would have meant its being recognised by that state. That could only have been avoided if the Government of the Republic of Cyprus had also granted the other State, at least tacitly, special permission or other authorisation for scheduled air traffic with Ercan airport.¹⁶⁶ However, such an arrangement was unacceptable for the Turkish Cypriots, since they contest the authority of the Government of the Republic of Cyprus to grant such permission.

Implicit permission granted by the Government of the Republic of Cyprus raises interesting questions of state responsibility. It has to be considered whether, in that case, the Republic of Cyprus would be responsible for security at Ercan Airport. The British Parliament's Foreign Affairs Committee seems to assume that responsibility would lie with the Republic of Cyprus. The recommendations in its Cyprus report of 7 May 1987 included the following:

'The Greek Cypriot Government ... should permit commercial air services into the north of Cyprus (*subject to Turkish Cypriot willingness to allow Greek Cypriot and international inspectors to validate one or more airstrips in the north for international use*).¹⁶⁷

However the fact that, irrespective of the question of recognition, a local *de facto* government can be held responsible for wrongful acts is an argument against the

¹⁶³ UN Doc. S/26438, 14 September 1993, pp. 6-7. See also *Cyprus News* No 45 (1993), p. 3; *ibid.*, No 47 (1993), p. 3.

¹⁶⁴ The Director of ICAO's Legal Bureau made the following comment on the statement by the Secretary-General: 'it would appear that the statement by the UN Secretary-General was made in light of the extreme political sensitivities associated with any action which could be interpreted by either side as in any way implying recognition of Northern Cyprus' (letter to the author from Dr Ludwig Weber, 31 August 1998).

¹⁶⁵ That is, however, a commonly held view. Back in 1937, a plan to operate an air route between Germany and Japan via Manchukuo failed. It was assumed that the necessary agreement could not be signed because Manchukuo was not recognised (*Akten zur Deutschen Auswärtigen Politik*, Series C, VI/2, Nos 409, 434).

¹⁶⁶ See proposal by Lord Willis, Vice-Chairman of Friends of Turkish Cyprus, 9 February 1987: House of Commons Foreign Affairs Committee, Third Report, 1987, p. 49.

¹⁶⁷ House of Commons Foreign Affairs Committee, Third Report, 1987, xxxiv (my italics).

Republic of Cyprus being responsible.¹⁶⁸ Injured States have regularly addressed their claims for compensation to the local *de facto* government, not to the *de jure* government of the mother state. There are no known cases of a mother state acknowledging liability for compensation for wrongful acts by a local *de facto* government.¹⁶⁹ Furthermore, in most cases it would probably be impossible to establish the responsibility of the mother state under international law because of the difficulty of attributing actions carried out beyond its supervision and control.¹⁷⁰

VII. Scheduled air services without recognition: the case of Taiwan

In the negotiations on the opening of the northern Cyprus airports, the Turkish Cypriot side initially drew attention to the existence of direct flights between the Republic of China (Taiwan) and states that did not recognise that country as a state. However, when the details of those direct flights were examined, it became clear that the Turkish Cypriot side was not prepared to transpose that model to Cyprus *mutatis mutandis*.¹⁷¹ The reasons for that will be discussed below.

1. *Flights between the Federal Republic of Germany and Taiwan*

When the Government of the People's Republic of China was recognised as the government of China on 11 October 1972 (and at the same time that recognition was withdrawn from the nationalist government),¹⁷² the German airline Lufthansa stopped flights to Taipei Airport. For a long time the non-recognition of the government in Taiwan appeared to be an impediment to resumption of the Taipei services. In answer to the written question as to the reason for the Federal Government's restrictions on the extension of the international air route network of the nationalist Chinese airline China Airlines (CAL), Irmgard Adam-Schwaetzer, Minister of State in the Ministry of Foreign Affairs, stated: 'The authorisation of flights requires sovereign acts between the States concerned. Such acts are not possible between the Federal Republic of Germany and Taiwan'.¹⁷³ The main reason that there were no flights between the Federal Republic of Germany and Taiwan, however, was not non-recognition. As the answers to several parliamentary questions show, 'overriding foreign policy considerations and the protection of extensive German transport and

¹⁶⁸ Cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Rep. 1971, pp. 16, 54, para. 118.

¹⁶⁹ See Frowein, *Das de facto-Regime im Völkerrecht*, 1968, pp. 71-86; same author, *Encyclopedia of Public International Law*, Vol. 1, 1992, pp. 966-967.

¹⁷⁰ Cf. Art. 8 of *ILC Articles on Responsibility of States for Internationally Wrongful Acts*, 2001: A/RES/56/83, 12 December 2001, Annex. Responsibility according to Art. 7 cannot be assumed in this case, since the Turkish Cypriot authorities are neither organs of the Republic of Cyprus nor persons or entities empowered by it.

¹⁷¹ UN Doc. S/26438, 14 September 1993, p. 7: 'Mr Denktash put forward ... an agreement that had been made earlier in 1993 concerning flights to and from Taiwan by a British registered airline. However, when the details of this arrangement were examined it became evident that the Turkish Cypriots would be unwilling to accept such an agreement *mutatis mutandis* in the case of Cyprus'.

¹⁷² Lin, *Der völkerrechtliche Status der Republik China (Taiwan)*, 1986, pp. 121-128.

¹⁷³ BT-Drs. [*German Parliament circular*] 11/6184, 2 January 1990, p. 2.

economic interests in the People's Republic of China' were an obstacle to the establishment of flight connections.¹⁷⁴

When it seemed possible to resume flight connections with Taiwan without endangering German interests in the People's Republic of China, an aircraft belonging to the Condor air service, a subsidiary of Lufthansa, flew direct from Frankfurt to Taipei on 4 July 1993, 21 years after flights had been stopped.¹⁷⁵ On 1 August 1993 an aircraft of Mandarin Airlines, a subsidiary of the state airline China Airlines (CAL), flew in the opposite direction, from Taipei to Frankfurt. Since then scheduled flights have been operating between Germany and Taiwan again, even though the Republic of China (Taiwan) is not officially recognised. It is true that initially the flights were operated by the subsidiaries of the state airlines, but the state airlines advertised the services under their own name.¹⁷⁶ For some years now, the Taiwan airline China Airlines has been operating the flights itself.¹⁷⁷ The Federal Republic of Germany is not alone in this practice. At the moment over 20 States have direct flight connections with Taipei, despite the fact that it is not recognised.¹⁷⁸

2. Framework conditions of international air traffic with Taiwan

The Chicago Convention contracting parties recognise that each State has full and exclusive sovereignty over the airspace above its territory and that scheduled international flights may only be operated in the territory of a contracting state with special permission from the government of that state.¹⁷⁹ If it is assumed that Taiwan is not a sovereign state but part of the state of China,¹⁸⁰ scheduled international air traffic with Taiwan requires at least tacit permission from the Chinese Government. For most states, including Germany, that is the Government of the People's Republic of China in Beijing. That means that air traffic with Taiwan is dependent on

¹⁷⁴ BT-PIPr. 11/196, 14 February 1990, p. 15095; BT-Drs. 11/8546, 19 December 1990, p. 39; BT-PIPr. 12/50, 17 October 1991, p. 4206. For flight connections to Taiwan, see also BT-Drs. 11/5824 of 24 November 1989, pp. 20-21.

¹⁷⁵ IHT, 5 July 1993, p. 2; BBC, *Summary of World Broadcasts*, FE/WO291/A, 21 July 1993.

¹⁷⁶ For instance, the following advertisement appeared in the *Frankfurter Allgemeine Zeitung* magazine on 4 October 1996: 'The best route between Germany and the Far East – China Airlines, Taiwan's leading airline ... you can fly straight from Frankfurt ... to Taipei and on to Hong Kong seven days a week. China Airlines, Taipei, Taiwan, ROC'. In small print underneath: 'Mandarin Airlines is a subsidiary of China Airlines. Weekly flights from Europe are operated under contract with Mandarin Airlines' (*Frankfurter Allgemeine Zeitung* magazine, week 40, no 866, 4 October 1996, p. 45). Similar advertisements appeared on page 4 of the *Frankfurter Allgemeine Zeitung* on 25 June 1997 and on page 18 of *Die Zeit* on 4 July 1997.

¹⁷⁷ Cf. advertisements in the *Frankfurter Allgemeine Zeitung*, 11 March 2000, p. 59: 'Take off with China Airlines'.

¹⁷⁸ Including Australia, Austria, Canada, France, Indonesia, Italy, Japan, Luxembourg (air cargo only), Malaysia, Netherlands, New Zealand, Philippines, Russia, Singapore, Switzerland, Thailand, Turkey, United Kingdom, USA and Vietnam. On flight connections with Taiwan, see Shen, *Struktur, Gestaltung und Funktion der offiziellen und inoffiziellen Beziehungen der Europäischen Gemeinschaft (EG) zu den Staaten ausserhalb der Gemeinschaft*, 1992, p. 358; Mengin, in: *The Republic of China on Taiwan in International Politics*, 1998, p. 33; Chen, *Ann. Air & Sp. L.22* (1997), p. 78.

¹⁷⁹ Arts. 1, 6 Chicago Convention.

¹⁸⁰ For state practice, see Crawford, *The Creation of States in International Law*, 1979, pp. 146-151. In a letter to the author on 31 August 1998, the Director of ICAO's Legal Bureau, Dr Ludwig Weber, wrote: 'As the UN, ICAO does not recognise Taiwan as a sovereign State, and is also cautious in refraining from any act, or from being associated with any act, which could be implied as such recognition. The fact that a number of airlines operate direct flights into Taiwan does not mean or imply that ICAO recognises this territory as a State'.

permission from that government. In its White Paper of August 1993 on the Taiwan Question and Reunification of China, the Beijing Government explained:

'Airspace is an inalienable part of the country's territory. The 1919 Paris Aviation Convention and the 1944 Convention affirm the principle of complete and exclusive sovereignty of each country over its airspace. Therefore, the opening of aviation services with Taiwan by any airlines, including privately-owned ones, of countries having diplomatic relations with China is a political issue affecting China's sovereignty and cannot be regarded as a non-political transaction. State-run airlines of countries having diplomatic relations with China certainly must not operate air services to Taiwan. Privately-owned airlines must seek China's consent through consultations between their government and the Chinese Government before they can start reciprocal air services with privately-owned airlines of Taiwan. As a matter of fact, according to the afore-said principle the Chinese Government has consented to such services between privately operated airlines of Britain, Germany, Canada, etc. and their counterparts in Taiwan'.¹⁸¹

Although the position of states is not uniform and is often very difficult to determine,¹⁸² it appears that most states, including Germany, France and the United Kingdom,¹⁸³ have started flights to Taiwan only after consultation with Beijing. When resuming flights between London and Taipei, the British Government expressly stated that Taiwan was a province of the People's Republic of China and that the latter, as the only legal government of China, had full rights over any proposed air services.¹⁸⁴ The Australian Government also stated that it was keeping the Chinese Government informed of the negotiations to resume flights to Taiwan.¹⁸⁵

In so far as the Government of the People's Republic of China bases its claim to control over flights to Taiwan on air sovereignty, it is less convincing. As indicated above,¹⁸⁶ the exercise of rights based on air sovereignty requires that the government wishing to exercise such rights must control the territory or the airspace above. However, the Government of the People's Republic of China does not effectively control Taiwan; it is controlled by the Republic of China, which, like the TRNC, is regarded as a local *de facto* government.¹⁸⁷ Thus the Government of the People's Republic of China could not prevent flights to Taiwan by refusing overflying and landing permission.

¹⁸¹ People's Republic of China, Taiwan Affairs Office and the Information Office of the State Council, *The Taiwan Question and Reunification of China*, August 1993, reprinted in Henckaerts (ed.), *The International Status of Taiwan in the New World Order*, 1996, pp. 267-278 at pp. 276-277. That position was confirmed on page 10 of the White Paper on the One-China Principle and the Taiwan Issue, published in February 2000.

¹⁸² In view of the political sensitivity of relations with the People's Republic of China, most States have a fairly restrictive policy on information.

¹⁸³ The three states started direct flights to Taiwan in March, July and November 1993 in a concerted operation.

¹⁸⁴ See statement by the British Minister for Aviation and Shipping on page 16 of *The Times*, 16 April 1993: 'Compromise deal allows British Airways direct access to Taiwan'.

¹⁸⁵ 'The Australian foreign minister said that his government had kept the Chinese Government closely informed on the negotiations and affirmed that in line with Australia's policy of recognition of the PRC, neither Qantas nor Taiwan's flag carrier China Airlines would operate the route' (*Asian Yearbook of International Law* 1 (1991), pp. 267-268). However, see, by contrast, *CWILJ* 25 (1995), p. 382; 'Both Australia and New Zealand reestablished direct flights without seeking approval from the PRC. Russia and Vietnam did the same in 1993'. On flights between Taiwan and Australia, see *Australian Yearbook of International Law* 13 (1992), pp. 235-236.

¹⁸⁶ See section III.2 above.

¹⁸⁷ Crawford, *The Creation of States in International Law*, 1979, p. 151.

However, the Government of the People's Republic of China could declare to the other Chicago Convention contracting parties,¹⁸⁸ with binding effect, that Taipei International Airport was not a customs airport within the meaning of Art. 10 of the Convention. It has not so far done so. In contrast to the Northern Cyprus airports, ICAO shows Taipei Airport as 'Taibei City/Taibei Intl AP, *China*'¹⁸⁹ in the location indicators. The reason for that is that until 1974 the contracting party, China, was represented in ICAO by the Government of the Republic of China,¹⁹⁰ which designated the airport a customs airport in the 1950s.

Not only do scheduled international flights to Taiwan require at least tacit permission from Beijing, they also have to be authorised by the government in Taipei, since the latter has *de facto* control over the airspace and airports. States that obtain landing or overflying authority from a local *de facto* government for their airlines must avoid any indications that they recognise the country as an independent state. Consequently, flights to Taiwan generally have the following characteristics in common:

(1) The legal basis for the flights is not an international law aviation agreement with the Government of the Republic of China (Taiwan), but a commercial non-governmental agreement¹⁹¹ between the airlines concerned, the airports or private commercial and economic associations.¹⁹²

(2) As a rule the states make a declaration that no official government contacts have been made with the Taiwan authorities when signing the agreement,¹⁹³ that they do not recognise those authorities and that they are adhering to the 'One-China principle' that Taiwan is part of the state of China.

(3) The aircraft used do not carry any national flags, sovereign emblems or other emblems with official significance.¹⁹⁴ Flights to Taiwan are operated not by state or state-owned airlines,¹⁹⁵ but by (sometimes specially created) subsidiaries.¹⁹⁶ In recent

¹⁸⁸ The German Government lists both 'China' and 'China (Taiwan)' as Chicago Convention contracting parties; see *Fundstellennachweis B*, 2004, p. 289.

¹⁸⁹ ICAO Doc. 7910, 89th edition, 1 July 1998.

¹⁹⁰ The Government of the Republic of China signed the Chicago Convention on 9 December 1944 and lodged the ratification document on 20 February 1946. The Convention entered into force for China on 4 April 1947. The Government of the Republic of China stated in a letter on 15 February 1974 that it considered itself bound by that instrument. See <http://www.icao.int/>.

¹⁹¹ *Beijing Rundschau*, 19 April 1993, p. 8.

¹⁹² See 'List of Bilateral Trade Agreements': *Chinese Yearbook of International Law and Affairs 10* (1990-91), pp. 241-251.

¹⁹³ However, the agreements were approved (at least implicitly) by the national aviation authorities of the parties.

¹⁹⁴ *South China Morning Post*, 30 January 1993; Central News Agency (Taipei), 30 March 1993; *The Times*, 16 April 1993; *The Reuters Library Report*, 26 April 1993.

¹⁹⁵ See, for example, Art. 1(4) of the agreement of 28 July 1993 on mutual cooperation in aviation between the Taipei-Moscow Economic and Cultural Coordination Commission and the Moscow-Taipei Economic and Cultural Coordination Commission: *Chinese Yearbook of International Law and Affairs 10* (1992-94), pp. 463-466

¹⁹⁶ Central News Agency (Taipei), 25 May 1993: 'According to diplomatic sources Great Britain, France, Germany and Russia ... have all received messages of concern from mainland Chinese authorities. These objections led to an arrangement where Britain and German would set up subsidiaries under their flag-carrier airlines before flying the Taiwan route'.

years, however, that requirement has been increasingly watered down¹⁹⁷ or has lost its significance in view of the privatisation of most state airlines.

In that light, it was to be expected that the states would attach official declarations to the agreements between their airlines and the Turkish Cypriot airline that they still recognise the Government of the Republic of Cyprus as the *de jure* government of the whole of Cyprus. Such official confirmation of the legal position of the Greek Cypriot side made the 'Taiwan model' unacceptable to the Turkish Cypriots.¹⁹⁸

VIII. Conclusion

Whilst the TRNC is not recognised as an independent State and the Government of the Republic of Cyprus continues to be regarded as the government of the whole of Cyprus, direct flights to northern Cyprus are only possible with the consent of the Greek Cypriot side. The Government of the Republic of Cyprus would first have to designate Ercan and Geçitkale Airports customs airports in accordance with Article 10 of the Chicago Convention and inform the International Civil Aviation Organisation so that other contracting states could be notified. In order for scheduled international commercial flights to be operated to northern Cyprus, it would, in addition, have to grant, at least tacitly, its permission or other authorisation in accordance with Article 6 of the Chicago Convention. States that secure landing rights for their aircraft in northern Cyprus must avoid any action that might imply recognition of the TRNC as a state. For the past 30 years the introduction of direct flights under those conditions has been unacceptable to the Turkish Cypriots and, in view of the recent statements by the Turkish Cypriot leadership, it seems unlikely that for the sake of securing direct flights it will now be prepared to recognise that the Government of the Republic of Cyprus has sole right of representation.¹⁹⁹ Not only do states that start direct flights to northern Cyprus against the expressed wish of the Government of the Republic of Cyprus breach their obligations under the Chicago Convention, they deny the Government of the Republic of Cyprus recognition as the government of the whole of Cyprus and thereby, at least indirectly, recognise TRNC as an independent state.

So can the isolation of the Turkish Cypriots not be ended without abandoning the international law *status quo* on Cyprus? One may think of a Security Council resolution under Chapter VII of the UN Charter, in which the UN calls upon states, in accordance with Resolution 541 (1983), to continue not to recognise any Cypriot state other than the Republic of Cyprus, but at the same time allows them to start flights to northern Cyprus even without the approval of the Government of the Republic of Cyprus. The breach of the rights of the Government of the Republic of Cyprus arising

¹⁹⁷ For instance, one of the destinations China Airlines (CAL), owned by the Republic of China, now flies to is Frankfurt.

¹⁹⁸ Letter to the author from Mr Z.M. Necatigil, former Attorney General of the TRNC, 30 September 1996, pp. 2-3.

¹⁹⁹ On 29 April 2004, the TRNC Prime Minister, Mehmet Ali Talat stated: 'The Greek Cypriots can have no claim on governing us ... The requirement of a Greek Cypriot approval at every stage is unacceptable for us ... The Greek Cypriots have no right to speak on our behalf after the referendum ...' (Agence France-Presse, 29 April 2004: <http://web.lexis-nexis.com/executive/>). See also statement by Turkish Foreign Minister Gül on 24 April 2004: 'The Greek Cypriots can no longer claim to represent the whole island' (Associated Press: *ibid.*).

from the Chicago Convention that that implies would be overcome by the binding Security Council decision in accordance with Article 103 of the UN Charter. The introduction of scheduled commercial air traffic with northern Cyprus would in principle be compatible with non-recognition of the TRNC, as long as, when the states obtain landing and overflying rights from the Turkish Cypriot local *de facto* government, they avoid any action that might imply recognition of the TRNC as an independent state. Only intergovernmental aviation agreements are excluded. All other aspects of the 'Taiwan model', on the other hand, are based more on political than on international law considerations.