

# EU Membership of an internally divided State – the Case of Cyprus

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## I. Introduction

Today, the Republic of Cyprus can look back on 18 years of association with the then European Communities and seven years of full EU membership. However, contrary to the high expectations at the time of accession in 2004, seven years later the country is still divided, UN Peace Keeping Forces are still deployed to ensure peace and security and the northern part of the island is still economically isolated from the rest of the EU's internal market. As a matter of fact, the northern part of the island has become sort of a second class EU Member State, whose nationals are at least factually EU citizens, but where the application of EU law is still being suspended territorially.

After 82 years of colonial rule, the Republic of Cyprus gained independence from Britain in 1960. In the course of its emancipation, three international treaties were concluded between the newly founded Republic of Cyprus and the Guarantor States Greece, Turkey and the United Kingdom. These treaties – namely the Treaty of Guarantee,<sup>1</sup> the Treaty of Alliance<sup>2</sup> and the Treaty of Establishment<sup>3</sup> – as well as the 1960 Constitution of the Republic formed the legal basis of independent Cyprus. To ensure appropriate participation of the Greek and the Turkish Cypriot community, the Constitution was based on the idea of shared powers and is said to be a “finely drawn compromise, a fascinating account of sincere though unrealistic legalism or how not to bring an anxious colony into statehood”.<sup>4</sup>

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<sup>1</sup> Treaty of Alliance concluded between Cyprus, Greece and Turkey, 16.8.1960, 397 UNTS 5712.

<sup>2</sup> Treaty of Guarantee concluded between Cyprus, Greece, Turkey and the United Kingdom of Great Britain and Northern Ireland, 16.8.1960, 382 UNTS 5475.

<sup>3</sup> Treaty concerning the Establishment of the Republic of Cyprus concluded between Cyprus, Greece, Turkey and the United Kingdom of Great Britain and Northern Ireland, 16.8.1960, 382 UNTS 5476.

<sup>4</sup> *Adams*, The First Republic of Cyprus: A Review of an Unworkable Constitution, in 19/3 The Western Political Quarterly (1966) 475 (475).

Due to subsequent internal conflicts between the two communities, culminating in 1974, the island was split into the southern – the government controlled part of the internationally recognised Republic of Cyprus – and the northern part – the Turkish Republic of Northern Cyprus – which has solely been recognised by the Republic of Turkey. The efforts to find a solution to the conflict under the auspices of the United Nations resulted in the adoption of the Annan Plan, which failed due to a negative referendum in the Greek Cypriot community in April 2004. However, seven days after the referendum Cyprus acceded the European Union on 1.5.2004. Notwithstanding the criticism from the Turkish community's side regarding the accession negotiations conducted by the Greek Cypriot government of the Republic on behalf of the whole island, there were great expectations from the international as well as the Greek Cypriot's side that the accession would have a positive impact on a foreseeable settlement of the conflict.

## II. The Constitution of 1960 and the Outbreak of Intercommunal Violence

Proclaimed on 16.8.1960, the comprehensive Constitution of the Republic of Cyprus<sup>5</sup> provides for a bi-communal regime with the general idea of shared powers between the Turkish and the Greek Cypriot community.<sup>6</sup> This idea pervades the whole Constitution and is particularly evident with regard to the representation of the two communities within the institutions of the Republic.

The first Part of the Constitution covers general clarifications such as the definition of Greek community and Turkish community. The former comprises all citizens who are of Greek origin, whose mother tongue is Greek, who share the Greek cultural traditions or who are members of the Greek-Orthodox Church. Citizens of the Republic of Cyprus, who are of Turkish origin, whose mother tongue is Turkish, who share the Turkish cultural traditions or who are Muslims, belong to the Turkish community.<sup>7</sup>

The Republic of Cyprus is based on a presidential regime, and – according to the idea of shared powers – “the President is Greek and the Vice-President is Turk”, whereas the two Presidents are elected by the Greek and the Turkish community respectively.<sup>8</sup> The mutual substitution in case of a temporary

<sup>5</sup> Stating that “the long and complicated constitution contributes directly to the political confusion now prevailing on the island”, *Adams* supra note 4, 475; cf. also Opinion of *Prof. Mendelson Q. C.*, The Application of “The Republic of Cyprus” to join the European Union of 6.6.1997, issued as a document of the UN General Assembly and of the Security Council under reference A/51/951 and S/1997/585 on 25.7.1997, para 96.

<sup>6</sup> For a detailed analysis of the Cyprus Constitution see *Adams* supra note 4.

<sup>7</sup> Art. 2 para 1 and Art. 2 para 2 Cyprus Constitution.

<sup>8</sup> Art. 1 Cyprus Constitution; for the duties of the two Presidents cf. Art. 37 f. Cyprus

absence of the President or the Vice-President is implicitly prohibited<sup>9</sup> – it is rather the Greek President and the Turkish Vice-President of the House of Representatives who are deputising or replacing the respective President in such cases.<sup>10</sup> The House of Representatives, which is vested with the legislative power of the Republic, consists of fifty members, of which 70 % are elected by the Greek and 30 % by the Turkish Cypriot community.<sup>11</sup>

The Council of Ministers, consisting of seven Greek and Turkish Ministers respectively, is exercising the executive power of the Republic. The 14 Ministers are designated by either the Greek President or the Turkish Vice President, whereas the latter also have the competence to dismiss the Ministers belonging to their respective community.<sup>12</sup>

In the field of foreign affairs, Art. 50 para 1 of the Constitution confers the right of final vetoes to both Presidents on any law or decision of the House of Representatives or any part thereof.<sup>13</sup> This right must be exercised within 15 days of the transmission of any law or decision.<sup>14</sup> As far as decisions of the Council of Ministers relating to foreign affairs are concerned, the right of veto must be exercised within four days only.<sup>15</sup>

Art. 181 of the Constitution awards the Treaty of Guarantee and the Treaty of Alliance with constitutional force. According to Art. 182 Cyprus Constitution the respective Articles that have been incorporated from the Zurich Agreement (1959)<sup>16</sup> and that are dealing with the basic structure of the Republic are qualified as Basic Articles of the Constitution. The latter “cannot, in any way, be amended, whether by way of variation, addition or repeal”.<sup>17</sup> Most of the other provisions contained in the Constitution are amendable or can be subject to repeal by a majority vote comprising at least two-thirds of all representatives belonging to the Greek or the Turkish community respectively.<sup>18</sup>

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Constitution. Provisions regarding the Presidents of the Republic and the Council of Ministers are laid down in Part 3 of the Constitution.

<sup>9</sup> Art. 36 Cyprus Constitution.

<sup>10</sup> Regarding the election of the Presidents of the House of Representatives cf. Art. 72 Cyprus Constitution.

<sup>11</sup> Art. 62 Cyprus Constitution.

<sup>12</sup> Art. 46 and Art. 59 para 3 Cyprus Constitution.

<sup>13</sup> Art. 50 Cyprus Constitution implements Art. 8 of the Basic Structure of the Republic of Cyprus, agreed in the course of the Zurich Agreement 1959.

<sup>14</sup> Art. 50 para 3 and Art. 52 Cyprus Constitution.

<sup>15</sup> Art. 57 para 3 Cyprus Constitution.

<sup>16</sup> By the initiative of representatives of the two communities, in the course of the Zurich Agreement on 11.2.1959, the Basic Articles of the Cyprus Constitution have been first set out, Opinion of *Leigh*, The legal status in international law of the Turkish Cypriot and the Greek Cypriot communities in Cyprus of 20.7.1990, issued as a document of the UN General Assembly and of the Security Council under reference A/44/967 and S/21420 on 1.8.1990; see also *Hoffmeister*, Cyprus, in Max Planck Encyclopedia of Public International Law, at <http://www.mpepil.com> (29.12.2011).

<sup>17</sup> See *Adams* supra note 4, 486 et seq.

<sup>18</sup> Art. 182 para 3 Cyprus Constitution.

Due to mutual blockage,<sup>19</sup> in 1963 then President of the Republic of Cyprus, Archbishop *Makarios*, advanced a memorandum to the Presidents of Greece, the UK, Turkey and the Turkish Cypriot Vice-President of Cyprus, *Faisal Küçük*,<sup>20</sup> containing a Thirteen Point Proposal<sup>21</sup> to amend the Constitution.<sup>22</sup> Among other propositions, the Proposal provided for the abandonment of the Presidents' right of final veto and for the Vice-President to deputise for the President in cases of temporary absence. The same should apply for the Presidents of the House of Representatives. Furthermore, the Greek President and the Turkish Vice-President of the House of Representatives were to be elected by all Representatives, not by the Turkish and the Greek Members respectively. Moreover the Proposal aimed at the unification of the administration of justice as well as the establishment of unified municipalities. The participation of Greek and Turkish Cypriots in the composition of the Public Service and the Forces should be modified in proportion to the ratio of the population of the respective communities. Even though *Makarios*' objective was the simplification of the organisation of the Republic, the implementation of the Proposal would have resulted in the restriction of the rights of Turkish Cypriots.<sup>23</sup> Accordingly, Turkey signalled its willingness to intervene in case Greek Cypriots would implement the amendments unilaterally.<sup>24</sup>

The subsequent outbreak of intercommunal violence in December 1963 due to the Turkish community's refusal to accept the amendments, led to numerous deaths in both communities.<sup>25</sup> As a result, according to the UN Security Council resolution of March 1964<sup>26</sup> and with the consent of the government of the Republic of Cyprus, UN Peace-keeping Forces (UN Force in Cyprus, UNFICYP) were deployed in Cyprus and have remained

<sup>19</sup> For a detailed analysis of the breakdown of the bi-communal regime, see *Hoffmeister*, *Legal Aspects of the Cyprus Problem. Annan Plan and EU Accession* (2006) 12 et seq.

<sup>20</sup> From 1959 to his death in 1977 (with an interruption), Archbishop *Makarios* was the first President of the independent Republic of Cyprus. The one and only Turkish Vice-President of the Republic was *Faisal Küçük* from 1959 to 1973. In February 2008, *Demetris Christofias* was elected President for a period of five years until 2013 (The President and the Vice-President are elected for a period of five years (Art. 43 para 1 Cyprus Constitution)).

<sup>21</sup> The Thirteen Point Proposal is printed in *Joseph*, *Cyprus. Ethnic Conflict and International Politics: From Independence to the Threshold of the European Union* (1999) 146 f.; cf. also *Ertekin*, *The Cyprus Dispute and the Birth of the Turkish Republic of Northern Cyprus* (1981) 182.

<sup>22</sup> *Poew*, *Der Beitritt Zyperns zur EU – Probleme des Völkerrechts, des Europarechts und des zypriotischen Rechts* (2007) 22 et seq.

<sup>23</sup> *Oppermann*, *Cyprus*, in *Encyclopedia of Public International Law*, Volume 1 (1992) 923 (925).

<sup>24</sup> *Hoffmeister* supra note 19, 14.

<sup>25</sup> According to *Hoffmeister* (supra note 19, 15 f.) "there was evidence of arms imports from Greece".

<sup>26</sup> S/RES/186 (1964).

there to date. Their function is to prevent a recurrence of fighting and to contribute to the maintenance and restoration of law and order.<sup>27</sup>

There is dissent regarding the question, whether or not Turkish Cypriots have voluntarily resigned from their functions. According to *Oppermann*, the Turkish Cypriot members of the government and holders of public offices resigned at the time when the conflict began.<sup>28</sup> In contrast to that, *Necatigil* holds the view that the Turkish Cypriot ministers and the Turkish Cypriot members of the House of Representatives *could no longer* officiate due to interferences from the Greek community's side<sup>29</sup>. Furthermore, as *Necatigil* states, the Greek government of Cyprus would anyway have announced that it was no longer willing to accept *Küçük* as Vice-President of the Republic.<sup>30</sup> At least several laws were enacted by the Greek government, amending even the unalterable Basic Articles of the Constitution.<sup>31</sup>

The following years were characterised by ongoing violence between the communities,<sup>32</sup> culminating in 1974, when Turkish troops invaded Cyprus and occupied the northern part of the island.<sup>33</sup> As a consequence of the invasion, hundreds of Greek Cypriots residing in the northern part had to

<sup>27</sup> S/RES/186 (1964) para 4 et seq.

<sup>28</sup> *Oppermann* supra note 23, 925.

<sup>29</sup> Cf. also *Denktaş*, Turkish Cypriot Memorandum of 12.7.1990 addressed to the Council of Ministers of the European Communities in Respect of an "Application" for Membership by "the Republic of Cyprus", issued as a document of the UN General Assembly and of the Security Council under reference A/44/966 and S/21398 on 18.7.1990, para 10; cf. also the Declaration of Independence by the Turkish Cypriot Community Parliament on 15.11.1983 para 2.

<sup>30</sup> In his opinion, *Prof. Lauterpacht* argues that from 1963 to 1964, "the Greek Cypriot community had effectively excluded the Turkish Cypriot community from the scheme of power-sharing established by the Basic Structure of the Constitution"; Opinion of *Prof. E. Lauterpacht* of 10.7.1990, Turkish Republic of Northern Cyprus – The status of the two Communities in Cyprus, in Ertekün (ed.), *The Status of the two Peoples in Cyprus. Legal Opinions*<sup>2</sup> (1997) 15 para 37.

<sup>31</sup> Cf. *Necatigil*, *The Cyprus Question and the Turkish Position in International Law*<sup>2</sup> (1989) 57, 62 et seq. From the Greek Cypriots' side there are serious doubts on the objectivity of *Necatigil* due to his function as "Attorney-General of the Turkish Republic of Northern Cyprus" and later as a "Member of the Assembly of the Turkish Republic of Northern Cyprus"; cf. *Markides*, Introduction, in *Markides* (ed.), *Cyprus and European Union Membership. Important Legal Documents* (2002) 5 – (Markides Alecos was Attorney-General of the Republic of Cyprus); cf. also the Opinion of *Prof. Crawford*, *Prof. Hafner* and *Prof. Pellet* of 24.9.1997, Republic of Cyprus: Eligibility for EU Membership, issued as a document of the UN General Assembly and of the Security Council under reference A/56/723 and S/2001/1222 on 20.12.2001, Fn. 8; dissenting from that and stating that "his account of the facts which I have cited [...] appears to be accurate", *Mendelson* supra note 5, Fn. 2.

<sup>32</sup> For details see for example *Choisi*, *Wurzeln und Strukturen des Zypernkonfliktes 1878 bis 1990* (1993) 233 ff.; *Stephen*, *Die Zypernfrage* (1999) 36 ff.; *Wendt*, *Wiedervereinigung oder Teilung? Warum das Zypern-Problem nicht gelöst wird* (2006) 60 et seq.

<sup>33</sup> By using the terms TRNC, northern Cyprus, the north of the island or the areas to the north of the Green Line, it is always referred to the areas which are not under the effective control of the government of the Republic of Cyprus.

leave their homes and to flee to the south. From the Turkish side, the invasion is justified by invoking Turkey's rights under the Treaty of Guarantee of 1960.<sup>34</sup> According to its Art. IV, each of the three guaranteeing powers – Greece, Turkey and the United Kingdom – has the right to take action in order to re-establish the state of affairs as created by the Treaty. Evaluating the legality of the action taken by Turkey, on the one hand it is argued that the provision has to be construed narrowly with the result that military action is excluded; on the other hand, the provision is interpreted insofar as the use of force by the guarantor power Turkey could be theoretically justified by the consent of Cyprus, which is a party to the Treaty of Guarantee – but only as far as the re-establishment of the constitutional order provided for in the Treaties of 1960 is concerned.<sup>35</sup> However, there seems to be consent among the majority of authors, that the intervention in its entirety did not exclusively focus on the re-establishment of the state of affairs as created by the 1960 accord; especially the second phase of the intervention was excessive and therefore not in compliance with international law.<sup>36</sup> As a matter of fact, some authors dissent from this opinion, qualifying the intervention as a lawful exercise of Turkey's rights as a guarantor under Article IV of the Treaty of Guarantee. In this context, *Lauterpacht* refers to a resolution of the Consultative Assembly of the Council of Europe<sup>37</sup> which – according to his interpretation<sup>38</sup> – expressly acknowledged the lawfulness of the intervention.<sup>39</sup>

Subsequently, the representatives of the Turkish Federated State of Cyprus, which was proclaimed in 1975 and the Greek Cypriot government in the south were negotiating on a possible unification of the country.<sup>40</sup> However, due to the failure of the negotiations, on 15.11.1983, a Turkish Cypriot legislative assembly – the so called Turkish Cypriot Parliament – declared an independent State, namely the Turkish Republic of Northern Cy-

<sup>34</sup> Cf. for example *Ronen*, Status of Settlers implanted by illegal territorial Regimes, in *The British Yearbook of International Law* (2008) 195 (218).

<sup>35</sup> *Hoffmeister* supra note 16, para 23; *Hoffmeister* supra note 19, 46; cf. also *Epiney/Hofstötter*, Zur Stellung von Nordzypem und Nordzyperern im europäischen Gemeinschaftsrecht, in *Epiney/Haltern/Hofstötter/Ileri*, Zypern in der Europäischen Union. Ausgewählte völker- und europarechtliche Aspekte (2008) 67 (80).

<sup>36</sup> *Hoffmeister*, The Cyprus Problem in 2009: Which Role for International and European Law, in *Giegerich/Proelß* (Hg.), *Krisenherde im Fokus des Völkerrechts – Trouble Spots in the Focus of International Law* (2010) 57 (62).

<sup>37</sup> Res 1974/573 of 29.7.1974.

<sup>38</sup> According to *Hoffmeister* (supra note 19, 46) this conclusion is plausible with regard to the first phase of the intervention only.

<sup>39</sup> *Lauterpacht* supra note 30, para 15: *Denktash*, Urgent Need to Rethink Cyprus, in *Center for Strategic Research, Perceptions I/1996*; according to *Denktash* (supra note 29, para 13), "in order to safeguard the Turkish Cypriot population and prevent takeover of the island by Greece", Turkey freed the northern part of the island; cf. also *Necatigil* supra note 31, 132.

<sup>40</sup> *Oppermann* supra note 23, 925.

prus (TRNC).<sup>41</sup> Thereupon, the Security Council of the United Nations adopted a resolution qualifying the declaration of independence as being invalid due to its incompatibility with the Treaty of Establishment and the Treaty of Guarantee. Furthermore, it called upon “all states not to recognize any Cypriot State other than the Republic of Cyprus”.<sup>42</sup> Even though the resolution was not adopted under Chapter VII of the Charter of the United Nations (UN Charter) and therefore is not binding upon states, the Security Council condemned the recognition of the TRNC by the Republic of Turkey. *Lauterpacht* argues that by the resolution recommending the non-recognition of the TRNC, the Security Council has failed to treat the two communities “on equal footing”, as it has repeatedly proclaimed.<sup>43</sup> In his view, by means of its resolutions, the Security Council implicitly placed a higher legal value on the compatibility of Turkish Cypriots’ conduct with the Treaties than on the compatibility of the Greek Cypriot community’s conduct<sup>44</sup> with the 1960 settlement.<sup>45</sup>

Assuming the case that *Lauterpacht*’s assumption that Greek Cypriots have “effectively excluded Turkish Cypriots from the scheme of power-sharing” provided for by the 1960 Constitution,<sup>46</sup> reflects the truth,<sup>47</sup> his conclusion seems plausible. However, as already mentioned, there are also different views – *Oppermann* for example advances the view that “Turkish Cypriot members of the government and office holders resigned when the conflict began”.<sup>48</sup> In this case, *Lauterpacht*’s assumption could not be agreed upon. As a result, the question of whether or not the Security Council violated the principle of equal treatment by means of its request

<sup>41</sup> *Oppermann* supra note 23, 925; In contrast to the Turkish Federated State of Cyprus which was declared in 1975, the TRNC was supposed to be not only an autonomous Turkish Cypriot administration, but an independent state, see Opinion of *Prof. Lauterpacht* (supra note 30) of 10.7.1990, Turkish Republic of Northern Cyprus – The status of the two Communities in Cyprus para 33.

<sup>42</sup> S/RES/541 (1983), see also S/RES/550 (1984).

<sup>43</sup> Cf. for example S/RES/367 (1975) para 2, S/RES/750 (1992) para 6; see also the references in *Leigh* (supra note 16, Fn. 24).

<sup>44</sup> In this context, *Leigh* (supra note 16) holds the view that the Greek Cypriot government violated the 1960 Constitution, especially its Art. 182, stating that the basic Articles are unamendable; cf. also the notes protesting against the amendments due to their incompatibility with the international treaties from the Turkish Embassy in Nicosia to the Minister for Foreign Affairs in Cyprus and from the British High Commission in Cyprus to the Government of Cyprus, *Leigh* supra note 16, Fn. 10.

<sup>45</sup> Opinion *Prof. Lauterpacht* supra note 30, para 38.

<sup>46</sup> Opinion *Prof. Lauterpacht* supra note 30.

<sup>47</sup> *Necatigil*, *Heinze*, *Leigh* and *Mendelson* are of the same opinion; *Necatigil* supra note 31; *Leigh* supra note 16, Fn. 8; *Mendelson* supra note 5, para 47; see also Opinion by *Heinze* of March 1997, Opinion on the Question of the Compatibility of the Admission of Cyprus into the European Union with International Law, the Law of the EU and the Cyprus Treaties of 1959/60, issued as a document of the UN General Assembly and of the Security Council under reference A/52/404 and S/1997/757 on 29.9.1997, 188.

<sup>48</sup> *Oppermann* supra note 23, 925.

not to recognise the TRNC largely depends on the question of whether or not Turkish Cypriots have voluntarily given up their rights conferred on them by the 1960 Constitution. If they were effectively prevented from exercising their rights by Greek Cypriots, the latter have violated the 1960 Constitution,<sup>49</sup> which has the same legal value as the Treaties of Establishment and Guarantee.

Following the declaration of independence by the Turkish Cypriot Parliament, the Constitution of the Turkish Republic of Northern Cyprus (TRNC-Constitution), largely based on the 1975 Constitution of the Turkish Federated State of Northern Cyprus, entered into force on 5.5.1985.<sup>50</sup> According to the Constitution, the legislative power is vested with the Assembly of the Republic, consisting of elected representatives of the people. The official language of the TRNC is Turkish and its capital, Nicosia, is likewise the capital of the Republic of Cyprus. Envisaging a parliamentary democracy, the executive powers are held and exercised by the President<sup>51</sup> and the Council of Ministers. For the government controlled part of the Republic of Cyprus, the (amended) Constitution of 1960 is still applicable – without the participation of the Turkish Cypriot community.

### III. EU – Cyprus Relations in a Historical Context

The very starting point for the intensified cooperation between the then European Economic Community and Cyprus dates back to 1972. In the following section, the EC-Cyprus cooperation within the framework of the Association Agreement is described (III.1.) followed by an outline of Cyprus' way from association to full membership of the European Union in May 2004 (III.2.).

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<sup>49</sup> Regarding breaches of the 1960 Constitution by Greek organs, cf. the Appendix of *Heinze's Opinion*, *The Fate of the Constitution of 1960* – a summary with reference to the most important constitutional statutes (supra note 47, 226 et seq.).

<sup>50</sup> Cf. *Necatigil* supra note 31, 296 et seq. 70.18% voted in favour of the Constitution. The Constitution was published in the *Official Gazette* on 7.5.1985.

<sup>51</sup> Art. 5 TRNC-Constitution. In 1976, *Rauf Raif Denktaş* was elected first President of the TRNC – he was re-elected in 1990, 1995 and 2000. Since April 2010 *Derviş Eroğlu* has been President of the TRNC.

### 1. Association Agreement

On 19.12.1972 the Association Agreement<sup>52</sup> between Cyprus and the European Economic Community (EEC) was concluded by the Council of the European Communities and the (Greek) government of the Republic of Cyprus.<sup>53</sup>

The aim of the association was the elimination of trade obstacles between the EEC and Cyprus. Within the first stage the tariffs on industrial goods and agricultural products should be reduced, the second stage aimed at the adoption of the common customs tariff by Cyprus.<sup>54</sup> In the course of the negotiations for the first stage of the Association Agreement, the Greek Cypriot community and the Turkish Cypriot community were both consulted.<sup>55</sup> Correspondingly, it was highly criticised by the Turkish Cypriot community that the negotiations for the second stage were solely conducted with the Greek Cypriot administration – on behalf of the whole of Cyprus.<sup>56</sup> In the course of this argumentation, the Turkish Cypriots invoked Art. 50 para 1 Cyprus Constitution, according to which the Turkish Vice-President of the Republic would have had “the right of final veto on any law or decision of the House of Representatives or any part thereof concerning [...] (a) foreign affairs, except the participation of the Republic in international organizations and pacts of alliance in which the Kingdom of Greece and the Republic of Turkey both participate”. Therefore – from the Turkish community’s viewpoint – the consent of both communities would have been necessary.<sup>57</sup>

In 1994, the European Court of Justice (ECJ) delivered its prominent judgement in the *Anastasiou I* case, dealing with the complex situation in Cyprus under the regime of the Association Agreement.<sup>58</sup> Due to the lack of appropriate movement certificates it was questionable whether the importation of goods originating in the northern part of Cyprus and the ac-

<sup>52</sup> OJ L 1973 133/1. For a detailed analysis of the Association Agreement with Cyprus, cf. *Tsardanidis*, The EC-Cyprus Association Agreement: Ten Years of a Troubled Relationship 1973–1983, in 22/4 *Journal of Common Market Studies* (1984) 351. The Agreement establishing an Association between the EEC and Turkey (so called Ankara-Agreement, OJ L 1964 217/1) with the objective of establishing a customs union in three stages was signed on 12.9.1963.

<sup>53</sup> Cyprus was not an EFTA State and therefore never part of the European Economic Area.

<sup>54</sup> Art. 2 para 1–3 of the Association Agreement between the EEC and the Republic of Cyprus. On 19.10.1987, a Protocol laying down the conditions and procedures for the implementation of the second stage of the Association Agreement was adopted, OJ L 1987 393/2.

<sup>55</sup> Cf. *Necatigil* supra note 31, 341 et seq.

<sup>56</sup> Cf. *Necatigil* supra note 31, 341 et seq.

<sup>57</sup> Cf. *Necatigil* supra note 31, 342 et seq.

<sup>58</sup> ECJ Case C-432/92 ECR 1994, I-3116 – *Anastasiou and others*; cf. *Koutrakos*, Legal Issues of EC-Cyprus Trade Relations, in *The International and Comparative Law Quarterly*, 52/2 (2003) 489 (490 f.); *Talmon*, The Cyprus Question before the European Court of Justice, in 12/4 *EJIL* (2001) 727 (731).

ceptance of TRNC issued certificates by UK authorities was legal. According to the rules laid down in the 1977 Protocol to the Additional Protocol to the Association Agreement,<sup>59</sup> the customs authorities of the exporting state were competent to issue the respective movement certificates. Invoking these provisions, the Greek government argued that the acceptance of movement certificates issued by authorities other than those of the Republic of Cyprus would be unlawful.<sup>60</sup> In contrast, the European Commission and the UK favoured the acceptance of TRNC certificates in the light of Art. 5 of the Association Agreement, which prohibits any discrimination among nationals and companies of Cyprus.<sup>61</sup>

However, the Court did not follow the Commission's reasoning and rather held that "the acceptance of movement certificates not issued by the Republic of Cyprus would constitute, in the absence of any possibility of checks or cooperation, a denial of the very object and purpose of the system established by the 1977 Protocol".<sup>62</sup> The ECJ reasoned its strict interpretation of the Protocol by the necessity of a uniform application of the Association Agreement in all Member States and the need for certificates reliably documenting the origin of products.<sup>63</sup> As a consequence of this judgement, no movement certificates issued by TRNC authorities were accepted by the Union's Member States anymore. Hence, a direct export of goods originating in the northern part of Cyprus was no longer possible under the customs preferential treatment regime provided for by the Association Agreement.<sup>64</sup>

## 2. Accession Process

Almost 18 years after the conclusion of the Association Agreement, on 3.7.1990, the Greek government of the Republic of Cyprus submitted its formal application for accession to the European Communities (EC) – namely the European Coal and Steel Community (ECSC), the European

<sup>59</sup> Art. 7 para 1 and Art. 8 para 1 of the Protocol. The Protocol is also annexed to the Council Regulation 2907/77/EEC of 20.12.1977 on the conclusion of the Additional Protocol to the agreement establishing an association between the European Economic Community and the Republic of Cyprus, OJ L 1977 339/1.

<sup>60</sup> ECJ Case C-432/92, *Anastasiou and others*, supra note 58 margin number 17; cf. *Greenwood*, Unrecognised States and the European Court, in 54 *The Cambridge Law Journal* (1995) 4; *Emiliou*, Cypriot Import Certificates: Some hot Potatoes, in 20 *ELR* (1995) 202; *Vedder/Folz*, A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law in 1994, in 7/1 *EJIL* (1996) 112 (120 et seq).

<sup>61</sup> ECJ Case C-432/92, *Anastasiou and others*, supra note 58, margin number 31.

<sup>62</sup> ECJ Case C-432/92, *Anastasiou and others*, supra note 58, margin number 41.

<sup>63</sup> For *Anastasiou II* see infra III.2.

<sup>64</sup> In this context see infra III.2.; cf. Communication from the Commission to the Council and the European Parliament, Economic and Social Committee and the Committee of the Regions – Ways of promoting economic development in the northern part of Cyprus and bringing it closer to the Union, COM(2003) 325 final, 3.6.2003.

Economic Community and the European Atomic Energy Community (EAEC/Euratom). From the perspective of the Greek Cypriots there were manifold reasons making the accession desirable, such as the EC providing increased protection in case of another Turkish invasion and – at least to a certain extent – making the EC responsible for a settlement of the conflict.<sup>65</sup> Subsequently the Council of the European Communities, which was the addressee of Cyprus' application, asked the Commission to draw up an opinion as required by Art. 205 Euratom Treaty, Art. 237 EEC Treaty and Art. 98 ECSC Treaty.

In answer to the application, on 3.9.1990 TRNC representatives transmitted a Memorandum to the Council of Ministers notifying their objections to the accession.<sup>66</sup> Even though the de facto authorities of the northern part of Cyprus highlighted that an accession to the EC would be in the interest of the Turkish Cypriot community, they denied the right of the Greek government of the Republic to apply on behalf of the whole island. In this context they invoked inter alia Art. 50 Cyprus Constitution and claimed that the European Communities' institutions should not take any action on Cyprus' application due to its incompatibility with national law.<sup>67</sup>

Nonetheless, on 30.6.1993 the Commission presented its Opinion on the Application by the Republic of Cyprus for Membership.<sup>68</sup> As a matter of fact, TRNC authorities had refused to cooperate in the course of the preparation of the Opinion. Therefore the Commission had to rely mainly on the data provided for by the Greek government of the Republic of Cyprus.<sup>69</sup> The Commission concluded that “following the logic of its established position, which is consistent with that of the United Nations, where the legitimacy of the government of the Republic of Cyprus and non-recognition of the ‘Turkish Republic of Northern Cyprus’ are concerned, [the European Communities] felt that the application was admissible [...]”.<sup>70</sup>

As a consequence, on 6.3.1995, the General Affairs Council authorised the Commission to start negotiations with Cyprus,<sup>71</sup> still presuming that under the auspices of the UN a settlement of the conflict could be reached. Accordingly, at the Luxembourg European Council in 1997, the Presidency concluded that the accession negotiations would contribute positively to the search of a political solution for the Cyprus Problem. It was highlighted once again that this should be handled under the auspices of the UN which “must continue with a view to creating a bi-com-

<sup>65</sup> Cf. *Nugent*, EU Enlargement and the ‘Cyprus Problem’, in 38/1 Journal of Common Market Studies (2000) 131 (132).

<sup>66</sup> *Denktaş* supra note 29, see also *Mendelson* supra note 5, 100.

<sup>67</sup> *Denktaş* supra note 29, para 18 et seq.

<sup>68</sup> COM(1993) 313 final, 30.6.1993, para 2.

<sup>69</sup> COM(1993) 313 final, supra note 68, para 12.

<sup>70</sup> COM(1993) 313 final, supra note 68, para 8.

<sup>71</sup> Press: 66 Nr: 5221/95.

munity, bi-zonal federation".<sup>72</sup> At the same time it was recalled by the European Council that the strengthening of Turkey's links with the EU would depend inter alia on the support for negotiations on a political settlement in Cyprus. It was decided that on 30.3.1998 the accession process should be launched by a meeting of the Ministers of Foreign Affairs of the then fifteen Member States of the European Union.<sup>73</sup> As a consequence of that decision the TRNC abandoned nearly all existing informal contacts with the EU.<sup>74</sup>

Finally, at the 1999 Helsinki European Council, the scenario of an eventual failure of the UN settlement efforts was subject to discussion for the first time. It was emphasised that a political settlement of the conflict would facilitate the accession of Cyprus to the European Union. But in case that no settlement would be reached by the time of completion of accession negotiations, the Council's decision on accession should be made without the settlement being a precondition.<sup>75</sup> Even though the European Council had repeatedly emphasised that there was a "strong preference" for the accession by a united Cyprus on the basis of the Annan Plan, it expressed its willingness to accept the accession of a divided Cyprus. This decision was taken in the light of the argument of the Greek Cypriot government that it would be unacceptable for the EU as well as for Cyprus to be prevented from intensified cooperation by an illegal state like the TRNC and a non-Member State of the EU like Turkey.<sup>76</sup>

In conformity with the decision of the European Council in Helsinki, at the Copenhagen European Council 2002, the *modi operandi* for both scenarios – the accession of a united Cyprus after the settlement of the conflict on the basis of the Annan Plan and an eventual accession without the settlement of the conflict – were discussed. As regards the first scenario, the European Council recalled the willingness of the EU to adapt the terms of accession depending on the terms of a settlement. In this regard, the Annan Plan provided for a Draft Act of Adaption to the Terms of Accession of the United Cyprus Republic to the European Union (DAA)<sup>77</sup> on the basis of Art. 4 Protocol No 10 of the Act of Accession 2003<sup>78</sup>. For the second scenario – no solution of the conflict – it was decided that the appli-

<sup>72</sup> Luxembourg European Council, 12. and 13.12.1997, Presidency Conclusions para 28.

<sup>73</sup> Luxembourg European Council, 12. and 13.12.1997, Presidency Conclusions para 11, 35. For a more detailed analysis of the accession process itself, see *Nugent* supra note 65, 139 et seq.

<sup>74</sup> *Nugent* supra note 65, 138.

<sup>75</sup> Helsinki European Council, 10. and 11.12.1999, Presidency Conclusions para 9, see also Copenhagen European Council, 12. and 13.12.2002, Presidency Conclusions para 10 et seq.

<sup>76</sup> Cf. *Nugent* supra note 65, 137.

<sup>77</sup> The Comprehensive Settlement of the Cyprus Problem, 31.3.2004, Appendix D, see also Commission Proposal COM(2004) 189 final, 7.4.2004.

<sup>78</sup> See infra note 133.

cation of the *acquis communautaire* to the Turkish Cypriot part of the island should be suspended.<sup>79</sup>

Before the referendum on the Annan Plan was held on 24.4.2004, there were several efforts from the EU's side in order to improve the economic situation in northern Cyprus and thereby contribute to the political settlement of the conflict. By means of financial assistance, trade promotion as well as information activities of the Commission, the northern part of the island should be brought closer to the European Union. As asked for by the European Council at its meeting in Copenhagen in December 2002,<sup>80</sup> the Commission presented a proposal concerning ways of promoting economic development of the northern part of the island.<sup>81</sup> Due to the negative implications on direct exports of products originating in the TRNC by the *Anastasiou I* ruling of the ECJ,<sup>82</sup> the Commission proposed to explicitly authorise the Turkish Cypriot Chamber of Commerce to issue movement certificates according to Art. 8 of the Protocol concerning the Definition of the Concept Originating Products and Methods of Administrative Cooperation to the Association Agreement.<sup>83</sup> As a consequence, the above mentioned products could have benefitted from the preferential treatment under the Association Agreement.<sup>84</sup>

As a consequence of *Anastasiou I*, exporters could no longer ship their products from the TRNC to EU Member States. In July 2000, the *Anastasiou II* judgment<sup>85</sup> was delivered by the ECJ. It concerned the issuance of phytosanitary certificates by a non-Member State instead of the respective EU Member State which was the country of origin of the product. In this case Turkey – rather than the competent authorities of the Republic of Cyprus – issued the certificates mentioned above for goods originating in the TRNC. The ECJ ruled that – provided (a) the products had been imported into the territory of the non-Member State where checks have been made before the export to the EC, (b) the products have remained in that respective country for such a period of time and under conditions enabling the checks to be completed and (c) there are no special requirements for the respective goods that can be satisfied in their place of origin only – the admission of such products into the territory of EU Member States is in com-

<sup>79</sup> Copenhagen European Council, 12. and 13.12.2002, Presidency Conclusions para 11 et seq.

<sup>80</sup> Copenhagen European Council, 12. and 13.12.2002, Presidency Conclusions para 12.

<sup>81</sup> COM(2003) 325 final, supra note 64.

<sup>82</sup> ECJ Case C-432/92, *Anastasiou and others*, supra III.1.

<sup>83</sup> OJ 1977 L 339/19.

<sup>84</sup> COM(2003) 325 final, supra note 64, para 2.

<sup>85</sup> ECJ Case C-219/98 ECR 2000, I-5241 – *R/Anastasiou and others*; cf. *Talmon* supra note 58, 738 ff., *Koutrakos* supra note 58, 493; *Skoutaris*, *The European Courts as Political Actors in the Cyprus Conflict*, in Snyder/Maher (eds.), *The Evolution of the European Courts: Institutional Change and Continuity* (2009), 235 (249 et seq); *Laulhé Shaelou*, *The EU and Cyprus: Principles and Strategies of Full Integration* (2010) 71 et seq.

pliance with EU law.<sup>86</sup> As a result, the export of products from the TRNC to the internal market is possible via a non-Member State of the Union – Turkey –, even without the necessary certificates being issued by the Republic of Cyprus. Thereby the importing Member States of the EU were not obliged to take account of the reasons why the certificates have not been issued by the country of origin.

However, it was in July 2004 only, when the Commission finally implemented its proposal by the adoption of a decision authorising the Turkish Cypriot Chamber of Commerce to issue accompanying movement documents on the basis of Art. 4 para 5 of the Green Line Regulation (GLR).<sup>87</sup> At that time, Cyprus had already joined the European Union as a divided island.

On 7.4.2004, the Commission presented its Proposal for an Act of Adaption of the Terms of Accession of the United Cyprus Republic to the European Union, based on Appendix D of the Annan Plan.<sup>88</sup> The Proposal should have been submitted to the Council for adoption immediately after a positive outcome of the referenda on the Annan Plan. It would have provided for transitional derogations from the *acquis* such as the right of Turkish Cypriots to purchase immovable property in the Turkish Cypriot part of the island until it has reached a level of 85 % of the GDP of the Greek Cypriot state without permission of the competent authority of the Turkish Cypriot constituent state.<sup>89</sup> Furthermore, it would have been allowed to impose non-discriminatory restrictions on the right of Cypriot citizens to reside in the other constituent state and on the right of Greek and Turkish nationals to reside in Cyprus. The latter were to be vested with equivalent rights.<sup>90</sup> For the case of a serious deterioration of the economic situation in northern Cyprus, the Proposal provided for transitional safeguard measures, prolongable by the Commission as well as for rules regarding the representation of Cyprus in the European Parliament.<sup>91</sup> At the same time, Turkish would have been introduced as an official and working language of the European Union institutions.<sup>92</sup> According to Art. 6 of the Proposal, the participation of Cyprus in the European Security and Defence Policy would have been without prejudice to the Foundation Agreement and the provisions of the Treaties of Guarantee and Alliance.

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<sup>86</sup> ECJ Case C-219/98, *R/Anastasiou and others*, *supra* note 85 margin number 38.

<sup>87</sup> Council Regulation 866/2004/EC on a regime under Article 2 of Protocol No 10 of the Act of Accession, OJ 2004 L 161/128 as amended by Council Regulation 587/2008/EC, OJ 2008 L 163/1; *infra* V.1.a.

<sup>88</sup> COM(2004) 189 final, *supra* note 77.

<sup>89</sup> Art. 1 COM(2004) 189 final, *supra* note 77.

<sup>90</sup> Art. 2, 3 and 5 COM(2004) 189 final, *supra* note 77.

<sup>91</sup> See *infra* V.4.

<sup>92</sup> Art. 4, 7 and 8 COM(2004) 189 final, *supra* note 77; *infra* V.5.

However, on 24.4.2004, 75.8 % of the Greek Cypriots voted against the Annan Plan, “because they felt that it was not balanced and did not meet their main concerns regarding security, functionality and viability of the solution”.<sup>93</sup> Even though around 65 % of the Turkish Cypriots voted in favour of it,<sup>94</sup> all hopes were spoilt to find a solution for the Cyprus problem in the near future.

#### IV. The Legality of Cyprus’ Accession to the European Union

The decision that the lack of a political settlement of the Cyprus problem was not anticipating the accession to the Union by the whole of the island resulted in a legal discourse of lawyers and practitioners. In the following section, the legality of Cyprus’ accession is evaluated from a European perspective.

At the time the decision was taken that Cyprus was eligible for membership, the talks under the auspices of the Secretary General of the United Nations were still pursued and a settlement of the conflict prior to Cyprus becoming a full member of the EU seemed very likely. Probably this was the reason for the fact that the attention from the EU’s side was mainly focused on the question whether or not the accession was in compliance with the provisions of the Cyprus Constitution and the respective international treaties. At the same time, the question of compatibility of the *de facto* partition of the Republic with the Union’s preconditions for accession remained widely unconsidered from the EU’s side.<sup>95</sup>

When Cyprus acceded the EU in May 2004, according to Art. 49 TEU (Nice version),<sup>96</sup> the latter was basically open to accession by any European State which respects certain principles set out in Article 6 para 1 TEU (Nice version). Therefore, an obligatory requirement for accession was – and under the Treaty of Lisbon<sup>97</sup> still is – that EU membership is open for states only, whereas neither international organisations nor constituent states are allowed to accede.<sup>98</sup> Assuming that the TRNC’s declaration of

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<sup>93</sup> See the website of the embassy of the Republic of Cyprus in Berlin, at <http://www.mfa.gov.cy> (15.6.2011).

<sup>94</sup> In the course of the referendum, the following question was asked: “Do you approve the Foundation Agreement with all its Annexes, as well as the constitution of the Greek Cypriot/Turkish Cypriot State and the provisions as to the law to be in force to bring into being a new state of affairs in which Cyprus joins the European union”, see Annex IX of the Annan Plan; 75.8 % of Greek Cypriots and only 35 % Turkish Cypriots voted against it. Government of Cyprus, Cyprus at a Glance, at <http://www.moi.gov.cy> (30.4.2011).

<sup>95</sup> The negligence of the question of compatibility with EU law was criticised by *Mendelson* *supra* note 5, para 102.

<sup>96</sup> For the actual legal situation cf. Art. 2 and 49 TEU (Lisbon version).

<sup>97</sup> OJ C 2007 306/1.

<sup>98</sup> According to Art. 4 UN Charter the same requirement applies to the accession to the

independence would have been legal, resulting in the emergence of two sovereign states – namely that of the Greek Republic of Cyprus and that of the Turkish Republic of Northern Cyprus – an accession of both states would have been possible. In contrast, an accession of the southern respectively the northern part of the island as constituent states of the Republic would not have been compatible with Art. 49 TEU (Nice version).

In this context it is appropriate to shortly evaluate the international legal status of the TRNC and the subsequent question of an eventual emergence of two separate states. According to *Jellinek's* well known classical doctrine of statehood,<sup>99</sup> there are three elements being constitutive for the emergence of a state: territory, population and governmental authority. Purely implementing *Jellinek's* theory in the context of the Cyprus conflict, one could come to the conclusion that the TRNC fulfils all these requirements.<sup>100</sup> First, the existence of a territory does not depend on its size; insofar the territory of the part of Cyprus to the north of the UN buffer zone can be regarded as sufficiently defined territory. Second, the existence of a population depends on the permanency of the coexistence and a common identity of the people<sup>101</sup> rather than on the number<sup>102</sup> of inhabitants.<sup>103</sup> In the case of the TRNC, with its permanent population of 256 644 inhabitants,<sup>104</sup> this requirement is given. The third criterion, namely the question whether or not effective governmental authority does exist in the case of the TRNC is much more questionable. One can argue that the TRNC has an effective legislature as well as a judiciary and executive enforcing the law. This was even confirmed by the European Court of Human Rights<sup>105</sup> – in a different context though – when it held that the

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United Nations – with the exceptions of Ukraine and Byelorussia, which (being constituent states of the USSR) acquired UN membership due to a political compromise [cf. for example *Blum*, Russia takes over the Soviet Union's Seat at the United Nations, in *EJIL* (1992) 354 (Fn. 2)]. When Cyprus joined the UN in September 1960, the island was still united on the basis of the 1960 Constitution. See *S/RES/155* (1960).

<sup>99</sup> *Jellinek*, *Allgemeine Staatslehre*<sup>3</sup> (1914) 396.

<sup>100</sup> Of this opinion, *Heinze* (supra note 47, 190) – he qualifies the situation in Cyprus as *dismembratio*.

<sup>101</sup> In this context, the coexistence of different religious groups and people with different languages does not contradict the existence of a population.

<sup>102</sup> In 2007 the TRNC population amounted to 265 100, TRNC General Population and Housing Unit Census, at <http://www.nufussayimi.devplan.org> (25.9.2011).

<sup>103</sup> Cf. *Hoffmeister* supra note 19, 50; *Hailbronner* considers the existence of citizenship – as a formal link between the population and the state – necessary for the existence of the population criterion *Hailbronner*, *Der Staat und der Einzelne als Völkerrechtssubjekte*, in *Vitzthum* (Hg.), *Völkerrecht*<sup>4</sup> (2007) recital 78, 79, 96 et seq.

<sup>104</sup> This is indicated by the TRNC Public Information Office according to the 2006 census; at <http://www.trncinfo.com> (22.5.2011).

<sup>105</sup> *Loizidou v Turkey*, 28.7.1998, Reports of Judgements and Decisions ECtHR 1998–IV para 21.

TRNC, even though internationally not recognised, “exercises effective authority through constitutionally established organs”.<sup>106</sup>

But there are also many aspects contradicting this theory. *Hoffmeister* for example negates the existence of governmental authority in case of the TRNC due to a lack of independence from Turkey. Even though he concedes that there is a legislature, a civil government and a functioning judiciary, the presence of the Turkish army as well as the economic dependence on Turkey in his view is contradictory to the qualification as a state.<sup>107</sup> But if one compares the case of the TRNC with that of Kosovo, which was still under the co-administration of UNMIK (United Nations Interim Administration Mission in Kosovo)<sup>108</sup> at the time it declared independence, the degree of independence seems not to be a striking argument for denying statehood in the present case. The fact that to date at least 75 states have recognised Kosovo as a sovereign state shows that the international community is quite generous in this regard.<sup>109</sup> Unsurprisingly, in the case of Kosovo, the government of the Republic of Cyprus held the view that Kosovo did not meet the criteria for statehood – inter alia – due to a lack of an effective government with the capacity to enter into relations with other states.<sup>110</sup>

Emanating from the declaratory theory, the recognition by other states is not a constitutive element of statehood. Thus, the fact that the TRNC is recognised solely by Turkey might appear irrelevant.<sup>111</sup> But there is an

<sup>106</sup> According to *Orakhelashvili*, the TRNC possesses *effectivité* as part of the factual criteria of statehood, *Orakhelashvili*, Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo, in 12 Max Planck Yearbook of United Nations Law (2008) 1 (9 et seq).

<sup>107</sup> *Hoffmeister* supra note 19, 51 et seq.

<sup>108</sup> See S/RES/1244 (1999); all branches of authority that according to constitutional theory are attributed to a state were attributed to UNMIK, see *Stahn*, The Law and Practice of International Territorial Administration. Versailles to Iraq and Beyond (2008) 317; see also *Knoll*, The Legal Status of Territories Subject to Administration by International Organisations (2008) 129 ff., who qualifies Kosovo as a “non-state territorial entity” that had been addressed by Resolution 1244 (1999) of the Security Council, whereas the latter “represented the first phase in a trajectory that could telescope into the constitution of a legal personality *ad interim*”.

<sup>109</sup> In its Advisory Opinion the International Court of Justice did not comment on the question whether or not Kosovo has achieved statehood; Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion of 22.7.2010.

<sup>110</sup> According to the statement of the Republic of Cyprus “it is apparent that much of the responsibility for governance still falls on the ‘international presences’. The Provisional Institutions are not acting independently. They have not established control throughout Kosovo. For example, there is as yet no single legal space across the whole territory of Kosovo.” Written statement concerning the accordance with international law of the unilateral declaration of independence by the provisional institutions of Kosovo, submitted by the Republic of Cyprus, 17.4.2009 para 173 ff., 193.

<sup>111</sup> Bangladesh had recognised the TRNC but withdrew its recognition due to political pressure from Greece and the United States; *Talmon*, Kollektive Nichtanerkennung illegaler

other criterion often referred to in the context of statehood, especially in countries of Anglo-American law: the capacity to act effectively and to enter into relations with other nations. The United States' government for example has traditionally looked for that criterion before recognising new states.<sup>112</sup> So does the Montevideo Convention on the Rights and Duties of States (1933), qualifying the "capacity to enter into relations with the other states" as being a constitutive criterion for the qualification of a state as a person of international law.<sup>113</sup> However, the requirement of an effective capacity to act is inevitably linked with the question of recognition. A state not recognised by other states will hardly be able to conclude international treaties with these nations. In the case of the TRNC, due to the recommendations of the UN Security Council and the General Assembly not to recognise the TRNC as a sovereign state,<sup>114</sup> entering into relations with other states has become quite unpromising for the TRNC. Hence, the requirement of the existence of a capacity to act effectively seems to amount to nothing more than the question of international recognition.

In conclusion, according to *Jellinek's* doctrine of statehood, all three constitutive elements are given, whereas the Turkish Republic of Northern Cyprus can be regarded as a state,<sup>115</sup> though internationally not recognised and largely – economically and military – dependent on the Republic of Turkey. Due to the policy of collective non-recognition demanded by the UN Security Council, the TRNC is not capable of acting effectively and to enter into relations with other states, with the sole exception of the Republic of Turkey.<sup>116</sup> In line with *Talmon*,<sup>117</sup> the collective non-recognition can be qualified as having negating effect as to the existence of the TRNC as a sovereign state.

However, there is yet another fact that should not remain unregarded. The TRNC has developed after a military intervention by Turkey, when in 1974 Turkish Troops invaded the island and subsequently occupied

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Staaten. Grundlagen und Rechtsfolgen einer international koordinierten Sanktion, dargestellt am Beispiel der Türkischen Republik Nord-Zypern (2006) 62.

<sup>112</sup> *Rovine*, Contemporary Practice of the United States relating to International Law, in 68 AJIL (1974) 309.

<sup>113</sup> Art. 1 lit. d Montevideo Convention on the Rights and Duties of States of 26.12.1933, reproduced in 28 AJIL (1934) 75.

<sup>114</sup> S/RES/541 (1983), S/RES/550 (1984), A/RES/34/30 (1979) see supra II.; see also *Dugard*, Recognition and the United Nations (1987) 108 et seq.

<sup>115</sup> Drawing the same conclusion, *Leigh* supra note 16; *Talmon* supra note 111, 231 et seq with further references.

<sup>116</sup> *Epiney/Hofstötter* (supra note 35, 187) for example argue that the TRNC is a *de-facto-regime*; *Hoffmeister* holds the view that "the legal status of the TRNC [...] today resembles the one of a local *de-facto* government", *Hoffmeister* supra note 36, 65. Cf. *Frowein*, Das De Facto Regime im Völkerrecht. Eine Untersuchung zur Rechtsstellung „nichtanerkannter Staaten“ und ähnlicher Gebilde (1968).

<sup>117</sup> *Talmon* supra note 111, 259 et seq.

about 3500 square kilometres<sup>118</sup> in the north. Turkey invoked the Treaty of Guarantee,<sup>119</sup> according to which in case of a breach all three guaranteeing powers reserve the right to take action with the aim of re-establishing the state of affairs created by the Treaty. Thereby, Turkey wanted to justify its action caused by increased efforts from the Greek Cypriots' side – especially among the radical terror organisation EOKA-B<sup>120</sup> – to realise *Enosis*, which means union with Greece.<sup>121</sup> These efforts, culminating in the coup d'état organised by radical Greek officers of the National Guard on 15.7.1974 would have provoked Turkish military intervention.<sup>122</sup> Nevertheless, this means that the TRNC arose from a breach of international *ius cogens*, namely the prohibition of the use of force according to Art. 2 para 4 UN Charter which has peremptory character.<sup>123</sup> While parties of a civil war are not bound by Art. 2 para 4 UN Charter, the Republic of Turkey definitely is and cannot justify a breach of *ius cogens* by invoking international obligations like the Treaty of Guarantee. In this regard, according to the policy of the United States for example, “a State has an obligation not to recognise or treat as a state an entity that has attained the qualification for statehood as a result of the threat or use of armed force in violation of the UN Charter”.<sup>124</sup> As the ICJ highlighted in its Advisory Opinion on the Kosovo case, the *ius cogens* argument itself justifies the invalidity of the TRNC's declaration of independence of 1983. Therefore the policy of collective non-recognition is a consequence not only of the breach of the Treaties of Guarantee and Establishment, but first and foremost of the breach of Art. 2 para 4 UN Charter.

Hence, the EU – in line with the respective resolutions of the Security Council and the General Assembly of the United Nations<sup>125</sup> as well as several judgments of the European Court of Human Rights<sup>126</sup> – has at no point recognised the TRNC as a sovereign state.<sup>127</sup> It has rather – expres-

<sup>118</sup> *Oppermann* supra note 23, 925.

<sup>119</sup> According to Art. IV para 2 Treaty of Guarantee, in cases when common or concerted action of the guaranteeing Powers is not possible, each of them has the right to take action with the objective of re-establishing the state of affairs created by the Treaty.

<sup>120</sup> The objective of the EOKA (Ellenikos Organismos Kypriakon Agoniston – Hellenic Organisation for the Struggle for Cyprus) was the realisation of *Enosis* by radical means; see *Ertekin* supra note 21, 3, 10; *Oppermann* supra note 23, 925.

<sup>121</sup> See *Gürbey*, *Zypern. Genese eines Konflikts* (1988) 76 ff.; *Necatigil* supra note 31, 86 et seq.

<sup>122</sup> See *Necatigil* supra note 31, 89 et seq.

<sup>123</sup> *Critical Talmon* supra note 111, 254 et seq.

<sup>124</sup> *American Law Institute*, *Restatement of the Law. Foreign Relations Law of the United States*, Vol 1 (1987) 77.

<sup>125</sup> S/RES/541 (1983), S/RES/550 (1984), S/RES/1117 (1997); S/RES/649 (1990); S/RES/774 (1992); S/RES/939 (1994); S/RES/1092 (1996).

<sup>126</sup> Cf. *Xenides-Arestis v Turkey*, 22.12.2005, ECtHR No 46347/99.

<sup>127</sup> Cf. the Decision of the European Parliament regarding the “Declaration of Inde-

sively and factually – recognised the Greek government of the Republic as being competent to act on behalf of the whole island.<sup>128</sup>

Another criterion to be met by the applicant state is that of being *European*. The Commission has repeatedly highlighted that this criterion has to be interpreted in a cultural and political rather than a geographical way. Therefore, the crucial criterion is that of the existence of a European identity rather than the geographical position of the country.<sup>129</sup> In the case of Cyprus, the existence of a European identity has been approved by the Commission in its Opinion regarding the eligibility of Cyprus for membership, when it concluded that “the intensity of the European influence apparent in the values shared by the people of Cyprus and the conduct of the cultural, political, economic and social life of its citizens, the wealth of its contact of every kind with the Community, all these confer Cyprus, beyond all doubt, its European identity and character and confirm its vocation to belong to the Community”.<sup>130</sup> This conclusion seems plausible with regard to the Greek part of the island. The northern part on the other hand is characterised by its Turkish mentality, which is revealed by language, religion and history. The question whether or not the Turkish cultural tradition goes well together with the common understanding of a European identity has been heavily debated in all over Europe, mainly in the context of Turkey’s status as candidate country. In fact, the answer was given by the European Council in Helsinki 1999, when it concluded that Turkey should be a candidate state for full membership of the Union.<sup>131</sup> This is in line with the decision of the Council of Europe (CoE), which – more than sixty years ago – accepted Turkey as a Member State in 1950. Membership to the CoE is likewise open to “any European State”.<sup>132</sup> Cyprus acceded the CoE in 1961.

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pendence” of the Turkish-Cypriot Part of Cyprus, OJ C 1983 342/52; cf. also ECJ Case C-432/92, *Anastasiou and others*, supra note 58 margin number 40.

<sup>128</sup> See for example COM(1993) 313 final, supra note 68, para 8, where the Commission stated that “[...] the government of the Republic of Cyprus, recognized by the European Community and its Member States as the only legitimate government representing the Cypriot people [...]”.

<sup>129</sup> For a detailed analysis of this criteria cf. *Šarčević*, EU-Erweiterung nach Art. 49 EUV: Ermessensentscheidungen und Beitrittsrecht, in 4 EuR (2002) 461 (465 et seq); *Dorau*, Die Öffnung der Europäischen Union für europäische Staaten. „Europäisch“ als Bedingung für einen EU-Beitritt nach Art. 49 EUV, in 6 EuR (1999) 736; *Vedder*, Art. 49 EUV, in *Grabitz/Hilf* (Hg.), Das Recht der Europäischen Union supplement<sup>40</sup> (2009) recital 10 ff.; *Bruha/Vogt*, Rechtliche Grundfragen der EU-Erweiterung, in 30 VRÜ (1997) 477 (479 et seq).

<sup>130</sup> COM(1993) 313 final, supra note 68, para 44.

<sup>131</sup> Helsinki European Council, 10. and 11.12.1999, Presidency Conclusions para 12.

<sup>132</sup> Art. 4 CoE Statute.

## V. Cyprus as a Member State of the European Union

On 16.4.2003 the Accession Treaty was signed by then President *Tassos Papadopoulos* and then Minister for Foreign Affairs, *George Iacovou*, and ratified by Cyprus on 14.7. of the same year. As a consequence of the negative referendum on the implementation of the Annan Plan in the Greek part of the island four days prior to Cyprus' accession, Cyprus became a Member State of the European Union as a whole, while being still divided internally. Hence, several fundamental questions arose regarding how the implementation of EU law should be realised. In due consideration of the special circumstances in Cyprus and as decided at the Copenhagen European Council 2002, an Additional Protocol on Cyprus<sup>133</sup> to the Act of Accession was adopted. According to Art. 1 para 1 Prot. (No 10) on Cyprus, the application of the *acquis communautaire* is limited to those areas of the island where the government of the Republic exercises effective control. As far as other areas of the island are concerned, the application of EU law has been suspended.<sup>134</sup> Only by means of a unanimous decision, the Council may decide to withdraw the suspension. In case of a settlement of the conflict, it can decide on appropriate adaptations to the terms concerning the accession of Cyprus by means of a unanimous decision following a proposal of the Commission.<sup>135</sup>

Furthermore, Art. 2 para 1 of the Protocol constitutes the legal basis for the definition of terms under which the provisions of EU law shall apply to the borderline between the areas under the control of the government and those that are not. The regulation which was adopted on the basis of this provision will be discussed in the following.

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<sup>133</sup> Protocol (No 10) on Cyprus, OJ L 2003 236/955. According to Art. 355 para 5 lit. b TFEU (former Art. 299 para 6 lit. b TEC) the Treaties are only applicable to the UK Sovereign Base Areas in Cyprus to the extent necessary to ensure the implementation of the arrangements set out in Protocol (No. 3) on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus annexed to the Act concerning the conditions of accession.

<sup>134</sup> As the ECJ ruled in *Apostolides/Orams* (C-420/07 ECR 2009, I-3571 margin numbers 35, 37 et seq), the suspension of the *acquis* as provided for in Art. 1 para 1 Prot (No 10) has to be interpreted narrowly. In this case the Court had to deal with the recognition and enforcement of a judgement delivered by a Court of the Republic of Cyprus concerning immovable property situated in the TRNC by another Member State of the EU. The ECJ concluded that the suspension of the *acquis* does not preclude the application of Regulation 44/2001/EC on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters; see also *Hoffmeister* supra note 36, 67 et seq.

<sup>135</sup> Art. 1 para 2 and Art. 4 Prot (No 10). There is still disagreement whether or not the Direct Trade Regulation has to be qualified as a partial withdrawal from the suspension according to Art. 1 para 2 Prot (No 10) and therefore has to be based on Art. 1 para 2 Prot (No 10) or if it has to be adopted on the basis of Art. 207 TFEU; infra V.2.

### 1. *The Green Line Regulation*

Even though the whole of Cyprus has become a Member State of the Union, due to the suspension of the *acquis* in the northern part of the island, the free movement of goods, services, capital and persons is not possible under the usual no restrictions regime which is applicable for the rest of the single market. Thus, the constitution of the internal market of the European Union had to be adapted by the enactment of additional rules governing the special relations with the TRNC in terms of free movement.

In this context, Art. 2 para 1 Prot. (No 10) constitutes the legal basis for the enactment of appropriate secondary legislation governing trade between the areas under control of the Cyprus government and those that are not. On 29.4.2004, Regulation 866/2004/EC<sup>136</sup>, referred to as Green Line Regulation (GLR), was adopted unanimously by the Council and entered into force on the day of accession of the Republic of Cyprus to the EU on 1.5.2004. The Green Line does not constitute an external border of the Union, but the parts of the island to the north of the Line are outside the customs and fiscal territory, as well as the Area of Freedom, Security and Justice (AFSJ) of the Union.<sup>137</sup> Thus, the adoption of the GLR was a balancing act for the Council. On the one hand it aimed at the facilitation of trade between the areas under the authority of the Cypriot government and those which are not and on the other hand it had to ensure the protection of economic interests of the EU and of the security threatened by illegal immigration from third countries.

#### *a) The Free Movement of Goods within Cyprus*

As regards intra-Cypriot trade, goods that were wholly obtained in the northern part of the island or have undergone their last substantial, economically justified processing in this part of Cyprus, may be transported across the Line without being subject to customs duties or charges having equivalent effect.<sup>138</sup> According to Art. 4 para 5 GLR, the Commission adopted a Decision on the Authorisation of the Turkish Cypriot Chamber of Commerce to issue accompanying documents.<sup>139</sup>

Hence, goods that are crossing the Line have to be accompanied by a movement certificate issued by the Turkish Chamber of Commerce, which is checked by the competent authorities of the Republic of Cyprus after the

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<sup>136</sup> OJ L 2004 206/51 as amended by Council Regulation 587/2008/EC, OJ L 2008 163/1; see *Skoutaris*, The Application of the *Acquis Communautaire* in the Areas not under the effective Control of the Republic of Cyprus: The Green Line Regulation, in 45 CMLR (2008) 727.

<sup>137</sup> See recital 7 of the GLR, *supra* note 87.

<sup>138</sup> See Art. 4 para 1 and 2 GLR, *supra* note 87.

<sup>139</sup> Commission Decision 2004/604/EC, OJ 2004 L 272/12.

goods have passed the Line. As far as these goods are destined to be consummated within the Republic of Cyprus, they are to be treated as not being imported and have the status of EU goods.<sup>140</sup> In contrast to that, goods originating in the north that are destined to be exported to other EU Member States, are treated like third country goods and have to be cleared upon entrance into the EU customs union. This regime is maintained until the suspension of the *acquis* is being withdrawn or in case the Direct Trade Regulation (DTR)<sup>141</sup> is adopted. However, there are almost no goods crossing the Line with destination to other Member States of the European Union – 97 % amount to intra-island trade<sup>142</sup>. One reason for the limited trade might be the fact that there are still trade obstacles in place, like for example the non-recognition of roadworthiness certificates of TRNC commercial vehicles and professional driving licences issued by TRNC authorities in the south. In contrast to passenger cars, lorries, buses and other commercial vehicles cannot move freely.<sup>143</sup>

In the course of the implementation of the GLR, there were several provisions which turned out to be not appropriate. This was the case with the determined value of goods contained in the personal luggage of people that are crossing the Line. According to Art. 6 GLR, persons were allowed to carry goods contained in their luggage up to a total value of EUR 30 per person without being subject to turnover tax and excise duty. By means of the 2005 and the 2008 amendments of the GLR, the value was increased to EUR 135 respectively to EUR 260 in order to encourage the economic development of the north.<sup>144</sup> Apart from that, another point of criticism was that the Regulation did not provide for clear rules regarding the temporary crossing of goods, which are necessary in cases such as exhibitions of TRNC goods in the government controlled areas, goods required for journeys and for sport purposes, as well as service providers crossing the Line in need of certain professional equipment.<sup>145</sup> In this regard, the GLR was amended in 2008 insofar as certain goods – that are not subject to veterinary and phytosanitary requirements – may be introduced from the northern part into the part of Cyprus under the effective control of the

<sup>140</sup> See Art. 4 para 5–10 GLR; according to Art. 4 para 9 GLR, live animals and animal products are excepted. On 10.8.2004, on the basis of Art. 4 para 12 of the GLR, the Commission adopted Regulation 1480/2004/EC laying down specific rules concerning goods arriving from the areas not under the effective control of the government of Cyprus in the areas in which the government exercises effective control, OJ L 2004 272/3.

<sup>141</sup> See *infra* V.2.

<sup>142</sup> COM(2010) 499 final, 21.9.2010, para 2.2. However, since 2007 the overall volume of intra-island trade has increased significantly.

<sup>143</sup> COM(2007) 553 final, 9.9.2007, para 3.5.; COM(2010) 499 final, *supra* note 142, para 2.4.

<sup>144</sup> Art. 1 para 2 Regulation 293/2005/EC, OJ L 2005 50/1 and recital 7, Art. 1 para 3 Regulation 587/2008/EC, OJ L 2008 163/1.

<sup>145</sup> COM(2006) 551 final, 25.9.2006, para 3.5.

government for a period of up to six months. However, for certain goods a declaration by the introducing person and a registration by the customs authorities of the Republic is required.<sup>146</sup>

*b) The Free Movement of Persons*

The temporary regime established by the Council by means of the GLR also provides for rules regarding the crossing of persons. Persons are allowed to cross the Line after having undergone checks performed by the competent authorities of the Republic of Cyprus only. Thereby, EU nationals have to proof their identity, while third country nationals are in need of residence permits issued by the Republic of Cyprus, valid travel documents and in certain cases a visa. The crossing of the Line is allowed at two crossing points only, namely in *Ledra Palace* and *Agios Dhometios*. It is up to the authorities of the Republic of Cyprus to discourage people from circumventing the obligatory checks by crossing at other points of the Line.<sup>147</sup> But the surveillance of the Line has been subject to regular criticism from the Commission since Cyprus' accession in 2004. In this regard, the Commission assumes that the negligent conduct results from the Republic of Cyprus' apprehension that appropriate surveillance could lead to the assumption of the Green Line being an external border. In its annual reports on the implementation of the GLR, the Commission was constantly highlighting the problem of steadily increasing numbers of third country nationals illegally crossing the Line. At least in 2010, due to a decrease of 50 % of the number of illegal immigrants, the Commission qualified the conduct of controls as being satisfactory.<sup>148</sup> As it is the case with illegal immigration of third country nationals across the Line, the Commission was criticising the insufficient surveillance of the Line as required by Art. 6 GLR with regard to the movement of goods. According to the Commission, the estimated volume of smuggled goods might even have exceeded the volume of legal trade.<sup>149</sup>

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<sup>146</sup> This is necessary in case of temporary introduction of professional equipment, of goods destined to be repaired and goods to be exhibited or used at a public event (Art. 4a GLR).

<sup>147</sup> See Art. 2, 3 and Annex I to the GLR, supra note 87.

<sup>148</sup> COM(2006) 551 final, supra note 145, para 2; COM(2007) 553 final, supra note 143 para 2.2.; COM(2008) 529 final, 27.8.2008, para 3.2.; COM(2010) 499 final, supra note 142, para 1.2. Actually, in 2008 the number of illegal immigrants reached its highest level with a number of 5844 persons, decreasing to 2546 in 2009. In this context, according to the Commission, the cooperation of the competent authorities of the Sovereign Base Area and those of the Republic of Cyprus (according to art. 3 GLR) should be particularly improved; see COM(2008) 529 final para 3.2. and COM(2010) 499 final para 1.2.

<sup>149</sup> COM(2007) 553 final, supra note 143, para 3.5.

## 2. Direct Trade between Northern Cyprus and the European Union

Since the TRNC has been recognised solely by Turkey, as from 3.10.1974 the government of the Republic has declared closed all ports of entry into the Republic of Cyprus which are situated in the northern part of the island.<sup>150</sup> As a consequence, no external trade existed apart from that between Turkey and the TRNC and to date – as already mentioned – the volume of goods crossing the Green Line with a destination outside the island remains very limited.<sup>151</sup> Due to the fact that the Turkish community has stated its “strong desire for a future within the European Union”, the General Affairs Council concluded that it was willing to stop the isolation of the Turkish Cypriot community and to encourage the reunification of the island by facilitating the economic development of the Turkish Cypriot community.<sup>152</sup>

In this context, two regulations were proposed by the Commission in July 2004. First, a Regulation establishing an Instrument of Financial Support for encouraging the Economic Development of the Turkish Cypriot Community (Financial Aid Regulation),<sup>153</sup> providing for rules regarding assistance in form of finance procurement contracts, grants, including interest rate subsidies, special loans, loan guarantees and financial assistance.

The second proposal of the Commission is a Council Regulation on special conditions for trade with northern Cyprus (Direct Trade Regulation, DTR).<sup>154</sup> To overcome the economic isolation of the north, the proposal aims at the facilitation of trade between northern Cyprus and the EU customs territory. While the Financial Aid Regulation was adopted on 27.2.2006<sup>155</sup> on the basis of Art. 308 TEC (now Art. 352 TFEU), to date the adoption of the DTR is still pending.

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<sup>150</sup> Order by the Council of Ministers communicated to the International Maritime Organisation on 12.12.1974; cf. also the letter dated 19.8.2005 from the Chargé d'affaires a.i. of the Permanent Mission of Cyprus to the UN, addressed to the Secretary-General, A/59/899.

<sup>151</sup> COM(2006) 551 final, *supra* note 145, para 3.2.

<sup>152</sup> PRES/04/115; regarding financial assistance for the northern part of Cyprus in the pre-accession phase see *supra* note 64.

<sup>153</sup> COM(2004) 465 final, 7.7.2004; *Hoffmeister* (*supra* note 19, 220) argues that the correct legal basis for the Financial Aid Regulation would have been Art. 181a TEC (economic, financial and technical cooperation with third countries, now Art. 212 TFEU) instead of Art. 308 TEC (now Art. 352 TFEU). But the adoption of the Regulation on the basis of Art. 181a TEC (now Art. 212 TFEU) would have wrongly implied that the northern part of Cyprus is a third party, which would be contradictory to the EU's policy of non-recognition of the TRNC. Hence, the application of Art. 308 TEC (now Art. 352 TFEU) is a logical consequence of that policy. Cf. for example *Pitschas*, Art. 181a EGV, in Streinz (Hg.), *EUV/EGV. Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaften* (2003) para 22 et seq.

<sup>154</sup> COM(2004) 466 final, 7.7.2004.

<sup>155</sup> Regulation 389/2006/EC, OJ L 2006 65/5.

On 7.7.2004, the Commission presented its proposal for a DTR<sup>156</sup> based on Art. 133 TEC (now Art. 207 TFEU). The Commission proposed a preferential regime in the form of a tariff quota system for products<sup>157</sup> originating outside the government controlled areas entering the territory of the EU customs union.<sup>158</sup> Thereby certain products from the north should be released for free circulation into the EU customs territory and be exempted from customs duties and charges having equivalent effect. Within the limits of annual tariff quotas, which are to be fixed by the Commission,<sup>159</sup> products benefitting from the proposed preferential regime must originate in the areas not under the effective control of the Cypriot government and be accompanied by the relevant documents issued by the Turkish Chamber of Commerce “or another body duly authorised for that purpose by the Commission”.<sup>160</sup> The proposed introduction of direct trade between EU Member States and the northern part of Cyprus would also bring about the necessity to reopen the northern airports and ports which were closed in 1974<sup>161</sup> by the Greek Cypriot government of the Republic.<sup>162</sup> Even though the presentation of the proposal dates back to 2004, the adoption of the regulation is still pending due to disagreement on the appropriate legal basis and a blockage by the Republic of Cyprus.

As the ECJ ruled in *Titanium Dioxide*<sup>163</sup>, the choice of the legal basis for a measure cannot depend simply on the conviction of an institution. The decision must be based on objective factors which are amenable to judicial review. In the present case, the Commission on the one hand is convinced that the only possible legal basis is Art. 133 TEC (now Art. 207 TFEU), as it was in the context of trade rules with Ceuta and Melilla,<sup>164</sup> Spanish enclaves on the north African coast, which are not part of the customs union likewise the TRNC. However, in contrast to the TRNC, apart from specific exemptions, the *acquis* is fully applicable in Ceuta and Melilla – the enclaves are just outside the EU customs territory. In analogy to the adoption of customs rules with regard to Ceuta and Melilla, according to the

<sup>156</sup> COM(2004) 466 final, supra note 154.

<sup>157</sup> Certain products are exempted from the preferential treatment.

<sup>158</sup> Cf. Explanatory Memorandum of the Proposal, COM(2004) 466 final, supra note 154.

<sup>159</sup> See Art. 4 COM(2004) 466 final, supra note 154.

<sup>160</sup> See Art. 1 para 1, Art. 2 para 2 and Art. 5 COM(2004) 466 final, supra note 154.

<sup>161</sup> See supra note 150.

<sup>162</sup> See *Hoffmeister* supra note 19, 203.

<sup>163</sup> ECJ Case C-300/89 ECR 1991, I-2867 margin number 10 – *Commission/Council*; see also ECJ Case C-440/05 ECR 2007, I-9097 margin number 61 – *Commission/Council* with further references.

<sup>164</sup> Art. 3 para 1 Council Regulation 2913/92/EEC establishing the Community Customs Code, OJ L 1992 302/1 in the version OJ L 2006 363/1. See Council Regulation 1140/2004/EC suspending the autonomous Common Customs Tariff duties on certain fishery products originating in Ceuta and Melilla, OJ L 2004 222/1.

Commission, a regulation determining the conditions of trade with the areas not under the effective control of the Greek Cypriot government must be adopted on the basis of Art. 133 TEC (now Art. 207 TFEU). Due to the changes brought about by the entering into force of the Treaty of Lisbon, the applicable legislative procedure would be the ordinary legislative procedure according to Art. 294 TFEU. This means that – in contrast to the legal situation prior to Lisbon – now the consent of the European Parliament is necessary.

The Council Legal Service<sup>165</sup> as well as the Committee on Legal Affairs of the European Parliament<sup>166</sup> – supported by the government of the Republic of Cyprus – rather hold the view that the proposal has to be qualified as a partial withdrawal of the suspension of EU law with regard to a fundamental area of the common market, namely the free movement of goods. Hence, the regulation would have to be adopted on the basis of Art. 1 para 2 Prot. (No 10), which constitutes the *lex specialis* in the present case and requires unanimity in the Council. In this case the European Parliament is not involved in the enactment of the regulation – a fact that, according to the Parliament, cannot be determinative of the matter.<sup>167</sup>

But neither the Commission's approach seems convincing, nor that of the Greek Cypriot government, the Council Legal Service and the Legal Affairs Committee of the European Parliament. First, as regards Art. 207 TFEU, the objective is to establish a common policy governing external trade relations of the Member States, which is in turn necessary to ensure the functioning of the internal market.<sup>168</sup> In this context the necessity of

<sup>165</sup> Regarding the disclosure of opinions of the Council Legal Service “being of a particularly sensitive nature” the ECJ ruled that it is up to the Council to outweigh the interests; see ECJ joined Cases C-39/05 P and C-52/05 P ECR 2008, I-4723 margin number 69 – *Turco*.

<sup>166</sup> European Parliament, Committee on Legal Affairs, Opinion on the legal basis of the proposal for a Council Regulation on special conditions for trade with those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control, 20.10.2010; see also Press Release of the European Parliament, Committee on Legal Affairs, MEPs reject legal treatment of the northern part of Cyprus as a third country.

<sup>167</sup> See the opinion of the Committee on Legal Affairs of the European Parliament, *supra* note 166. Furthermore, according to the government of the Republic of Cyprus and the Council Legal Service, the reopening of the ports and airports situated in the north of the island irrespective of the decision of the government of 1974, would constitute a breach of Community (Union) as well as International Law. Only in case the Greek government of the Republic consents to the reopening for international traffic – which would be brought about by the adoption of the Regulation by unanimity on the basis of Art. 1 para 2 Prot (No 10) – the latter would be legal; see the Opinion of the Legal Service of the Council, Doc No 11874/04 of 25.8.2004. *Hoffmeister* (*supra* note 19, 218 et seq) on the other hand holds the view that by the adoption of the DTR an incentive would be created for Turkish Cypriots to use ports and airports closed by the government, which is not illegal under international law.

<sup>168</sup> See *Chalmers/Davies/Monti*, *European Union Law*<sup>2</sup> (2010) 638; *Hahn*, Art. 206 AEUV, in *Calliess/Ruffert*, *EUV/AEUV*<sup>4</sup> (2011) para 2; *Weiß*, *Gemeinsame Handelspolitik*,

an external link of measures adopted under the common commercial policy is confirmed by its systematic position within the TFEU. It is laid down within the context of Part 5 of the TFEU, concerning the Union's external action and comprising policies such as "cooperation with third countries and humanitarian aid", "restrictive measures" and "international agreements". Thus, an interpretation of Art. 207 TFEU, so as to include the introduction of a preferential regime governing trade between the Member States and a specific part of a Member State that is outside the customs territory seems to be too extensive and therefore cannot be the correct legal basis. Thus, the introduction of direct trade on the basis of Art. 207 TFEU would wrongly imply that the northern part of Cyprus is not part of the European Union. The argument put forward by the Commission and several academics<sup>169</sup> that the adoption of the provisions with regard to Ceuta and Melilla on the basis of Art. 133 TEC (now Art. 207 TFEU) would justify an adoption of the DTR on the same legal basis is not convincing. As far as Ceuta and Melilla are concerned, even though not explicitly referring to Art. 133 TEC (now Art. 207 TFEU), Protocol (No 2) concerning the Canary Islands and Ceuta and Melilla<sup>170</sup> at least implicitly refers to the common commercial policy. It states that, unless otherwise provided, in its trade with Ceuta and Melilla the Community applies the general arrangements which it applies in its foreign trade.

In the context of Cyprus' accession no such recourse was made. However, the ECJ has explicitly stated that a practice of the institutions of basing measures in a particular field on a specific legal basis cannot derogate from the rules laid down in the Treaties itself<sup>171</sup> and that the legal basis for an act must be determined having regard to its own aim and content and not to the legal basis used for the adoption of other acts which might display similar characteristics.<sup>172</sup> Therefore, such a practice cannot create a precedent binding on the institutions with regard to the correct legal basis.<sup>173</sup>

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in Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union* supplement 43 (2011) para 7; Streinz/Ohler/Herrmann, *Der Vertrag von Lissabon zur Reform der EU. Einführung mit Synopse*<sup>3</sup> (2010) § 18; regarding ex-Art. 133 TEC see *Nettesheim/Duwigneau*, Art. 133 EGV, in Streinz (Hg.), *EUV/EGV. Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft* (2003) para 1 ff.; *Osteneck*, EGV Art. 133, in *Schwarze* (Hg.), *EU-Kommentar*<sup>2</sup> (2009).

<sup>169</sup> Cf. for example *Hoffmeister* supra note 19, 218.

<sup>170</sup> See Art. 1 para 5 of the Protocol; OJ L 1985 302/4.

<sup>171</sup> See for example ECJ Case 68/86 ECR 1988, 855 margin number 24 – *United Kingdom/Council*; most recently ECJ Case C-370/07 ECR 2009, I-8917 margin number 28 – *Commission/Council*.

<sup>172</sup> ECJ Case C-411/06 ECR 2009, I-7585 margin number 77 – *Commission/Parliament and Council*.

<sup>173</sup> See for example ECJ Case 68/86 ECR 1988, 855 margin number 24 – *United Kingdom/Council*; most recently ECJ Case C-370/07 ECR 2009, I-8917 margin number 28 – *Commission/Council*.

Second, Prot. (No 10) on Cyprus, which has the status of primary law like Art. 207 TFEU (former Art. 133 TEC), would constitute the relevant *lex specialis* on which the Regulation would have to be based. Though, in the case of the DTR the Protocol contextually does not provide for an appropriate legal basis. Even though Art. 1 para 2 Prot. (No 10) is related to the “withdrawal of the suspension” of the application of EU law, which comprises also partial withdrawal of the same,<sup>174</sup> the introduction of a special preferential regime in the form of a tariff quota system is not equitable with a withdrawal of the suspension. If it was a withdrawal as provided for by Art. 1 para 2 Prot. (No 10), the *acquis* – in the present case the prohibition of customs duties and quantitative restrictions, respectively all measures having equivalent effect according to Art. 30 and 34 TFEU (former Art. 25 and 28 TEC) – would have to be applied for goods originating in the northern part of Cyprus.<sup>175</sup> However, this is obviously not intended by the proposal of the Commission.

Therefore, in case of an adoption of the DTR either on the basis of Art. 207 TFEU or Art. 1 para 2 Prot. (No 10), it would be very likely that the Regulation would be challenged before the ECJ. Then it would be left to the Court to decide, whether or not the right legal basis was chosen. Presumably, it would hold that the correct legal basis for the adoption of the DTR must be Art. 352 TFEU (former Art. 308 TEC), which, according to settled case-law may be used as the legal basis for a measure only where no other provision of the Treaty gives the EU institutions the necessary power to adopt it.<sup>176</sup> And as neither Art. 207 TFEU nor Art. 1 para 2 Prot. (No 10) constitute the correct legal basis for the DTR and the use of a joint legal basis would divest the ordinary legislative procedure “of its very substance”,<sup>177</sup> the only possible basis can be the flexibility clause. The latter requires unanimity in the Council and – in contrast to Art. 1 para 2 Prot. (No 10) – at least the consent of the European Parliament. Otherwise a new proposal would have to be drafted by the Commission according to Art. 1 para 2 Prot. (No 10), aiming at an actual withdrawal of the suspension of the *acquis*.

<sup>174</sup> See *Hoffmeister* (supra note 19, 216), who states that a *maius ad minus* it is arguable that a partial withdrawal of the suspension is covered by Art. 1 para 2 Prot. (No 10).

<sup>175</sup> For further arguments in favour of the adoption of the Regulation on the basis of Art. 133 TEC (now Art. 207 TFEU) see *Hoffmeister* (supra note 19, 216 et seq); *Türkiye Ekonomi Politikaları Araştırma Vakfı*, Legal Opinion on the Commission Proposal for a Council Regulation on special Conditions for Trade with Northern Cyprus (Direct Trade Regulation), 21.5.2007.

<sup>176</sup> ECJ Case C-166/07 ECR 2009, I-7135 margin number 40 et seq – *European Parliament/Council*.

<sup>177</sup> ECJ Case C-300/89, *Commission/Council*, supra note 163.

### 3. EU Citizenship and the Situation in Cyprus

The Republic of Cyprus as the solely recognised legal entity is competent for the conferral of nationality, the issuance of passports, identity cards, birth certificates and other documents for Greek as well as for Turkish Cypriots in line with the respective national provisions.<sup>178</sup> According to Art. 20 TFEU, “every person holding the nationality of a Member State shall be a citizen of the Union” and “shall enjoy the rights and be subject to the duties provided for in the Treaties”. As a consequence, Turkish and Greek Cypriots – even if they are residing outside the government controlled areas of the Republic – are likewise nationals of Cyprus and therefore EU citizens.

As stated in the preamble of Prot. (No 10), the objective is to make all Cypriot citizens benefit from the accession of Cyprus to the EU.<sup>179</sup> Since the suspension of the *acquis* provided for in Art. 1 para 1 Prot. (No 10) relates to the “areas of the Republic of Cyprus in which the government of the Republic of Cyprus does not exercise effective control” and not personally to the people residing in these areas, the suspension of the *acquis* theoretically should not affect the personal rights of these people as EU citizens, as far as the exercise does not imply a territorial link.<sup>180</sup> Hence, due to the territorial non-application of the *acquis*, the invoking of citizens’ rights before courts and administrative authorities of the TRNC is dependent on TRNC law. If necessary, the persons concerned have to go to courts and competent authorities situated in the government controlled areas to the south of the Green Line.

In general, EU citizens have the right to move and reside freely within the territory of the Member States and not to be discriminated against. In transnational cases, Cypriots residing outside the government controlled areas are benefiting from the fundamental freedoms of the internal market like all other EU citizens. Subsequently, Turkish Cypriots may invoke the right of free movement of workers, services as well as the freedom of establishment.<sup>181</sup> In this regard, they have to be treated like all other citizens of the Union with the result that unjustified discriminations and restrictions are prohibited. However, due to the territorial suspension of the *acquis* in

<sup>178</sup> Cf. the Letter dated 29.6.2005 from the Permanent Representative of Cyprus to the United Nations addressed to the Secretary-General, issued as a document of the UN General Assembly and of the Security Council under reference A/59/857 and S/2005/422 on 29.6.2005.

<sup>179</sup> Cf. the Preamble of Protocol (No 10).

<sup>180</sup> Cf. *Uebe*, Cyprus in the European Union, in 46 German Yearbook of International Law (2004) 375 (385).

<sup>181</sup> Art. 18, 21, 45, 49, 56 TFEU; see for example *Obwexer*, Grundfreiheit Freizügigkeit. Das Recht der Unionsbürger, sich frei zu bewegen und aufzuhalten, als fünfte Grundfreiheit (2009); *Barnard*, The Substantive Law of the EU. The four Freedoms<sup>3</sup> (2010) 223 ff.; *Chalmers/Davies/Monti*, supra note 168, 744 et seq.

the north, citizens from other Member States as well as returnees<sup>182</sup> cannot invoke the above mentioned freedoms outside the government controlled areas in Cyprus. Accordingly, an Italian could not invoke the right of free movement of workers according to Art. 45 TFEU when applying for a job in the TRNC. Likewise, a Cypriot who has studied in Italy and who wants to return to his home district situated outside the government controlled areas in Cyprus, cannot invoke the right of free movement and the non-discrimination rule according to Art. 21 and 18 TFEU. A Cypriot national from the northern part of the island on the other hand who wants to work in Italy could invoke Art. 45 TFEU.

However, according to recent case law, Art. 20 TFEU precludes national measures – even in cases without a transnational link – that have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. If the Court’s argumentation in the *Zambrano* ruling is applied to the situation in Cyprus, Greek and Turkish Cypriots may not be prevented from exercising the substance of the rights, even within the territory of the Republic of Cyprus.<sup>183</sup> If for instance there are national rules in place hindering or preventing Greek or Turkish Cypriots from moving from the northern to the southern part of the island, they should be able to invoke EU law. If they would have to remain in the northern part of Cyprus, they would be deprived of the genuine enjoyment of the substance of rights, as they cannot invoke EU citizens’ rights in the northern part of the Republic.

Apart from the right to free movement, EU citizens have the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence. They also have the right to enjoy the protection of the diplomatic and consular authorities of other Member States in the territory of third countries in which their Member State of origin is not represented. Furthermore they may submit a petition to the European Parliament and apply to the European Ombudsman.<sup>184</sup> Some of these rights are additionally laid down in Title V of the Charter of Fundamental Rights of the EU, which – by means of a cross re-

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<sup>182</sup> In the context of the free movement of workers see for example ECJ Case C-224/98 ECR 2002, I-6191 margin number 30 – *D’Hoop*, when the ECJ held that “it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement”.

<sup>183</sup> ECJ 8.3.2011, Case C-34/09, not yet reported margin number 42 et seq – *Zambrano*; cf. for example *Hailbronner/Thym*, Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEm)*, Judgement of the Court of Justice (Grand Chamber) of 8 March 2011, not yet reported, in 48 CMLR (2011) 1253.

<sup>184</sup> See Art. 20 ff. TFEU.

ference in Art. 6 para 1 TEU – is newly awarded with the same legal status as the Treaties.<sup>185</sup>

In principle, EU fundamental rights are applicable within the scope of application of EU law. Consequentially TRNC authorities are not bound by fundamental rights as laid down in the Charter. Thus, Turkish Cypriots can invoke the rights derived from the Charter – provided that they are judicially enforceable – before the courts of other EU Member States and before courts situated within the government controlled areas of Cyprus. Obviously there are no reasons opposing a unilateral application of EU law by TRNC authorities and courts.

By virtue of the Treaty of Lisbon, an additional citizens' right was introduced, namely the right to organise and participate in a citizens' initiative. Thereby, according to Art. 11 para 4 TEU, at least one million citizens who are nationals of a significant number of Member States may take the initiative and invite the Commission to submit any proposals on matters where citizens consider that a legal act of the Union is required for the implementation of the Treaties.<sup>186</sup> After the enactment of the respective secondary legislation, this provision is directly applicable and confers rights on individuals that can be invoked before national courts. The signatories, who have to be EU citizens and be of the age to be entitled to vote in elections to the European Parliament, have to come from at least one quarter of all Member States. Regulation 211/2011/EU specifies a minimum number of signatories for each State by multiplication of the respective members of the European Parliament by 750. Subsequently, in the case of Cyprus, the minimum number of signatories amounts to 4500. As long as 4500 people are supporting such an initiative, it is irrelevant, if they are belonging to the Greek or the Turkish Cypriot community, respectively whether or not they are living in the government controlled areas. Accordingly, it would be sufficient, if 4500 Turkish Cypriots would support a citizens' initiative without a single Greek Cypriot amongst them. Nevertheless – as far as the involvement of national authorities is necessary – Turkish Cypriots are dependent on the Greek Cypriot government. This is for example the case

<sup>185</sup> See ECJ Case C-555/07 ECR 2010, I-365 – *Küçükdeveci*; cf. for example *Eilmansberger*, Die Anwendung der EU Grundrechte durch nationale Gerichte (und Behörden), in *ecolex* (2010) 1024 (1025).

<sup>186</sup> Art. 11 para 4 TEU; The minimum number of citizens per Member State has been specified by the European Parliament and the Council by means of Regulation 211/2011/EU on the Citizens' Initiative, OJ L 2011 65/1; see *Isak*, Die Anwendung der demokratischen Grundsätze unter besonderer Berücksichtigung der Europäischen Bürgerinitiative, in *Eilmansberger/Griller/Obwexer* (Hg.), Rechtsfragen der Implementierung des Vertrags von Lissabon (2011) 143; *Geiger*, Art. 11 EUV, in *Geiger/Khan/Kotzur*, EUV AEUUV. Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union. Kommentar<sup>5</sup> (2010) 60 f.; *Pichler*, Aufstand der Sterne, in *Pichler* (Hg.), Verändern wir Europa! Die Europäische Bürgerinitiative – Art. 8b (4) Vertrag von Lissabon (2008) 23.

with the designation of competent authorities for the certification of online collection systems and the verification of statements of support.<sup>187</sup>

#### 4. Representation of the Turkish Cypriot Community in EU Institutions

The positions reserved for representatives of the Turkish Cypriot community as provided for by the Constitution of 1960 are still being vacant. Hence, on the EU level, Cyprus is currently represented by the Greek Cypriot community only. The same applies to the forthcoming Council presidency of Cyprus in the latter half of 2012. In contrast to the provisions provided for by the Annan Plan – there is no legal obligation for a proportional representation of the two communities.

In the European Council Cyprus is represented by the Greek Cypriot President of the Republic, *Dimitris Christofias*, and in the Council by the respective ministers of the Greek Cypriot government. The Commission, according to Art. 17 para 4 TEU, consists of one national of each Member State. Even though the Treaties would have provided for a reduction of the number of Commissioners as from 1.11.2014, the European Council has decided that the Commission shall continue to include one national of each Member State.<sup>188</sup> The current Cypriot Commissioner, *Androulla Vassiliou*, is the wife of former President of the Republic of Cyprus and chief negotiator for the accession of Cyprus to the European Union, *George Vassiliou*.<sup>189</sup> Since 10.2.2010 she has been responsible for the portfolio Education, Culture, Multilingualism and Youth.

Currently there are six directly elected persons representing Cyprus in the European Parliament.<sup>190</sup> According to Art. 7 DAA,<sup>191</sup> the two constituent states would have been represented proportionally, which means that each constituent state would have been attributed no less than one third of the Cypriot seats in the European Parliament. However, due to the failure of the Annan Plan there is no legal obligation for a proportional representation. As a matter of fact, currently all six members of the Parliament are of Greek Cypriot origin.

The Court of Justice consists of one judge per Member State, while – according to Art. 19 para 2 TEU – the General Court consist of *at least* one judge per Member State. However, currently both courts are made up of 27

<sup>187</sup> Art. 6 para 3, Art. 8 para 2 and Art. 15 Regulation 211/2011/EU.

<sup>188</sup> See Brussels European Council, 11. and 12.12.2008, Presidency Conclusions para 2.

<sup>189</sup> George Vassiliou was President from 1988 to 1993.

<sup>190</sup> The six Cypriot MEPs are *Hadjigeorgiou Takis*, *Kasoulides Ioannis*, *Mavronikolas Kyriakos*, *Papadopoulou Antigoni*, *Theocharous Eleni* and *Triantaphyllides Kyriacos*; see the website of the European Parliament, at <http://www.europarl.europa.eu> (25.9.2011).

<sup>191</sup> See supra note 77.

judges.<sup>192</sup> Thereby, national governments nominate their respective candidates whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their countries. Before the governments of the Member States make their appointments, a panel comprising seven experts of recognised competence gives a non-binding opinion on the candidates' suitability for the position.<sup>193</sup> Since its accession, Cyprus has been represented by judge *George Arestis* in the ECJ and by judge *Savvas Papasavvas* in the General Court, both of Greek Cypriot origin.<sup>194</sup>

Likewise, the Court of Auditors consists of one national of each Member State,<sup>195</sup> as proposed by the respective government and Cyprus is represented by former Chief Revenue Officer of the Republic, *Lazaros S. Lazarou*. Finally the twelve persons<sup>196</sup> representing Cyprus within the Committee of the Regions are again all of Greek Cypriot origin. The same applies to the six out of 344 members of the Economic & Social Committee who were appointed by the Greek Cypriot government of the Republic of Cyprus for the term 2010–2015.

### 5. *The Turkish Language in the European Union*

To ensure transparency, all institutions and advisory bodies of the EU may be addressed in any of the 23 Treaty languages<sup>197</sup> and EU citizens have the right to obtain an answer in their respective language. Even though according to Art. 3 para 1 of the 1960 Cyprus Constitution, the official languages of the Republic of Cyprus are both, Greek and Turkish, Turkish is not a Treaty language of the European Union. Accordingly there is no right for Turkish Cypriots to obtain an answer in their language.<sup>198</sup> In its report *Europe and the Challenge of Enlargement*, which was adopted with regard to the 2004 enlargement of the Union, the Commission claimed that for principal reasons, the translation of legal acts and important documents into the official languages of all Member States should be retained.<sup>199</sup>

<sup>192</sup> Art. 48 Prot. (No 3) on the Statute of the Court of Justice of the European Union, OJ C 2010 83/210.

<sup>193</sup> Art. 19 para 2 TEU and Art. 253 ff. TFEU.

<sup>194</sup> Currently there is no Cypriot member of the Civil Service Tribunal.

<sup>195</sup> Art. 285 ff. TFEU.

<sup>196</sup> There are six full and six alternate members representing Cyprus.

<sup>197</sup> For the Treaty Languages see Art. 55 para 1 TEU.

<sup>198</sup> Depending on whether the persons concerned are Greek or Turkish, judgments had to be drafted in the respective language (Art. 3 para 4 Cyprus Constitution). All authoritative acts (no matter if they are legislative, executive or administrative) had to be drafted and published in the official Gazette in both languages (Art. 3 para 2 Cyprus Constitution).

<sup>199</sup> *Commission of the European Communities, Europe and the challenge of Enlargement* (24.6.1992) para 26.

The specific question, if Turkish should have become an official language of the EU in case of Cyprus' accession was first raised by the Commission in its Opinion on the Application by the Republic of Cyprus for Membership.<sup>200</sup> In this context, though, no preference of the Commission was identifiable. However, the Draft Act of Adaption to the Terms of Accession which would have been relevant in case of an accession by a united Cyprus on the basis of the Annan Plan, would have provided for a provision, stating that Turkish would become an official and working language of the EU institutions.<sup>201</sup> But due to the negative referendum on the Annan Plan, today Turkish is neither an official nor a working language of the Union. However, according to the Council, the question of an eventual upgrading of Turkish should be part of a comprehensive settlement of the Cyprus problem.<sup>202</sup>

At least there are alternatives for the Member States to upgrade specific languages that are neither official nor working languages of the EU but of particular national importance. First, the TEU itself newly provides for the possibility of translating the Treaties into other languages which are constitutionally awarded with official status in all or part of the territory of a Member State. The respective Member State has to provide for a certified copy of the translated text to be deposited in the archives of the Council.<sup>203</sup> The intention of a Member State to do so should have been communicated to the Council within six months after the signing of the Treaty of Lisbon – until 1.6.2010. Due to the fact that the translation is not binding upon the Union and its Member States, the provision particularly aims at the information of minority groups<sup>204</sup> and reaffirms the respect for the Union's rich cultural and linguistic diversity.<sup>205</sup> So far, more than two years after the entering into force of the Treaty of Lisbon,<sup>206</sup> the Council has been informed solely by the Permanent Representation of the Netherlands about the intention to translate the Treaty of Lisbon into the Frisian language. However, there was no such communication from the government of the Republic of Cyprus with regard to the Turkish language.

Second, by means of administrative arrangements, Member States have the possibility to designate bodies that translate written communications

<sup>200</sup> COM(1993) 313 final, supra note 68, para 40.

<sup>201</sup> Art. 8 Draft Act of Adaption to the Terms of Accession of the United Cyprus Republic to the European Union, supra note 77.

<sup>202</sup> E-4118/08, OJ C 2009 40/178.

<sup>203</sup> Art. 55 para 2 TEU in conjunction with Art. 358 TFEU; cf. *Cremer*, EUV Art. 55 (ex-Art. 53 EUV), in Calliess/Ruffert (Hg.), EUV/AEUV<sup>4</sup> (2011) para 7 et seq.

<sup>204</sup> *Geiger*, Art. 55 EUV, in *Geiger/Khan/Kotzur* supra note 186, 172 f.; regarding the identical provision in the Treaty establishing a Constitution for Europe (TECE), OJ C 2004 310/1, see *Heintschel von Heinegg*, Art. IV-448, in *Vedder/Heintschel von Heinegg* (Hg.), *Europäischer Verfassungsvertrag. Handkommentar* (2007) 1022 et seq.

<sup>205</sup> Cf. Declaration (No 16) on Art. 55 para 2 TEU, OJ C 2010 83/344.

<sup>206</sup> Information of the General Secretariat of the Council 6.5.2011.

of citizens to and the respective answers of EU institutions and bodies from languages other than those referred to in Regulation (EEC) 1/1958<sup>207</sup>. Furthermore, certified translations of acts adopted in the former codecision procedure which is now the ordinary legislative procedure according to Art. 294 TFEU can be added to the archives of the Council and are published on its website. It is also possible to use languages not mentioned in Regulation 1/1958 for speeches in meetings, provided this is communicated reasonably in advance and the necessary equipment and staff are available.<sup>208</sup> This possibility was opened up by the Council, inviting other EU institutions to equally conclude above mentioned administrative arrangements with the Member States. Even though several arrangements were concluded,<sup>209</sup> there were once again no efforts from the government of the Republic of Cyprus to do so with regard to the Turkish language.

## VI. Conclusion

First of all, Cyprus' accession to the European Union is in full compliance with European as well as international law. The decision to recognise the government of the Republic of Cyprus as the actor being competent to legally act on behalf of the whole island is in line with the policy of the international community in this regard. It is much more a political issue to allow for the accession of the internally divided island and thereby accept the partial exclusion of the Turkish Cypriot community. A more diplomatic and proactive position of the Union in the course of the conduct of the accession process could nevertheless have contributed positively to an overall solution of the problem, even after the failure of *Annan*. It is evident that if the government of Cyprus would have joined the EU just on behalf of the southern part of the island, the de facto division of the country would have become de jure.<sup>210</sup> Therefore it is comprehensible that the latter was not the preferred choice of the Greek Cypriots. Nevertheless, even though the Annan Plan failed a few days prior to the accession, at least specific parts of the compromise could have been resumed. This would have been appropriate all the more against the background that there was a majority of Turkish Cypriots voting in favour of the Plan. After all, certain concessions would have constituted a political signal for Turkish Cypriots, but the EU failed

<sup>207</sup> OJ L 1958 17/385.

<sup>208</sup> Council Conclusion of 13.6.2005 on the official use of additional languages within the Council and possibly other Institutions and bodies of the European Union, OJ C 2005 148/1.

<sup>209</sup> See the administrative arrangements between Spain and the Council, OJ C 2006 40/2, and between the UK and the Council, OJ C 2008 194/7.

<sup>210</sup> See *Nugent* supra note 65, 136 et seq.

to provide for an appropriate backup plan for the case of an accession of a divided island. Though, even if there was no alternative to *Annan*, there would have been options to at least symbolically open the door for people from the northern part of Cyprus. This would have been possible by certain concessions from the Greek Cypriots' side, which have been made for example with regard to the introduction of the Euro. In the course of Cyprus' joining of the euro area in January 2008, with a view to a forthcoming full membership of the whole island, euro coins were introduced being engraved with inscriptions in both languages – Greek and Turkish. In this regard the upgrading of the Turkish language on the EU level by the conclusion of administrative arrangements or the translation of the Treaties according to Art. 55 para 2 TEU could have been other possible concessions.

Apart from the lack of transparency, another problem is that of representation. Since Turkish Cypriots have not been exercising the functions as provided for by the bi-communal regime of the 1960 Constitution, they have neither been represented in the Cypriot government nor in the EU institutions. In this context, there is still dissent regarding the question, if Turkish Cypriots have voluntarily resigned from their functions or if they were effectively prevented from exercising these rights. At least it is confirmed that the Greek Cypriot community under *Markarios*' leadership violated the 1960 settlement by amending unalterable provisions of the Constitution. However, according to Art. 10 para 1 TEU, the functioning of the Union is based on representative democracy. This principle is first and foremost reflected in the direct representation of citizens in the European Parliament, but also in the indirect representation in the European Council and the Council. Even though the question of composition of national governments is exclusively a national issue, in the case of Cyprus, the complexity of the internal situation was common knowledge to European actors before its accession. And it was also common knowledge that the majority of Turkish Cypriots voted in favour of the UN settlement which would have provided for appropriate rules ensuring effective participation in national as well as in EU institutions. Instead of simply suspending the application of EU law in the north of the island, the objective should have rather been to reach consensus on appropriate terms of accession that are in the spirit of the bi-communal regime created by the 1960 settlement and pursued by the Annan Plan. However, at present not a single member of the Turkish Cypriot community is representing Cyprus on the EU level, which will be especially evident when Cyprus will take over the rotating EU presidency in 2012.

As regards citizens' rights according to Art. 20 TFEU and as laid down in the Charter of Fundamental Rights, the status of Turkish Cypriots is twofold. On the one hand, within the territory of other EU Member States, they can invoke their rights such as the right to move and reside freely

without being discriminated against likewise all other EU citizens. However, on the other hand, within the areas to the north of the buffer zone, the exercise of certain citizens' rights is limited due to the territorial non-application of the *acquis*. This is the case with the newly introduced instrument of direct democracy, the right to organise and participate in a citizens' initiative, where Turkish Cypriots face additional hurdles. The same applies with regard to the right to submit a petition to the European Parliament and to obtain an answer in the same language, which is not possible in Turkish, as well as to the right to cast votes for the European Parliament. Even though Turkish Cypriots are entitled to vote like citizens belonging to the Greek Cypriot community, they can cast their votes in the government controlled areas only and therefore have additional expenses, be it financially or temporally.

Though, due to the fact that the Greek Cypriot government does by far not make the most from the opportunities available to it in order to integrate the Turkish Cypriot community, it seems that they are still sceptical on the issue. However, the Greek Cypriots' approach is twofold. On the one hand, it is constantly tried to avoid the impression that the Green Line constitutes an external border, but on the other hand there seem to be no effective efforts to involve Turkish Cypriots. The problem is that now there are no incentives for them to do so, while before accession the incentive would have been membership to the Union.

As *Uebe* stated it, the numerous efforts to find a solution for the problem in Cyprus "have ended in the 'diplomats' graveyard".<sup>211</sup> But there seems to be gleams of hope. While in June 1993 the Commission assumed that the accession of Cyprus would bring the two communities closer and have a positive impact on the settlement of the conflict by creating the necessary conditions,<sup>212</sup> it was only four years after Cyprus' accession and the failure of the Annan Plan, on 21.3.2008, when it was agreed that fully fledged negotiations between the leaders of the two communities should be resumed.<sup>213</sup> Instead of the European Union, it is the United Nations again, under whose mediation – namely by Special Advisor of the Secretary-General on Cyprus, *Alexander Downer*<sup>214</sup> – a solution to the conflict should be found. The negotiations should involve not only the leaders of the two communities but also the Guarantor States and the European Union. The fact that an eventual solution of the conflict should be elaborated under the

<sup>211</sup> *Uebe* supra note 180, 378.

<sup>212</sup> COM(1993) 313 final, supra note 68, para 46.

<sup>213</sup> Turkish Cypriots were represented by *Mehmet Ali Talat*, then President of the TRNC, and the Greek Cypriot Community was and still is represented by the President of the Republic of Cyprus, *Demetris Christofias*.

<sup>214</sup> His mandate is to assist the two parties in the conduct of the negotiations aimed at reaching a comprehensive settlement of the Cyprus problem, S/2009/248.

auspices of the United Nations instead of the European Union is plausible against the background that since Cyprus has acceded the EU, the latter is no longer a neutral actor.

There was already consent among the two moderate leaders that at the end of the road there should be a single Cypriot state with common citizenship for Turkish and Greek Cypriots. The compromise should be “a bicomunal, bizonal federation with political equality” as the two Presidents have stated in June 2008. Since the negotiations have started, on the level of the leaders more than 100 meetings have taken place. In the course of these sessions, the two sides have reached partly convergence in relation to the question how Cyprus should be represented in the institutions of the European Union. However, there are still divergences on the incorporation of the settlement into EU law and possible derogations from the EU *acquis*.<sup>215</sup> Due to elections in both parts of the island, there has been some concern that the process would not be driven forward fast enough and the negotiations could lose momentum.<sup>216</sup> Subsequently, on 18.4.2010, the moderate TRNC leader *Mehmet Ali Talat* was replaced by *Derviş Eroğlu* who is said to be a hardliner. At least he does not intend to revisit questions that were already settled between *Christophias* and *Talat*.<sup>217</sup>

Of course, the present situation is extendable, especially if one thinks of the consequences of *Anastasiou II*, the EU's efforts to realise direct trade and the regime of financial support for northern Cyprus. Nevertheless, the objective should be to find an overall solution for the problem, rather than extending the present unsatisfying de facto separation of the island by the enactment of pragmatic short term rules. There is for example the question regarding the correct legal basis for the Direct Trade Regulation, which has been up for discussion since 2004. Irrespective of the fact that in this regard neither the Commissions' position nor that of the European Parliament, the Council Legal Service and the Greek Cypriot government seems convincing, the attention should be rather directed to an overall solution of the problem. Though, by the overhasty admission of Cyprus, the EU has missed its opportunity to contribute to such a comprehensive solution of the conflict at an early stage. Due to that failure it is now once more left to the United Nations to step into the breach. However, in continuation of the half-hearted compromise of 2004, an internally divided Member State will take over the Presidency of the Council of the European Union in the latter half of 2012.

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<sup>215</sup> So far, details of the compromise have not been disclosed.

<sup>216</sup> Assessment report of the Secretary-General on the status of the negotiations in Cyprus, 4.3.2011, S/2011/112; see also S/RES/1953 (2010); S/RES/1930 (2010); S/RES/1898 (2009); S/PRST/2009/10.

<sup>217</sup> See *Vogel*, MEPs consider allowing EU trade with northern Cyprus, European Voice, at <http://www.europeanvoice.com> (26.9.2011).

*Summary*

In July 2012 the Republic of Cyprus will take over the rotating Presidency of the Council of the European Union for the first time. Within the period of six months, the respective members of the government of the Republic will chair all configurations of the Council with the sole exception of the Foreign Affairs Council. While the preparations run at full speed in Cyprus, Turkish Prime Minister *Recep Tayyip Erdogan* threatened that he would freeze all EU-Turkey relations during Cyprus' Presidency, due to the still unsolved conflict between the Greek and the Turkish Cypriot Community. This makes one aware of the fact that even though the insular state has formally acceded the Union as a whole, the factual membership of a united Cyprus seems to be still far out of sight. Although it looks like the situation has calmed down during the seven years of EU membership, in the context of Cyprus' prominent role within the EU apparatus, the controversy of the issue is under the spotlight again. The present article outlines current developments in Cyprus' EU relations such as the exceptional status of Turkish Cypriots as EU citizens and their representation within EU institutions, the practical implementation of the Green Line Regulation and the desperate efforts to stop the economic isolation of the north.