Foreword

Although much has been written about the 'Cyprus issue' this book takes a perspective which is not much discussed in the literature, legal or otherwise, but which is of great significance for the legal order of the European Union as well as for Cypriots, Turks and Greeks—how does the EU legal order deal with the de facto division of the island? What legal solutions have been found and what impact do those solutions have on the concept of EU citizenship and on human rights as among the general principles of Community law, and on the working of the internal market? To what extent might the EU *acquis* be affected by, and to what extent could it accommodate, a future settlement? And what role might the EU play in mediating or constructing a settlement, given Cypriot, Greek and UK membership of the EU, and Turkey's candidate status?

The subject is a difficult one for two somewhat different reasons. On the one hand it involves highly technical questions addressing the application of EU free movement law, and its interaction with both the preferential regime established by the EC-Turkey Association agreement and customs union and the special regime established by the Protocol on Cyprus and subsequent legislation. On the other hand it is of course highly political and, as the author himself points out, not only are there two conflicting narratives with respect to the history of the Cyprus issue, but also—and harder to deal with—the vocabulary used to describe the current position and possible future solutions is rarely neutral. This book does an excellent job of steering between the two dangers of such a close attention to legal detail that the larger issues of principle are lost, and an approach which is politically aware but does not do justice to the genuinely interesting legal questions posed. In Chapter 1 these dangers are brought into the open and a workable methodology is suggested, that of illuminating the way in which what appears to be a technical and depoliticised EU legal approach has in fact a highly political context and outcome. The result is a fascinating and engaged book, offering a balanced and realistic analysis of an important issue.

Chapter 2 sets the legal and historical context up to the failure of the Annan Plan; the emphasis is on the interaction with the EU, in particular the Cyprus accession process and the EU's reaction to the Annan Plan failure, giving rise to Protocol No.10 to the Accession Treaty. This chapter is important not only in explaining the path to the present impasse, but also in emphasising the principles which both communities have adopted as the basis for any future settlement—principles which are then tested against EU law in chapter 5. Thus this chapter looks forward as well as back. It also looks sideways, in the sense that it compares the Cyprus situation to other instances of territorial or geographical exceptions to the application of the *acquis*, or where the *acquis* applies under special conditions, including the French DOMs, the Åland Islands, the Channel Islands and Greenland.

Chapter 3 examines the position of individuals affected by the de facto division of Cyprus: the application of Union citizenship, fundamental rights and the free movement rules. Among its insights are the inseparable nature of these three issues and the non-territorial nature of the rights in question, while the suspension of the *acquis* is territorially-based. As far as citizenship is concerned, the situation in Cyprus tests in a very concrete way the link made by the EU Treaties between Union citizenship and Member States' national laws as well as the question of how the rights associated with the 'fundamental status' of Union citizenship can be exercised. The cases discussed, including the *Orams* case, demonstrate the limits of the judicial process to provide adequate solutions: effective protection of fundamental rights will only be possible in the context of a permanent settlement and the suspension of the *acquis* established by Protocol No 10 must be regarded as temporary. This important case also clarifies the scope of the suspension of the *acquis*: it does not simply create a 'no go' area for Community law, nor is it some kind of 'sanction' against the 'TRNC'. It should be limited to what is necessary to achieve its objective i.e. of not imposing on Cyprus, as an EU Member State, obligations with which it cannot in practice comply. The conclusion of this chapter—which is then picked up again in Chapter 5—is that certain barriers to free movement are inherent to the bi-zonal approach to a settlement and that this being the most likely basis for a long-term solution, the Union should be prepared to accept some long-term derogations to even the fundamental freedoms.

Chapter 4 turns to the free movement of goods. Here we can see a distinct evolution in the position, from the pre-accession *Anastasiou* cases, to the current Green Line Regulation, and then to the possibility of a Direct Trade Regulation. Perhaps even more clearly than with the movement of people, the challenge has been to break down the economic isolation of the northern 'areas' while remaining sensitive to the unwillingness of the Cypriot government to any act which might imply recognition of the 'TRNC' authorities. Again we can see that the suspension of the *acquis* does not mean that there is no movement at all, rather that the free movement regime is limited and controlled. 'Technical' solutions have been found which facilitate the integration of the northern 'areas'. However the author points to the limits of what has been achieved by the Green Line Regulation, especially where trade with other EU Member States is concerned. The controversial aspects of the Direct Trade Regulation are explained and the reasons why the kind of compromise which allowed for the enactment of the Green Line Regulation has not been possible—the political context of 'technical' solutions becomes apparent. In its final section, the chapter looks at the possibility of the 'Taiwan-isation' of northern Cyprus and its possible advantages and dangers.

In Chapter 5 we turn to the question of a possible future settlement and the impact of Cyprus' EU membership from two perspectives: first, the implications of the Union taking a role in the process as mediator or 'honest broker'; and second the constraints, if any, imposed by EU membership upon the terms of a possible settlement. As to the first, the author puts forward a persuasive argument that the EU lacks the legal competence to act, and that in any event it cannot any longer be (if

it ever was) a credible neutral party. Just as the Annan Plan was to be implemented via the accession of Cyprus to the EU, so a future settlement could be incorporated legally into the accession process for Turkey; it does indeed seem unlikely that a settlement would be reached without agreement on Turkish accession.

What conclusions can then be drawn from this study? It is apparent that to speak of 'the suspension of the *acquis*' does not do justice to the complexity of the regime currently in place with respect to the EU *acquis*. This book demonstrates the rather remarkable pragmatic flexibility of the *acquis*: the post-accession legal regime is viable and working. However it also clearly concludes that the current *modus vivendi* between the EU *acquis* and Cyprus is certainly not an optimal solution and should be seen as temporary and not as a model for other contested territories. It argues that the role of the EU, rather than becoming a key mediator, should be to facilitate a settlement through the use of its instruments to further integration, and by being prepared to accommodate the necessary long-term derogations from the *acquis* that are likely to be required. This is more modest than full-blown conflict resolution but more constructive. As far as other potential candidates are concerned (such as Serbia / Kosovo), Cyprus both provides an object lesson in the importance of resolving such conflicts before membership, and (somewhat paradoxically) represents the limits of accession conditionality as a lever to achieve change. Apart, then, from teasing out and clarifying the intricate question of exactly how EU law applies in the 'areas not under the effective control of the Republic of Cyprus' and to certain EU citizens, this book addresses a number of issues which have a broader significance for the European Union: the flexibility of the EU *acquis*, its ability to accommodate even such an unprecedented situation of contested authority in part of its territory; the attempt to use the legal–political process of pre-accession as a catalyst for conflict resolution and the limits to this; the difficult question of identifying where the theoretical limits of legally permissible derogations from the *acquis* might be. Does an amendment of EU primary law through an accession Treaty enable any derogation, or might there be limits, and if so, where? What are the implications for the EU of the book's conclusion that the non-derogable core of the *acquis* is found in the principles referred to in Article 6 TEU but not the four freedoms? By systematically addressing one of the most intractable challenges for the unity of Europe, this book prompts us to reflect on the fundamentals of the EU legal order and the foundations of the European Union.

Marise Cremona, Florence, August 2010

Acknowledgements

In Spanish it is fairly common to wish for a life *como una película*. My life, during the years of my doctoral research that has now been turned into a book, has been like many of them. Now that this research has reached its grand finale, it is the most appropriate moment to thank the actors in those movies.

***Entre les Murs* (Laurent Cantet, 2008)**

First and foremost, I am greatly indebted to my supervisor Professor Marise Cremona not only for her constant encouragement and her timely and rigorous guidance on every chapter of the book but also for her unfailing support even against the most unfounded hysterical nationalist attacks. My sincere thanks are due to (in alphabetical order) Dr K Agapiou-Josephides, Professor A Antoniadis, Professor M Attalides, Professor A Auer and the whole Constitutional Convention for Cyprus Research Team, Professor P van den Bossche, Dr K Chrysostomides, Professor V Coufoudakis, Professor GR De Groot, Mr A Demetriades, Mr M Droushiotis, Professor K Featherstone, Dr F Hoffmeister, Professor E Kaymak, Dr J Ker-Lindsay, Professor P Koutrakos, Dr S Laulhé Shaelou, Dr N Loizides, Professor K Nicolaidis, Dr P Nicolaides, Dr K Özersay, the late Professor G Papadimitriou, Professor EU Petersmann, Professor H Schneider, Professor J Shaw, Professor A Sözen, Dr Z Stavrinides, Dr A Strand, Dr N Tocci, Professor N Walker and Professor JHH Weiler for sharing their views on various aspects of the Cyprus issue and the book.

Special thanks go to the Staff of Hart Publishing. Without their help and their valuable comments, this publication would not have been possible.

***Casablanca* (Michael Curtiz, 1942)**

Rick: Louis, I think this is the beginning of a beautiful friendship.

As great 'Bogie' would have put it, the years I spent writing this book and especially my time in EUI where I undertook my doctoral research have led to 'the beginning of many beautiful friendships'. From the people I met during my last years in Florence I should mention Vicky, Nikolas, the other members of the *παραλίστα* and the ladies in the Academy. As for the old cohorts, it has been a great honour to meet and spend time with *les enfants terribles* of the Greek historiography, Giorgos (*Γεροδάσκαλος*) Antoniou, Sakis (*Compagno*) Gekas and Kostis (*Ινστρούκτωρ*) Kornetis. I feel fortunate to have met Hara Kouki, a real companion to my long and difficult endeavour to deconstruct the world and Stathis Georgiadis, who has made me a demanding customer when I visit an *ουζερί* and has admitted in my presence

that *è un mondo difficile*... Life would have been so much more boring without Elias (*The Spirit*) Dinas. We have together comprehended what *mala vida* means and we are preparing ourselves for *mala vyntra. Ανάποδα* . . . Special thanks go to my flatmate for three years, Vassilis P Tzevelekos. Despite the fact that I have benefited greatly from his deep knowledge of international law, it is mainly the highs and the lows of the cohabitation we have shared that I will always keep in my memory.

Much more than a friendship has been my relationship with my favourite librarian, Anna, who has provided me with another very important reason *to remember, remember the 17th of November*. I am really grateful that she managed to distract me from this book in Bologna, Florence, London, Barcelona, Epidaurus, Tate Modern, Anafi, MACBA, Koufonisia, Venice, Samothraki, Athens and has been extremely patient and caring during my moments of frustration and panic. *Proxima estación* . . .

In true *Casablanca* terms, and before the plane leaves, I could say to all of them: we will always have Florence . . .

Amici Miei **(Mario Monicelli, 1975)**

My friends outside the Institute have been a breath of fresh air when this project and life in the academic world, in general, seemed completely meaningless. A million thanks to Katerina, Vaso, Phoebe, Nikos and Tasos with whom distance does not make any difference and who are always ready for new adventures . . . A special mention is absolutely due to Carol Ni Ghiollarnath. The book has greatly benefited from her excellent language correction.

The Royal Tenenbaums **(Wes Anderson, 2001)**

I simply have no words to express my gratitude to my family, without the support and love of whom, this project and other endeavours would have never been accomplished. In recognition of my untellable gratitude, this book is dedicated to them: *στην Αλέξια, τη Βέρα και το Γιάννη*.

PS *Seul Contre Tous* **(Gaspar Noé, 1998)**

On 6 December 2008, I was working on the first draft of this book. That evening, I was out celebrating my *onomastico*. By the time I returned home, Alexis was already dead. And then? . . . And then, I realised that while I was studying, '*the times they [were] a-changing*' . . . While I was writing a thesis, a sixteen-year-old boy had to stand *upright and solitary in the terrible solitude of the crowd* (*Μανώλης Αναγνωστάκης, Μιλώ*). To all those people that at some moment in their life found themselves *seul contre tous*, this book is also dedicated.

Nikos Skoutaris

Athens-Florence-Maastricht-Barcelona, May 2010

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Το μετέωρο βήμα του πελαργού

The suspended step of the stork

Leyleğin Geciken Adımı

I

Introduction

Τεύκρος: . . . ες γην εναλίαν Κύπρον, ου μ' εθέσπισεν
οικείν Απόλλων, όνομα νησιωτικόν
Σαλαμίνα θέμενον της εκεί χάριν πάτρας.'

Teucer: . . . Apollo has declared that my home shall be
in the sea-girt shores of Cyprus, giving to it
the name of Salamis, my island home,
in honour of that fatherland across the main.

Helen, Euripides (412 B.C.)

1. INTRODUCTION

IN THE FIRST film of what could be loosely considered Theo Angelopoulos' *Trilogy of Borders, The Suspended Step of the Stork* (1991), there is an image of a stranger standing on a bridge poised over the dividing line between two countries. He has one leg suspended in mid-air, like a stork. 'If I take one more step I am . . . somewhere else, or . . . I die'.

Allegorical as it may be, this powerful scene could be a metaphor for the realities that the Cypriots have been facing for four decades[1] and even—to a lesser extent—the present *status quo* on the island. Since the break-up of the Republic in 1963–1964, after which the vast majority of the Turkish-speaking citizens of the Republic of Cyprus were secluded in enclaves and especially in the aftermath of Turkey's 1974 military intervention when the well-known geographical division of the island took shape, the two ethno-religious segments have been separated by a Green Line. Only after the massive demonstrations of the Turkish Cypriots in April 2003, did the regime in the North partially lift the restrictions on the free movement of people across the island, making it possible for the Cypriot 'storks' to start 'stepping' wherever they wanted. Acceptable rules for both communities with regard to the crossing of persons and goods were finally provided with the implementation of the

[1] See especially the ECHR cases of *Solomou and Others v Turkey* (Application No 36832/97) (judgment 24 June 2008) [not yet reported] and *Isaak v Turkey* (Application No 44587/98) (judgment 24 June 2008) [not yet reported] concerning the killings of two Greek Cypriots that crossed the dividing line in August 1996.

Green Line Regulation,[2] two days before the accession of the Republic of Cyprus to the Union.

Despite the partial normalisation of relations between the two ethno-religious segments on the island, Cyprus' accession to the EU meant neither its reunification nor the restoration of human rights or a complete end to the political and economic isolation[3] of the Turkish Cypriot community. Ironically enough, the accession of the island to the EU actually added a new dimension to the division of the island. According to Protocol 10 on Cyprus of the Act of Accession 2003, the Republic of Cyprus joined the Union with its entire territory. However, due to the fact that its Government cannot exercise effective control over the whole island, pending a settlement, the application of the *acquis* is 'suspended in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not have effective control'.[4]

It is of critical importance to note, however, that the scope of the suspension is territorial: Cypriots residing in the northern part of the island are able to enjoy, as far as possible, the rights attached to Union citizenship that are not linked to the territory as such,[5] as we shall see in chapter three. Moreover, until the withdrawal of the suspension takes place, Article 2 of Protocol No 10 has allowed the Council, as already mentioned, to define the terms under which the provisions of EU law shall apply to the 'Green Line'.[6] On the other hand, Article 3 allows measures with a view to promoting the economic development of those areas, such as the Financial Aid Regulation.[7] In addition to the above-mentioned legal matrix that allows the partial application of the *acquis* in northern Cyprus, there is the case law of several national and international courts that discuss the suspension of the *acquis* directly or indirectly.

[2] Council Regulation (EC) No 866/2004 of 29 April 2004 on a regime under Article 2 of Protocol No 10 of the Act of Accession 2003 [2004] OJ L206/51.

[3] In view of the Turkish Cypriot approval of the Annan Plan in April 2004, the then UN Secretary-General, (Report of the Secretary-General on his mission of good offices in Cyprus of 28 May 2004, UN Doc S/2004/437), expressed his hope that the Members of the UN Security Council 'can give a strong lead to all States to cooperate both bilaterally and in international bodies to eliminate unnecessary restrictions and barriers that have the effect of isolating the Turkish Cypriots and impeding their development' (para 93). More importantly, the EU's General Affairs Council on 26 April 2004 said in its Conclusions (8566/04 (Presse 115)) that: 'The Council is determined to put an end to the isolation of the Turkish Cypriot community and to facilitate the reunification of Cyprus by encouraging the economic development of the Turkish Cypriot community'. For the opposing views of the two communities on the isolation of the Turkish Cypriot community see eg M Brus, M Akgün, S Blockmans, S Tiryaki, T van den Hoogen, W Douma, *A Promise to Keep: Time to End the International Isolation of the Turkish Cypriots* (Istanbul, Tesev Publications, 2008); E Kozakou-Marcoullis, 'The So-called Isolation of the Turkish Cypriot Community' (2007) *The Cyprus Yearbook of International Relations* 9.

[4] Art 1(1) of Protocol No 10 on Cyprus of the Act of Accession 2003 [2003] OJ L236/955. For a more detailed account of the terms of Cyprus' Accession, see below ch 2.

[5] M Uebe, 'Cyprus in the European Union' (2004) 46 *German Yearbook of International Law* 375, 384.

[6] Art 2(1) of Protocol No 10 on Cyprus.

[7] Council Regulation (EC) No 389/2006 of 27 February 2006 establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community and amending Council Regulation (EC) No 2667/2000 on the European Agency for Reconstruction [2006] OJ L65/5 is a measure that promotes the economic development of those areas.

Given this unprecedented (for an EU Member State) situation of not controlling part of its territory, the main research question of this book is to analyse the limits of the suspension of the *acquis communautaire* in the areas North of the Green Line. In other words, the *telos* of this particularly challenging research is to map the partial application of Union law in an area where there are two competing claims of authority.

2. THE MAIN CHALLENGES

Cyprus is widely seen as a graveyard for the diplomatic aspirations of the UN Secretary-Generals ever since U Thant held office. At the same time, it is considered an 'international and European lawyer's goldmine' as Hoffmeister has noted.[8] In his report of 1 April 2003 to the UN Security Council, Kofi Annan stated that 'given the intractability and the variable geometry of the issues it is not far-fetched to describe it as a diplomatic "Rubik's cube" '.[9] It is exactly the intractability of the Cyprus conflict and the various legal issues arising from it that make any contribution on the interrelationship of the Cyprus problem and the Union legal order particularly challenging. More precisely, two different sets of challenges that have been present in the course of this research can be distinguished: namely the legal and political challenges.

2.1 Legal Issue

It is obvious from the main research question that this book focuses on the legal issues that arise from the interrelationship of Cyprus' post-1974 *status quo* and Cyprus' Union membership. The demands of the present project, however, go far beyond a typical analysis of the provisions of the relevant Union legislative instruments. The analysis of the legal issues that are connected with the post-accession situation require a deep knowledge of international law, Cypriot constitutional law, the laws of the internationally unrecognised Turkish Republic of Northern Cyprus (TRNC), the case law of the European Court of Human Rights and various other national and international courts and obviously EU law. In other words, the main challenge of the present research project, as a contribution to legal science, is that it calls for a 'multidisciplinary' legal approach.

Chapter three deals with the free movement of persons and provides the best example of the aforementioned challenge. This is because, firstly, in order to examine who among the inhabitants of northern Cyprus has access to Union citizenship status not only was it necessary to analyse the relevant provisions in the Cyprus

[8] F Hoffmeister, *Legal Aspects of the Cyprus Problem, Annan Plan and EU Accession* (Leiden, Martinus Nijhoff Publishers, 2006) 239.

[9] Report of the Secretary-General on his mission of good offices in Cyprus of 1 April 2003, UN Doc S/2003/398, para 4.

Agreements, the 1960 Constitution and the Citizenship laws of the Republic, but also the relevant laws of the secessionist entity in the North in order to shed light on the issue of 'settlers'. In addition, the situation with regard to the protection of fundamental rights is analysed through a close examination of the relevant case law of the Strasbourg Court, the Court of Justice and national courts in Cyprus and the UK. Moreover, the exercise of the rights attached to the 'fundamental status of nationals of Member States'[10] by all Union citizens in those 'Areas' is examined by focusing on the Green Line Regulation and the relevant Cypriot laws. Finally, it was deemed necessary throughout that chapter to refer to the relevant provisions of the UN-sponsored Plan for the Comprehensive Settlement of the Cyprus Problem, commonly known as the Annan Plan.

2.2 Political Issue

Obviously, in addition to the sheer complexity of the legal issue, the Cyprus conflict remains one of the most tantalising international political problems that affects the political lives of three Member States, a candidate State and obviously the Union as a whole. No matter how focused any research is on the legal aspects of this Gordian knot, it inevitably has to acknowledge the historical and political background.

The intractability of this age-old dispute is, inter alia, a result of the existence of two conflicting narratives with regard to the history of the problem. For the Greek Cypriots the Cyprus problem has been caused by Turkey's military intervention in 1974 and its grave consequences. On the other hand, the Turkish Cypriots, unsurprisingly, focus on events that took place in the aftermath of the break-up of the Republic in 1963. Although lately there have been some efforts to revise those unbalanced views on Cypriot history,[11] given the discrepancies between the two narratives, it is almost impossible for any view expressed on the issue to be accepted as objective by both sides in the conflict. This is a rather common challenge for anyone studying any conflict. Brendan O'Leary and John McGarry address the difficulty of researching conflict by explaining how all conflict has a 'meta-conflict' (conflict about what the conflict is about) that co-opts academic attempts to provide objective understandings on a particular conflict.[12]

Apart from the conflicting narratives that create a hurdle that precludes a view from being perceived as objective by both communities, the terminology that a

[10] Case C-184/99 *Rudy Grzelczyk v Centre Public d'Aide Sociale d'Ottignes-Louvain-la-Neuve (CPAS)* [2001] ECR I-6193, para 31; reaffirmed in Case C-413/99, *Baumbast, R. v Secretary of State for the Home Department* [2002] ECR I-7091, para 82.

[11] For a comprehensive analysis of those efforts see Y Papadakis, *History Education in Divided Cyprus: A Comparison of Greek Cypriot and Turkish Cypriot Schoolbooks on the 'History of Cyprus'* (Oslo, PRIO, 2008). At para 11.2.3 of Resolution 1628 (2008) the Parliamentary Assembly of the Council of Europe has called upon the authorities of the Republic of Cyprus to 'make full use of Council of Europe experience and assistance as regards history teaching for reconciliation, and to review history textbooks in such a way as to avoid hate speech and inflammatory language with regard to painful events of the past'.

[12] B O'Leary and J McGarry, *Explaining Northern Ireland: Broken Images* (Oxford, Blackwell, 1995).

social scientist uses when dealing with the Cyprus issue is always under scrutiny. Terms used in order to describe aspects of the Cyprus conflict are very rarely neutral. Almost every term has a political connotation that automatically reveals the political identity of the person using it to the 'connoisseurs' of the Cyprus issue discourse. A couple of examples of this 'code' shed light on this challenge.

The first and most obvious dilemma that one faces when dealing with this 'vocabulary' is the choice of a term to describe the entity North of the Green Line. Being a Greek national, I was used to the term 'Occupied Territories in Cyprus'. Obviously, that term is never used by the Turkish or Turkish Cypriots, who unsurprisingly prefer geographical terms like Northern or northern Cyprus or political terms like 'Turkish Republic of Northern Cyprus'. On the other hand, the European Court of Human Rights has used the term Turkey's 'subordinate local administration'.[13] The European Union, meanwhile, uses a rather politically neutral description, by referring to 'areas in which the Government of the Republic of Cyprus does not exercise effective control'. Despite the inventive nature of the latter term, it is the term which was chosen to be used throughout the book.[14] It has been chosen because although it is a 'monument' of political correctness, it still provides for a description that has been accepted by the leaders of both communities, despite the fact that is far from flawless.

Another example of that 'code' is the term 'European approach/solution'. Although it is beyond reasonable doubt that a future settlement should be in line with the principles in which the Union is founded, since Cyprus is an EU Member State, it is noted that there are possible tensions between the principles on which the two communities have agreed any future settlement should be based and the Union legal order, as we shall see to a greater extent in chapter five. This does not automatically mean that the framework that was agreed upon 30 years ago by the leaders of the two ethno-religious segments should be amended. The Union has expressed its willingness and is capable of accommodating a solution that would entail derogations from EU law in order to achieve a viable solution to the Cyprus problem.[15] Those tensions, however, have been used in order to cover up maximalist/rejectionist views, especially on the Greek Cypriot side. More analytically, former President Papadopoulos asked the Greek Cypriots 'to rally together for a new and more hopeful course for the reunification of our country through the European Union'.[16] This idea was later picked up by the most nationalist Greek Cypriot party, the 'European Party' which is an advocate for a unitary state solution. Thus, the term 'European approach/solution', innocuous though it may sound, is perceived in the Cyprus' issue 'vocabulary' as referring to a settlement that overthrows the

[13] *Loizidou v Turkey (Merits and Just Satisfaction)* (Application No 15318/89) (judgment 18 December 1996), ECHR Reports 1996-VI, para 52.

[14] Occasionally, the abbreviated term 'Areas' and the geographical terms 'northern part of Cyprus' and 'northern Cyprus' will be used instead. Finally, the term 'Cyprus' designates the country, the island of Cyprus while the term 'Republic of Cyprus' (RoC) refers to the internationally recognised State.

[15] 5th Recital of the Preamble of the Protocol No 10 of the Act of Accession 2003.

[16] Press Release, Press and Information Office, Republic of Cyprus, 7 April 2004.

agreed framework by favouring a unitary state where the Turkish Cypriots are relegated to the position of a privileged minority.

3. METHODOLOGY

It is clear that a solid methodological approach has been necessary in order for the research to respond effectively to the two aforementioned distinct sets of challenges arising from the legal dimension and the political and historical background of the Cyprus issue. The methodology used addresses the legal complexities of a conflict that has been heavily judicialised without ignoring its political nature.

Given that the very *telos* of the project has been to create an analytical framework of the partial application of the *acquis* in the areas not under the effective control of the Republic of Cyprus, it became obvious at a very early stage of the research that a positivist legal analysis of the relevant legal provisions was the first necessary step. Such an approach, first of all, ensures that the research retains its legal nature, which is of vital importance for a project in legal science. At the same time, despite the well founded critique against legal objectivism[17] by means of a 'black-letter law' approach, one can dissociate, in a way, the legal ontology of the issue and the several ideological positions expressed on the solution of the issue. In other words, as a first step, it was deemed necessary to distinguish what 'is' the legal situation from what 'ought' to be the political *status quo* on the island, by mapping the partial application of the *acquis*.

On the other hand, a legally 'autistic' contribution on the interrelationship of the Cyprus conflict and the Union legal order would have been meaningless, given the political and historical causes of the given legal 'anomalies'. In addition, it is almost impossible for anyone dealing with the Cyprus issue to completely distinguish the legal aspect of the conflict from its political one. Even the decisions of the Strasbourg and the Luxembourg Courts on cases arising from this Gordian knot have failed to completely distinguish the political dimension from the legal reality of the problem. As we shall see to a greater extent in chapters three and four, the judgments of both the Court of Justice and the Court of Human Rights take the dynamics of the conflict into account to some extent.

It was of critical importance, therefore, that the methodology would take the political environment of the conflict into account. Thus, following a 'law in context' approach, this book tries to put the analytical framework of the partial application of the *acquis* into its political and historical context. In other words, the research points to the many ways the legislative devices of the Union have been conditioned by the insistent realities of the conflict. Thus, the book, starting from a positivist analysis of the relevant legal provisions, consists of a critique of the Union policy on sensitive issues arising from the conflict such as the 'settlers' and the economic and

[17] See eg, RM Unger, *The Critical Legal Studies Movement* (Cambridge MA, Harvard University Press, 1983) 5–14.

political isolation of the Turkish Cypriot EU citizens but also the positions of the parties in the conflict with regard to the future settlement of the dispute.

Unsurprisingly, the methodology has influenced the outcomes of the present research, which point to the legal and political dimension of the issue. More analytically, with regard to the former, although almost all the aspects of the Cyprus issue have been extensively analysed by a number of social scientists, this book tries to address a *lacuna* in the existing literature concerning the interrelationship of the Union legal order with the dispute. In a way, the present research examines, from a legal point of view, issues that were raised after the period on which the excellent works of Tocci,[18] Ker-Lindsay[19] and Diez[20] focus. Taking into account important books that present the legal positions of the parties in the conflict,[21] and having as a background essays on several questions that the Cyprus' accession has posed,[22] the present project tries to present an overall picture of the partial application of the Union law in northern Cyprus. In other words, the book analyses how the four freedoms apply in that unprecedented situation (for a Union Member State).

Apart from extensively analysing which provisions of the *acquis* apply, the book also assesses the pragmatic approach that the Union has adopted when dealing with issues arising from the conflict. It provides for a critique of the seemingly depoliticised and overly technical approach of the Union to this international political problem. In order to achieve that, it particularly highlights the pragmatic solutions the Union offers to certain political problems, such as the crossing of the Green Line by the 'settlers' and the crossing of goods without the recognition of any other authority on the island apart from the Government of Cyprus. Thus, in every chapter, there is an analysis of the relevant legal issues concerning the partial application of the *acquis* and the compatibility of a possible future settlement plan with the

[18] N Tocci, *EU Accession Dynamics and Conflict Resolution: Catalysing Peace and Consolidating Partition in Cyprus?* (Aldershot, Ashgate Publishing Limited, 2004).

[19] J Ker-Lindsay, *EU Accession and UN Peacemaking in Cyprus* (Basingstoke, Palgrave Macmillan, 2005).

[20] T Diez (ed), *The European Union and the Cyprus Conflict. Modern Conflict, Postmodern Union* (Manchester, Manchester University Press, 2002).

[21] K Chrysostomides, *The Republic of Cyprus, A Study in International Law* (The Hague, Kluwer Law International, 2000); Z Negatigil, *The Cyprus Question and the Turkish Position in International Law* (2nd Revised Edition) (Oxford, Oxford University Press, 1996); C Palley, *An International Relations Debacle* (Oxford, Hart Publishing, 2005).

[22] See generally T Diez and N Tocci (eds), *Cyprus: A Conflict at the Crossroads* (Manchester, Manchester University Press, 2009); F Hoffmeister, *Legal Aspects of the Cyprus Problem, Annan Plan and EU Accession* (Leiden, Martinus Nijhoff Publishers, 2006); S Laulhé Shaelou, *The EU and Cyprus: Principles and Strategies of Full Integration* (Leiden, Brill / Martinus Nijhoff, 2010); A De Mestral, 'The Current Status of the Citizens of the Turkish Republic of Northern Cyprus in the Light of the Non-Application of the *Acquis Communautaire*' in S Breitenmoser, B Ehrenzeller, M Sassoli, W Stoffel, and BW Pfeifer (eds), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (Baden-Baden, Nomos, 2007) 1423; N Skoutaris, 'The Application of the Acquis Communautaire in the Areas not under the Effective Control of the Republic of Cyprus: The Green Line Regulation', (2008) 45 *Common Market Law Review* 727; N Skoutaris, 'The Legal Dimensions of Cypriot Membership' in H Faustmann, J Ker-Lindsay and F Mullen (eds), *An Island in Europe: The EU and the Transformation of Cyprus* (London, IB Tauris, 2010); C Tomuschat, 'The Accession of Cyprus to the European Union' in P Haberle, M Morlok, V Skouris (eds), *Festschrift für Dimitris Th. Tsatsos* (Baden-Baden, Nomos, 2003) 672; M Uebe, 'Cyprus in the European Union' (2004) 46 *German Yearbook of International Law* 375.

Union legal order. At the same time, the research points to the political realities that led to the given legal solutions.

4. THE THESES OF THIS BOOK

In undertaking the present research I had two main goals. First of all, I wished to describe the very special *status quo* of northern Cyprus within the Union legal order. Despite the existence of other territorial/geographical exceptions to the application of EU law, such as the French overseas departments and the Overseas countries and territories that are listed in Annex II of the TFEU, Mount Athos etc., northern Cyprus is a unique case. In the case of northern Cyprus, the suspension of the *acquis* is mainly a result of an unprecedented (for a Union Member State) political anomaly that does not allow a recognised Government to exercise effective control over the whole territory envisaged by its own Constitution. This part of the research is largely an extension of an earlier research concerning the Union citizenship status of the inhabitants of the areas not under the effective control of the Government of the Republic.[23] Following the outcome of the previous research, the working hypothesis for this part of the book has been that, however unacceptable it is for the political life of the Union, the EU legal order has the necessary flexibility to accommodate that international dispute.

Indeed, although the application of the *acquis* is suspended in the areas not under the effective control of the Republic pursuant to Article 1 of Protocol No 10 of the Act of Accession 2003, the territorial character of the suspension and the adoption of the Green Line Regulation, along with the instrument of financial support, have allowed a limited integration of northern Cyprus within the EU. Obviously, more measures should be adopted in order for the Turkish Cypriot community to become even closer to the Union. In the meantime, it should be noted that, by (indirectly) allowing exceptions to the absolute suspension of the *acquis* North of the Green Line—mainly through the application of Union citizenship rights to Turkish Cypriot citizens of the Republic and through the Green Line Regulation regime—the Union has provided a significant step in bridging the cleavages of Cypriot society. In parallel, this has also led to a possibility for differentiated integration of the Turkish Cypriot ethno-religious segment within the Union. The viability of this unprecedented regime of 'variable geometry' within a Member State's Union membership, proving the flexibility of the EU legal order in accommodating even international disputes, has been very recently scrutinised in front of the Court of Justice. As we shall see in greater detail in the following chapter, the Court of Justice has secured the proper functioning of the regime by essentially following the Opinion of Advocate General Kokott.[24]

[23] Skoutaris, *The Green Line Regulation* (above n 22).

[24] Case C-420/07 *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams* (Grand Chamber judgment 28 April 2009) [2009] ECR I-3571.

The second goal of this research has been to examine whether the Union membership of the Republic could influence the well-known parameters of a future settlement. This is all the more important in the aftermath of the overwhelming Greek Cypriot rejection of the Annan Plan and in the light of the current bi-communal negotiations. The working hypothesis of this part of the research has been that since it has been proven that the Union is capable of accommodating the present stalemate, it would therefore be absurd to pose hurdles to a mutually agreed solution of this age-old problem.

Concerning this, the book argues that the Union is 'ready to accommodate the terms of such a settlement in line with the principles on which the EU is founded'.[25] In other words, despite the foreseeable existence of tensions between a solution that would be based on the principles of bi-zonality, bi-communality and political equality and the Union legal order, the EU is willing and capable of accommodating the possible derogations from the *acquis* that such a solution could entail. The accommodation of a solution that would entail derogations from the *acquis* is not only compatible with Protocol No 10 but also with the fact that according to Article 6 EU, the Union is founded 'on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law'.[26]

In general, despite the fact that this research examines a case study in a very special situation, it still provides for proof of the omnipotence of the Member States as 'Master of the Treaties' to find tailor-made solutions which even go as far as to accommodate an international political problem with innumerable ramifications within the Union legal order. The suspension of the *acquis* in northern Cyprus, to the extent that it would not create 'any unrealisable obligations for the Republic of Cyprus in relation to Northern Cyprus which bring it into conflict with Community law',[27] has allowed the Union to provide for legislative measures which would promote the growing together of the two parts of the divided country thereby achieving a degree of integration of an area within the Union whose ports of entry have been closed for over 30 years. This achievement, however, should be seen as evidence of the capability of the Union to find technocratic but effective and practical solutions to even the thorniest political issue rather than as a model of integration that can be applied in analogous situations such as in the case of Serbia and Kosovo.

5. THE ANALYSIS

As already mentioned, the particular terms under which Cyprus joined the Union were necessitated by the post-1974 *status quo* and the failure of the parties in the conflict to achieve a settlement. Therefore, chapter two analyses the political, historical

[25] 5th Recital of Protocol No 10 on Cyprus (above n 15).

[26] See generally M Cremona and N Skoutaris, 'Speaking of the De . . . rogations' (2009) 11(4) *Journal of Balkan and Near Eastern Studies* 387.

[27] Case C-420/07 *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams* (Opinion of AG Kokott delivered on 18 December 2008) [2009] ECR I-3571, para 42.

and legal background of these particular terms which have resulted in the suspension of the *acquis*. Without providing for an exhaustive account of the modern history of Cyprus, it sets the suspension of the Union law in its historical and political context by referring to the most important political and legal debates, from the birth of the Republic on 16 August 1960 to the accession of the island to the Union on 1 May 2004. Chapter two examines the Cyprus Agreements by virtue of which the Republic was founded. It further refers to the 1963–1964 crisis that led to intercommunal violence and eventually to the 'first partition'. It questions the legality and legitimacy of the 1974 Turkish military intervention and the ramifications of the continuous presence of Turkey in northern Cyprus. Moreover, it presents the debate concerning the Cypriot application for accession to the EU. Furthermore, it analyses the proposed UN plan aiming at a comprehensive settlement of the Cyprus problem. Finally, it discusses the terms under which the Republic of Cyprus entered the Union and compares this case with other cases where parts of the *acquis* are suspended for different political and/or historical reasons.

Chapter three starts by responding to the fundamental question: who, among the inhabitants of northern Cyprus, has access to Union citizenship, which has been characterised by the Court of Justice as the 'fundamental status of nationals of Member States?'[28] Furthermore, this chapter analyses the situation with regard to the protection of fundamental rights in the areas not under the effective control of the Government of the Republic, by referring to the case law of several European courts. It further presents the framework for the protection of human rights in the United Cyprus Republic as envisaged in the Annan Plan. This examination is deemed necessary since, although it was massively rejected by the Greek Cypriots, the Annan Plan remains the most holistic approach to solving the Cyprus problem. Finally, the exercise of the free movement rights of the Union citizens in northern Cyprus is examined by an analysis of the relevant provisions of the Green Line Regulation.

Chapter four focuses on the trade relations of the Turkish Cypriot community with the EU. After thoroughly analysing the pre-accession economic isolation of the Turkish speaking Cypriot citizens, by reference to the *Anastasiou* judgments[29] of the Court of Justice, this chapter focuses on the Union legislative instrument that regulates the free movement of goods from the northern part of the island to the southern part and from there to the rest of the Union and also the free movement of goods from the southern part of the island to the northern part ie the Green Line Regulation. Particular emphasis is given to the pragmatic approach adopted by the Union in order to partially, but effectively, lift the economic isolation of the Turkish Cypriot community without, at the same time, providing for the recognition of any other authority apart from the legitimate Cypriot Government. Furthermore, the

[28] *Grzelczyk* and *Baumbast* (above n 10).

[29] Case C-432/92 *Regina v Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and Others* [1994] ECR I-3116; Case C-219/98 *Regina v Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and Others* [2000] ECR I-5241; Case C-140/02 *Regina v Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and Others* [2003] ECR I-10635.

Commission proposal for a Direct Trade Regulation is assessed legally and politically by reference to the notion of '*Taiwan-isation*'.

Chapter five takes Cyprus' Union Membership into account for a future settlement plan. Although, as already mentioned, the concept of a 'European approach/solution' covers quite different notions and has been used to cover up irredentist views, it mainly refers to two distinct but interconnected understandings of the role of the EU in the political equation. According to the first understanding, since Greece and Cyprus are Union Member States and Turkey is a candidate State, the EU should probably replace the UN as the principal *locus* and actor in any new initiative to move towards a solution. According to the second understanding, any future solution should be in 'strict compliance with European constitutional principles and the *acquis communautaire*, and international human rights and minority protection standards derived from international law and from the European Convention on Human Rights and other European instruments'.[30] With regard to the former proposition this chapter supports the view that the Union does not have the competence even under the post-Lisbon Treaty institutional and legal framework to become the principal *locus* and actor in a possible future initiative. Furthermore, even if the Union had this competence, there are serious political constraints to such an initiative. As far as the latter is concerned, it is argued that despite the possible tensions between the principles upon which any future settlement should be based, agreed upon by the two communities, and the Union legal order, the Union is willing and capable of accommodating a solution that would not be in strict compliance with EU law in order to achieve a viable solution to the Cyprus problem.

Chapter six provides the concluding remarks of the research. It argues that although the present legal regime is fairly stable and functional, only a comprehensive settlement can provide for a solution to all the pending issues of the Cyprus Gordian knot. Furthermore, it has to be stressed that if a lesson is to be learned for the political life of the Union, it is that the accession is not a *panacea* for all the possible problems that each candidate State faces. Despite offering more political stability to the Member States, the solution of grave international problems such as the Cyprus issue needs, first and foremost, the political willingness of the main actors.

The law and policy developments are reflected as they were on 1 June 2010.

[30] A Auer, M Bossuyt, P Burns, A De Zayas, S Marcus-Helmons, G Kasimatis, GD Oberdoerfer, and M Shaw, *A Principled Basis for a Just and Lasting Cyprus Settlement in the Light of International and European Law* (Paper of the International Expert Panel, submitted by the Committee for a European solution in Cyprus, presented to Members of the European Parliament, 12 October 2005), para 26.

II

The Historical, Political and Legal Context of the Suspension of the Acquis *in Northern Cyprus*

And the rivers swelling, blood in their silt
All for a linen undulation, a filmy cloud
A butterfly's flicker, a wisp of a swan's down
An empty tunic—all for a Helen.

Helen, George Seferis (1955)

1. INTRODUCTION

THE CYPRUS CONFLICT[1] is one of the most ancient political sagas in Europe. The pages of this fascinating political novel whose end is neither yet known nor seems probable to be 'happily ever after' contain inter alia a

[1] For a more detailed account of the modern history of Cyprus see eg (in alphabetical order): M Attalides, *Cyprus, Nationalism and International Politics* (New York, St. Martin's Press, 1979); A Borowiec, *Cyprus: a Troubled Island* (New York, Praeger Publishers, 2000); K Chrysostomides, *The Republic of Cyprus, A Study in International Law* (The Hague/Boston, Kluwer Law International, 2000); V Coufoudakis, *Cyprus, A Contemporary Problem in Historical Perspective* (Minnesota, Minnesota Mediterranean and East European Monographs, University of Minnesota, 2006); M Droushiotis, *Η 'Εισβολή' της Χούντας στην Κύπρο* [The 'Invasion' of the Colonels' Regime in Cyprus] (Athens, Stachi, 1996); M Droushiotis, *ΕΟΚΑ, Η σκοτεινή όψη* [EOKA, the Dark Side] (Athens, Stachi, 1998; Nicosia, Alfadi, 2002); M Droushiotis, *Η πρώτη διχοτόμηση, Κύπρος 1963–1964* [The First Partition, Cyprus 1963–1964] (Nicosia, Alfadi, 2005); M Droushiotis, *Cyprus 1974—The Greek Coup and the Turkish Invasion* (Mannheim, Bibliopolis, 2006); D Hannay, *Cyprus, The Search for a Solution* (London, IB Tauris, 2005); R Holland, *Britain and the Revolt in Cyprus, 1954–1959* (Oxford, Clarendon Press, 1998); JS Joseph, *Cyprus, Ethnic conflict and International Politics, From Independence to the Threshold of European Union* (Basingstoke, Palgrave Macmillan 1997); J Ker-Lindsay, *EU Accession and UN Peacemaking in Cyprus* (Basingstoke, Palgrave Macmillan, 2005); W Mallinson, *A Modern History of Cyprus* (London, IB Tauris, 2005); DW Markides, *Cyprus 1957–63: From Colonial Conflict to Constitutional Crisis. The Role of the Municipal Issue* (Minnesota, Minnesota Mediterranean and East European Monographs, University of Minnesota, 2001); KC Markides, *The Rise and Fall of the Cyprus Republic* (New Haven, Yale University Press, 1977); Z Negatigil, *The Cyprus Question and the Turkish Position in International Law*, (2nd Revised Edition) (Oxford, Oxford University Press, 1996); C Palley, *An International Relations Debacle* (Oxford, Hart Publishing, 2005); Y Papadakis, *Echoes from the Dead Zone—Across the Cyprus Divide* (London, IB Tauris, 2005); L Stern, *The Wrong Horse, The Politics of Intervention and the Failure of American Diplomacy* (New York, Times Books, 1997); N Tocci, *EU Accession Dynamics and Conflict Resolution: Catalysing Peace or Consolidating Partition in Cyprus* (Aldershot, Ashgate Publishing Limited, 2004).

short-lived bi-communal polity that was founded in 1960 but collapsed three years later in the aftermath of an inter-communal armed conflict, a *coup d'état* against the elected Greek Cypriot President of the Republic orchestrated by the Greek colonels' regime, the 1974 Turkey's 'peace operation' and a handful of rejected UN plans for comprehensive settlement.

On 1 May 2004 a new variable was added to the complicated political equation of the Cyprus issue: the European Union. The Republic of Cyprus, despite the fact that it cannot exercise effective control over all the areas envisaged by the 1960 Constitution because of the continuous presence of Turkey in the northern part of the island, became, as a whole, one of the ten new Member States acceding to the Union in the so called 'Big-Bang' enlargement of 2004. Unsurprisingly, the terms under which Cyprus entered the EU clearly depict this unprecedented (for an EU Member State) situation. The application of the *acquis communautaire,* pursuant to Article 1 of Protocol No 10 on Cyprus of the Act of Accession 2003, is suspended in the areas which are not under the effective control of the Republic of Cyprus.

Before analysing the limits of the suspension of the *acquis* in the subsequent chapters and evaluating the Union policies on this very sensitive issue for the political lives of two Member States and a candidate State, it is imperative to examine the historical, political and legal context of the suspension. It is beyond the purposes of the present chapter and the book in general to provide an exhaustive account of the modern history of Cyprus, which is rarely recounted in a balanced, informed way. The scope of the chapter is rather to describe, in a concise, thorough and as far as possible, objective manner, the most important political and legal debates from the birth of the Republic to its EU accession in order to place the suspension of the *acquis* in northern Cyprus in its historical, political and legal context. In order to achieve this objective, the chapter focuses on inter alia the constitutional structure of the Cypriot polity and the Treaties of Guarantee, Alliance and Establishment, examines the legal issues arising from the 1963–1964 crisis, questions the legality and legitimacy of the 1974 Turkish invasion and the continuous presence of Turkey in northern Cyprus, comments on the debate concerning the Cypriot application for accession to the EU, describes the proposed UN plan for a comprehensive settlement of the Cyprus problem and discusses the terms under which the Republic of Cyprus entered the Union.

2. THE BIRTH OF A REPUBLIC BUT NOT OF A NATION

2.1 Struggling for *Enosis*,[2] Fighting for *Taksim*,[3] Achieving Independence

Six centuries after the departure of Richard the Lionheart from Cyprus, the British returned to the island in 1878. In Istanbul on the 4th of June of the same year, Sultan

[2] *Enosis* [*Ενωσις*] means 'union' in Greek; it depicted the devotion of the Greek Cypriots to union with Greece.

[3] *Taksim* means 'partition' in Turkish; it depicted the intention of the Turkish Cypriots for self-governance.

Abdul Hamid II, in the name of the Ottoman Empire, signed the Convention of Defensive Alliance between Great Britain and Turkey with respect to the Asiatic Provinces of Turkey. According to this Convention, the Ottoman Empire agreed to hand over Cyprus, the population of which, at that time, consisted of approximately 180,000 Greeks and 46,000 Turkish, 'to be occupied and administered by England'.[4] In return, Britain would provide protection to the Ottoman Empire against a possible Russian aggression. In 1914, however, after the outbreak of the First World War, Britain annexed Cyprus and the island became a part of His Majesty's Dominions.[5] The annexation of Cyprus was recognised by Turkey in Article 20 of the Treaty of Lausanne, 1923. Despite the fact that Cyprus was a British colony from 1878 until 1960, the British retained and developed the Ottoman *millet* system of communal separation, since it accorded them the role of umpire on the island and thus facilitated colonial rule.[6]

During the 1920s the Greek Cypriot majority became increasingly dissatisfied with British colonial rule. However, unlike most of the twentieth century decolonisation movements, desire for freedom was not expressed as a demand for independence. It was rather envisaged as *Enosis* with the motherland Greece. Any alternative to *Enosis*, including self-government, was not regarded as appropriate. Indeed, in October 1931 the Orthodox Bishop of Kition officially demanded union with Greece and by doing so triggered violent riots in Nicosia that entailed the burning of the Government House. On 12 August 1948 the Church of Cyprus, in the name of the Greek Cypriot people, rejected the British Constitutional Plan proposing limited self-government through a 'Consultative Assembly'. Instead, in 1950 the Greek Cypriot Church, under the leadership of the newly elected and future first President of the Republic Archbishop Makarios III backed by the Cypriot Communist party AKEL, called a plebiscite on the question of union with Greece. Any inhabitant of Cyprus could indicate their position by signing one of the large books in which the phrase 'We demand the unification of Cyprus with Greece' was printed on each page. 215,000 out of the 224,000, ie ninety-six per cent of the Greek Cypriots and a small number of Turkish Cypriots, signed in favour of *Enosis*.

In the light of this petition, the Greek Cypriot leadership increased its pressure on Greece to support its cause. As a result of that and of the failure to find a solution through bilateral negotiations, on 16 August 1954, the Government of Greece brought the Cyprus issue to the UN as a case of self-determination. However, on 17 December 1954, the UN General Assembly decided that a resolution on Cyprus would not be opportune 'for the time being'.[7] Under those circumstances, the Greek Cypriot movement resorted to an armed struggle against the British colonial administration. On 1 April 1955, the EOKA[8] organised a series of explosions

[4] Chrysostomides, *A Study in International Law* (above n 1) 20.

[5] The Cyprus Annexation Order in Council 1914, S.R.O. 1924, No 1629, S.R & O. Rev (1948), vol. II, 577–578.

[6] Tocci, *EU Accession Dynamics and Conflict Resolution* (above n 1) 43.

[7] UN General Assembly Resolution 814 (IX) of 17 December 1954.

[8] *Ethniki Organosis Kyprion Agoniston* [*Εθνική Οργάνωσις Κυπρίων Αγωνιστών*]—National Organisation of Cypriot Fighters.

around the island that initiated what would become a four years campaign by the Greek Cypriots to end British rule and to achieve *Enosis*.

Aware of the potential danger of *Enosis* to Turkish Cypriots, given the expulsion of Turkish/Muslim populations from predominantly Orthodox areas of the Ottoman Empire after their annexation to Greece, the British encouraged the community's counter-mobilisation to serve its own colonial aims.[9] Thus, it is mainly after 1955, and especially after the rejection from Greece and Greek Cypriots of the Radcliff Plan in 1956—a plan which foresaw a Greek-dominated Assembly and guaranteed safeguards for the Turkish Cypriot community—that the Turkish Cypriots began countering EOKA through Volkan and then the TMT.[10] The seeds for the future heated inter-communal confrontation were sown. Hence, by 1957, Turkey had already formulated its own counter-position to *Enosis*: *Taksim*.

By 1957, Greece and the Greek Cypriots were fighting for *Enosis*, the Turkish Cypriots and Turkey were responding by asking for a *Taksim* and Britain was determined to retain full sovereignty on the island. In the Macmillan Plan of 1958, however, a suggestion for a compromise made its appearance for the first time that was later further developed in the Zurich-London Agreements and led to the birth of the Cyprus Republic. Such a compromise entailed the establishment of an independent sovereign State of Cyprus while at the same time British sovereignty over two military bases was reserved. Thus, the Republic of Cyprus gained its sovereign independence from the UK by virtue of three treaties, namely the Treaty of Guarantee, the Treaty of Alliance and the Treaty of Establishment and a Constitution, all of which came into operation the same day—16 August 1960.[11]

2.2 The Constitution

The Zurich Agreement of 11 February 1959 between the then Prime Ministers of Greece and Turkey contained inter alia the basic structure of the new State. This basic structure has been incorporated into the Constitution of the Republic and comprised its outline. Indeed, out of the 27 Basic Articles of the Zurich Agreement, a Constitution of 199 Articles was developed. It was agreed that those Basic Articles cannot be amended by way of constitutional change.[12] Eventually, the Constitution was signed by Sir Hugh Foot, Governor of the Colony of Cyprus until 15 August 1960, representatives of Greece and Turkey, Archbishop Makarios and Dr. F. Kutchuk[13] on 6 April 1960.

It has been acknowledged that the Constitution of the Cyprus Republic is one of the most complex in the world.[14] In order to achieve a political compromise between the UK, Greece and Turkey and to ensure the balance between the island's two

[9] Tocci (n 1) 45. See also Attalides, *Cyprus, Nationalism and International Politics* (above n 1).
[10] Türk Mukavemet Teşkilatı—Turkish Defence Organisation.
[11] See generally www.kypros.org/Constitution/English/.
[12] Art 182(1) of the Constitution of the Republic of Cyprus.
[13] Chrysostomides (n 1), 25.
[14] SA De Smith, *The new Commonwealth and its Constitutions* (London, Stevens, 1964).

main ethno-religious segments, a complicated power sharing structure was designed. The Constitution was drawn up explicitly in terms of the two communities[15] and was referred to subsequently by the Turkish Cypriots as a 'functional federation' although that expression does not actually appear in the Constitution itself. Moreover, all of the principles of the consociational democracy—grand coalition, proportionality, autonomy and veto—were elaborately embodied in the 1960 Constitution.

The Constitution provides for 'an independent and sovereign Republic with a presidential regime, the President being Greek and the Vice-President[16] being Turkish, elected by the Greek and the Turkish communities of Cyprus respectively'.[17] The President and Vice-President exercise executive power.[18] Their common powers are specifically enumerated in Article 47 while the two subsequent Articles provide the exclusive enumeration of their separate, almost identical, powers. According to Article 54, all the executive powers not expressly reserved to the President and the Vice-President are exercised by the Council of Ministers. The cabinet had to consist of seven Greek ministers designated by the President and three Turkish ministers designated by the Vice-President. More importantly, the 1960 Constitution provided for absolute veto power over decisions by the cabinet or the legislature in the fields of foreign affairs, defence and security to both the President and the Vice-President.[19]

A seven-to-three ratio entailed a deliberate overrepresentation of the Turkish minority rather than strict proportionality, also affecting the composition of the legislature which was unicameral. The House of Representatives is comprised of 35 Representatives belonging to the Greek community and 15 belonging to the Turkish one.[20] Laws are passed by simple majority but any amendment to the electoral law, the passing of laws concerning municipalities, and any law imposing taxes or duties requires a separate majority among Greek and Turkish Cypriot Representatives present and voting in accordance with Article 78(2). In addition to that, the amendment of any non-basic constitutional provision requires a two-thirds majority of the representatives of each community voting separately.[21] The Constitution also guaranteed a great deal of autonomy for the two ethnic segments by setting up two separately elected communal chambers with exclusive legislative powers over religious, educational, cultural, and personal status matters.[22]

The judicial system was to consist of a Supreme Constitutional Court,[23] a High Court of Justice and lower courts.[24] The Supreme Constitutional court was

[15] According to the 1960 census, the Greek Cypriot segment comprised about 78%, and the Turkish Cypriot about 18% of the population, the remaining 4% being the minorities of the Maronites, Armenians and Latins.

[16] See generally Part 3 (Arts 36–60) of the Constitution of the Republic of Cyprus.

[17] Art 1 of the Constitution of the Republic of Cyprus.

[18] Art 46 of the Constitution of the Republic of Cyprus.

[19] Art 50 of the Constitution of the Republic of Cyprus.

[20] See generally Part 4 (Arts 61–85) of the Constitution of the Republic of Cyprus.

[21] Art 182(3) of the Constitution of the Republic of Cyprus.

[22] See generally Part 5 (Arts 86–111) of the Constitution of the Republic of Cyprus.

[23] See generally Part 9 (Arts 133–151) of the Constitution of the Republic of Cyprus.

[24] See generally Part 10 (Arts 152–164) of the Constitution of the Republic of Cyprus.

comprised of a Greek Cypriot judge and a Turkish Cypriot judge and it was presided over by a neutral judge that was neither a Cypriot citizen nor a citizen of any of the Guarantor States. Its jurisdiction ranged from constitutional issues arising from the interpretation of provisions of the Constitution[25] to the settling of conflicts or disputes regarding the extent of authority of legislative and administrative bodies.[26] The High Court of Justice, which consisted of two Greek Cypriot judges, one Turkish Cypriot judge and one foreign presiding judge, was the appellate court of civil and criminal jurisdiction. The composition of lower courts depended on the community of the disputants.[27]

In addition to that, several other constitutional provisions were designed to safeguard the bi-communal nature of the State. For example, Article 173 provided for the establishment of separate municipal councils in the five largest towns of the island.[28] At the same time, while the public service had to be composed in accordance with the aforementioned seven-to-three ratio,[29] a six-to-four ratio was set for the army and the police.[30] All those provisions and similar ones relied on the cooperation of the two communities but did little to encourage it. By 1963, several issues of contention had already emerged.

2.3 The Treaties

2.3.1 The Treaty of Guarantee

Article 181 of the Constitution provides that the Treaties of Guarantee and Alliance have constitutional force and are considered as fundamental clauses that are not capable of being amended. More analytically, the Treaty of Guarantee was concluded on 16 August 1960 between the Republic of Cyprus, Greece, Britain and Turkey. According to Article I, the Republic of Cyprus undertook to ensure its maintenance, territorial integrity, security and respect for its Constitution while, at the same time, undertook not to participate in any union with any State or to proceed to partition. Taking note of the aforementioned undertakings, Greece, Turkey and Britain guaranteed Cyprus' 'independence, territorial integrity and security'.[31] Equally, Cyprus, Greece and Turkey undertook to respect the integrity of the UK Sovereign Base Areas.[32] Most importantly, Article IV provided that the Guarantor States should consult each other with respect to the 'measures necessary to ensure observance of those provisions'. However, 'in so far as common or concerted action may not prove possible, each of the three guaranteeing Powers reserves the right to

[25] Art 149 of the Constitution of the Republic of Cyprus.
[26] Art 139 of the Constitution of the Republic of Cyprus.
[27] Art 159 of the Constitution of the Republic of Cyprus.
[28] Markides, *Cyprus 1957–63* (above n 1).
[29] Art 123 of the Constitution of the Republic of Cyprus.
[30] Arts 129–130 of the Constitution of the Republic of Cyprus.
[31] Art II of the Treaty of Guarantee.
[32] Art III of the Treaty of Guarantee.

take action with the sole aim of re-establishing the state of affairs created by the' Treaty. This second paragraph of Article IV has been used as a legal basis for the 1974 Turkish military intervention.[33]

2.3.2 The Treaty of Alliance

The Treaty of Alliance between the independent State of Cyprus and the two motherlands, Greece and Turkey, provided that the three States should 'co-operate for their common defence'[34] in order to 'resist any attack or aggression, direct or indirect, directed against the independence or the territorial integrity of the Republic of Cyprus'.[35] To this effect, the establishment of a Tripartite Headquarters in Cyprus[36] and the stationing[37] of 950 Greek and 650 Turkish troops that would provide for the training of the army of Cyprus were foreseen.

2.3.3 The Treaty of Establishment

Finally, Cyprus, Greece, the UK and Turkey signed the Treaty of Establishment in order to give effect to the Declarations made at the London Conference. Article 1 provides that the territory of the Republic comprises of the whole island with the exception of the Sovereign Base Areas of Akrotiri and Dhekelia. With regard to those Areas, the UK continues to enjoy 'the international rights and benefits' it used to enjoy with regard to the whole island before 1960.[38] Pursuant to Article 2, Cyprus has an obligation to cooperate fully with the UK 'to ensure the security and effective operation' of those military Bases. It is worth examining the unique legal status of this relic of colonialism under UK, Cyprus, international and Union law since the special status of those 'little Gibraltars'—as Macmillan has characterised them—has been recognised inter alia by Protocol No 3 of the Act of Accession 2003.

According to the Halsbury's Laws of England, the Bases of Akrotiri and Dhekelia

> consist of those portions of the colony of Cyprus which were not established by the Cyprus Act 1960 as the independent sovereign Republic of Cyprus which remain within Her Majesty's sovereignty and jurisdiction. They are to be regarded, therefore, as constituting a colony.[39]

However, the term 'colony' should be understood only as a form of government in UK constitutional terms that is British overseas territory within its own form of government[40] but not part of the UK itself. Moreover, the UK has never treated the

[33] For a more detailed account see below s 4.1 The 1974 Turkish military invasion.
[34] Article I of the Treaty of Alliance.
[35] Article II of the Treaty of Alliance.
[36] Article III of the Treaty of Alliance.
[37] Article IV and Additional Protocol n.1 of the Treaty of Alliance.
[38] Article 8(2) of the Treaty of Establishment.
[39] Halsbury's Laws of England, 3rd ed, vol 6, para 1074.
[40] The 'Government' of the Bases is vested in the Administrator, who is the commander of the UK forces in Cyprus. The Administrator can enact laws after consulting an advisory panel subject to those laws being turned down by a Secretary of State in the UK. There is a civilian court as well as provision for

Bases as a colony or non-self governing territory in the sense of Article 73 of the UN Charter and has not, consequently, transmitted reports to the UN on the Bases as it does or did for its other colonies. This may be a result of the fact that in Article 2 of the Declaration,[41] on the administration of the Sovereign Base Areas made by the UK on 16 August 1960, the UK has unilaterally declared inter alia that they will neither develop the Bases for other than military purposes nor will they set up and administer 'colonies' or create customs ports or other frontier barriers between the Sovereign Base Areas and the Republic.

At the same time, there is a series of other rights which are granted to the Republic or its citizens, such as the freedom of movement, unrestricted employment as well as cultivation of fields, free sailing in the 'territorial waters' of the Bases, adoption of the Cyprus legislation, imposition of taxes by the Republic, and mainly recognition of Cypriot citizenship for all the Cypriot population in the Sovereign Base Areas.[42] Furthermore, from the point of view of Cypriot law, although UK's sovereignty over those areas is recognised,[43] it is important to also highlight the recognised exclusive right of the Republic to the transfer of the Bases if and when UK abandons them.[44]

With regard to international law, the Bases cannot be deemed to be a State, clearly, since despite the fact that they do have authorities and legislative possibilities they are nevertheless subject to indefinite constraints as a UK overseas territory. Furthermore, it is also difficult to consider the Bases to be a colony since the UK has, to date, refrained from depositing reports under Article 73 of the UN Charter. The approach adopted in the decision of the Supreme Court of the Republic of Cyprus in *Pearce v Estia*,[45] according to which the Bases, in essence, constitute a servitude under international law, is equally not convincing since sovereignty over those areas has never actually formed part of the sovereignty of the Republic. Interestingly enough, Theodolou describes them as a 'quasi-colony' with limited sovereignty leading to a *sui generis* regime in international law.[46] In any case, for the purposes of the present research, it suffices to note that the UK has complete territorial control over those Areas and it does represent them internationally.

The special regime of the Sovereign Base Areas is depicted in Protocol No 3 on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus.[47] In the Preamble, the High Contracting Parties refer to the Joint

a court martial in the Areas. This Court has jurisdiction over offences committed within the Bases and a large measure of civil jurisdiction; For a more detailed analysis see Chrysostomides (n 1) 82.

[41] Appendix O of the Cyprus Agreements *Declaration of Her Majesty's Government Regarding the Administration of the Sovereign Base Areas*; www.kypros.org/Constitution/English/ appendix_o.htm.

[42] *Ibid.*

[43] *Mizrahi v Republic of Cyprus*, [1968] 7 JSC 799; *Psaras and Licha v Republic of Cyprus* [1987] 2 CLR 132.

[44] *Graham Thomas Pearce v 'ESTIA' Insurance and Reinsurance Company Ltd.*, Civil Appeal 7656, Ruling of the Supreme Court dated 27 June 1991.

[45] *Ibid.*

[46] SC Theodoulou, *Bases militaries en droit international: le cas de Chypre* (Mannheim, Bibliopolis, 2006) 45–48.

[47] For an in depth analysis of Protocol No 3 of the Act of Accession 2003, see S Laulhé Shaelou, *The EU and Cyprus: Principles and Strategies of Full Integration* (Leiden, Brill / Martinus Nijhoff, 2010), ch 4.

Declaration on the Sovereign Base Areas of the UK in Cyprus annexed to the UK Act of Accession 1972.[48] There, it was provided that the arrangements applicable to relations between the European Economic Community and the Sovereign Base Areas would be defined within the context of any agreement between the Community and the Republic of Cyprus. The Contracting Parties also refer to the Treaty concerning the Establishment of the Republic of Cyprus[49] and the associated Exchanges of Notes between the Governments of the UK and the Republic of Cyprus concerning the administration of the Sovereign Base[50] Areas dated 16 August 1960. In the Treaty of Establishment and the associated Notes, it is declared that one of the main objects to be achieved is the protection of the interests of those resident or working in the Sovereign Base Areas. Furthermore, adding that, in this context, the said persons should have the same treatment, to the extent this is possible, as those persons resident or working in the Republic.

Thus, Protocol No 3 altered the former Article 299(6)(b) TEC [now Article 355(5)(b) TFEU] to the effect that the Treaty does not apply to the Sovereign Base Areas of Akrotiri and Dhekelia except to the extent necessary to ensure the implementation of the arrangements set out in the Protocol.[51] Consequently, according to Article 2 of the Protocol, the Bases are included within the Union customs territory and, for this purpose, the customs and common commercial policy acts listed in Part One of the Annex of the Protocol[52] apply to those Areas. Recently the Commission reported that '[t]he implementation of this part of the *acquis* . . . is

[48] Final Act of the Treaty concerning the conditions of Accession to the European Communities of the Kingdom of Denmark, Ireland, the Kingdom of Norway, and the United Kingdom of Great Britain and Northern Ireland and the adjustments of Treaties [1972] OJ L73/1.

[49] Appendix A of the Cyprus Agreements; www.kypros.org/Constitution/English/appendix_a.html.

[50] Appendix O of the Cyprus Agreements; www.kypros.org/Constitution/English/appendix_o.htm.

[51] Art 1 of Protocol No 3 of the Act of Accession 2003. For the application of the *acquis* in the Sovereign Base Areas with regard to the free movement of goods, see below section 4.3 of ch 3.

[52] According to Part One of Protocol No 3 of the Act of Accession 2003 Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [1992] OJ L302/1, Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff [1987] OJ L256/1, Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system reliefs from customs duty [1983] OJ L105/1, Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code [1993] OJ L253/1, Council Regulation (EEC) No 3677/90 of 13 December 1990 laying down measures to be taken to discourage the diversion of certain substances to the illicit manufacture of narcotic drugs and psychotropic substances [1990] OJ L357/1, Council Directive 92/109/EEC of 14 December 1992 on the manufacture and the placing on the market of certain substances used in the illicit manufacture of narcotic drugs and psychotropic substances [1992] OJ L370/76, Council Regulation (EEC) No 3911/92 of 9 December on the export of cultural goods [1992] OJ L395/1, Council Regulation (EC) No 3295/94 of 22 December 1994 laying down measures concerning the entry into the Community and the export and re-export from the Community of goods infringing certain intellectual property rights [1994] OJ L341/8, Commission Regulation (EC) No 1367/95 of 16 June 1995 laying down provisions for the implementation of Council Regulation (EC) No 3295/94 laying down measures concerning the entry into the Community and the export and re-export from the Community of goods infringing certain intellectual property rights [1995] OJ L133/2, Council Regulation (EC) No 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology [2000] OJ L159/1), apply to the UK Sovereign Base Areas.

assessed as satisfactory'.[53] Moreover, pursuant to Article 3 of the same Protocol, former Title II of Part Three of the EC Treaty [now Title III of Part Three of the TFEU] on agriculture and measures adopted under what was Article 152(4)(b) TEC [now Article 168(4)(b) TFEU][54] also apply to the UK Sovereign Bases. Generally speaking, those provisions are also implemented smoothly.[55]

Generally speaking, it is the UK, which is responsible for the implementation of the Protocol.[56] In particular, the UK is responsible for the application of the Union measures in the fields of customs, indirect taxation and the common commercial policy in relation to goods entering or leaving the island through a port or airport within the Sovereign Bases.[57] But also, it is responsible for issuing licences, authorisations or certificates which may be required under any applicable Union measure in respect of goods imported into or exported from the island of Cyprus by the UK forces.[58] However, in contrast with the aforementioned rule, Article 7(2) provides that with regard to the payment of any Union funds to which persons in the Bases may be entitled, pursuant to the application of CAP, it is the Republic of Cyprus, which is responsible and thus accountable to the Commission for such expenditure. Such a rule is in conformity with the aforementioned scope set out in the associated Treaty of Establishment Notes according to which Cyprus and the UK should strive to offer, to the extent possible, the same treatment to people residing and working in the Areas as that which is enjoyed by those residing and working in the Republic. Finally, the customs controls on the goods imported into or exported from the island by the UK forces through a port or airport in the Republic may be carried out within the Sovereign Base Areas.[59]

Having said that, one has to point out that all the aforementioned provisions should not be read as preventing the Governments of the UK and the Republic of Cyprus from concluding arrangements concerning the delegation of any functions imposed by the Protocol from one Member State to the other.[60] In fact, a couple of months after the signing of the Act of Accession 2003 the two States signed a Memorandum of Understanding concerning responsibility for the implementation of the Protocol No 3.[61]

[53] Report from the Commission to the European Parliament and the Council—First Report on the implementation of the provisions of Protocol No 3 to the 2003 Act of Accession on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus (hereafter Commission Report on the implementation of Protocol No 3); Brussels, 19 April 2010 COM(2010)155.

[54] Art 168(4)(b) TFEU [ex Art 152(4)(b) TEC] provides that: 'the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall contribute to the achievements of the objectives referred to in this Article through adopting in order to meet common safety concerns measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health'.

[55] Commission Report on the implementation of Protocol No 3.

[56] Art 7 of Protocol No 3 of the Act of Accession 2003.

[57] Art 7(1)(a) of Protocol No 3 of the Act of Accession 2003.

[58] Art 7(1)(c) of Protocol No 3 of the Act of Accession 2003.

[59] Art 7(1)(b) of Protocol No 3 of the Act of Accession 2003.

[60] Art 7(3) and (4) of Protocol No 3 of the Act of Accession 2003.

[61] Reprinted in N Makris (ed), *The 1960 Treaties on Cyprus and Selected Subsequent Acts* (Mannheim, Bibliopolis, 2003).

Most importantly, for the purposes of the present research, it is critical to mention that Article 6 of the Protocol provides the legal basis for the Council Regulation 866/2004. It provides inter alia that the Council, acting unanimously on a proposal from the Commission, may, in order to ensure the effective implementation of the objectives of the Protocol, 'apply other provisions of the EC Treaty and related Union legislation to the Sovereign Base Areas on such terms and subject to such conditions as it may specify'. The Green Line Regulation, as shall be seen to a greater extent in the two following chapters is the main legislative mechanism that allows the crossing of the Green Line by persons and goods.

Finally, with regard to the Union citizenship status of the inhabitants of the Sovereign Base Areas the following should be noted. The British Overseas Territories Act 2002,[62] by which the 'British Dependent Territories Citizens' were renamed as 'British Overseas Territories Citizens',[63] provides in section 3(1) that '[a]ny person who, immediately before the commencement of this section, is a British overseas territories citizen shall, on the commencement of this section, become a British citizen' and thus an EU citizen. However, British citizenship was not extended to persons who, on the day of commencement of the relevant section, were British Overseas Territories Citizens by virtue of a connection with the Sovereign Base Areas of Akrotiri and Dhekelia.

However, the British personnel working in the Sovereign Base Areas enjoy British citizenship and the Cypriot population residing in the Bases are recognised as citizens of the Republic[64] and thus, since 1 May 2004, are all EU citizens. Nevertheless, the extremely limited number of persons, if any, possessing only the British Overseas Territories Citizenship by virtue of a connection with the Sovereign Base Areas, for the purposes of the Green Line Regulation, are not deemed British citizens and thus are also not deemed Union citizens.

3. 'THE FIRST PARTITION'

3.1 The 13 Points

Independence had been granted to the Cypriots, but as Holland writes: 'In Cyprus "freedom" as most people understood it had not been won; self-determination, however partisanly defined, was not applied'.[65] The aspiration of the vast majority of the Greek Cypriots was still '*Enosis and only Enosis*'.[66] According to the Cyprus

[62] For a more comprehensive analysis see generally GR De Groot, *Towards a European Nationality Law—Vers un droit européen de nationalité* (Maastricht, Universiteit Maastricht, 2003).

[63] s 1 of the British Overseas Territories Act 2002.

[64] Appendix O of the Cyprus Agreements *Declaration of Her Majesty's Government Regarding the Administration of the Sovereign Base Areas*; www.kypros.org/Constitution/English/appendix_o.htm.

[65] Holland, *Britain and the Revolt in Cyprus* (above n 1).

[66] On 22 August 1954, Archbishop Makarios, as the Ethnarch of the Greek Cypriot community, delivered his famous speech that has been known as the 'oath of Faneromeni' where he made clear that the scope of the anti-colonial struggle of the Greek Cypriots is '*Enosis and only Enosis*'.

Agreements, not only the union with the motherland was banned, but also a disproportionately large say in the Government was given to the Turkish Cypriot minority. Consequently, the vast majority of the Greek Cypriots attached very little legitimacy to the new Republic.[67] Even the first President of the Republic, Archbishop Makarios, viewed the agreements as a tactical move under the given circumstances. On the other hand, many among the Turkish Cypriots regretted that *Taksim* did not take place,[68] although most were finding the Cyprus Agreements arrangements acceptable.

Under those circumstances, and given that the cooperation of the two communities was a prerequisite for the smooth functioning of the Cyprus Republic, it was inevitable that the internal stability of the new State would soon be at stake. Thus, the viability of the very elaborate and rigid 1960 Constitution was brought into question from the very first years of its life when a constitutional dispute over the establishment of separate municipalities in the five largest Cypriot cities arose.[69] The tension rose higher when, in November 1963, the first President of Cyprus, Archbishop Makarios, proposed thirteen constitutional amendments to the Vice-President Dr. Kutchuk, which would remove obstacles to the smooth functioning and development of the State. He suggested the following:

1. The right of veto of the President and the Vice-President of the Republic to be abandoned;
2. The Vice-President of the Republic to deputise for the President of the Republic in case of his temporary absence or incapacity to perform his duties;
3. The Greek President of the House of Representatives and the Turkish Vice-President to be elected by the House as a whole and not as at present the President by the Greek Members of the House and the Vice-President by the Turkish Members of the House;
4. The Vice-President of the House of Representatives to deputise for the President of the House in case of his temporary absence or incapacity to perform his duties;
5. The constitutional provisions regarding separate majorities for enactment of certain laws by the House of Representatives to be abolished;
6. Unified Municipalities to be established;
7. The administration of Justice to be unified;
8. The division of the Security Forces into Police and Gendarmerie to be abolished;
9. The numerical strength of the Security Forces and of the Defence Forces to be determined by a Law;

[67] Markides, *The Rise and Fall of the Cyprus Republic* (above n 1) 88.

[68] C Dodd (ed), *The Political, Social and Economic Development of Northern Cyprus* (Huntingdon, The Eothen Press, 1993) 6.

[69] Article 173(1) of the Constitution provides that 'separate municipalities should be created by Turkish inhabitants' of Nicosia, Limassol, Famagusta, Larnaca and Paphos. For a more detailed account of this constitutional dispute see Markides, *Cyprus 1957–63* (above n 1).

10. The proportion of the participation of Greek and Turkish Cypriots in the composition of the Public Service and the Forces of the Republic to be modified in proportion to the ratio of the population of Greek and Turkish Cypriots;
11. The number of the Members of the Public Service Commission to be reduced from ten to five;
12. All decisions of the Public Service Commission to be taken by simple majority;
13. The Greek Communal Chamber to be abolished.

The atmosphere after the presentation of the thirteen proposals was very tense. Three weeks later, the first, low-scale, inter-communal armed conflict broke out in Nicosia. Many Turkish Cypriot representatives, interpreting the move as a preparation to slide into *Enosis,* immediately withdrew from their posts in the executive, legislative and judiciary while others were prevented from assuming their positions. Most importantly, the members of the Turkish ethno-religious segment were regrouped and secluded in enclaves with strong lines of defence. British troops policed a truce in Nicosia and the 'Green Line', a neutral zone between the Greek and Turkish quarters in the capital city, was established. By March, a UN force had arrived to secure each community from further violence. The economic and political isolation of the Turkish Cypriot community, resulting in its seclusion into enclaves and some decisions of the Government subjected it to political, social and economic hardship which was so severe that the UN Secretary-General noted on 10 September 1964 that, in some instances, it amounted to a 'veritable siege'.[70] Some contemporary writers refer to those events as 'the first partition'.[71]

3.2 The Doctrine of Necessity

Despite the break-up of the bi-communal Republic in 1963, the State continued functioning. The Cypriot constitutional order has been maintained mainly by evoking the doctrine of necessity. In Cyprus, the doctrine of necessity has been considered to be a constitutional principle which indirectly forms part of the 1960 Constitution and the aim of which is to solve problems that were not foreseen by the drafters and which threaten the existence of the Republic.

The doctrine has been spelled out for the first time in the emblematic *Mustafa Ibrahim* judgment of the Supreme Court.[72] In the aftermath of the resignation of the President of the Supreme Constitutional Court, Professor Forsthoff, the House of Representatives enacted the Administration of Justice (Miscellaneous Provisions) Law, 33/1964. According to this law, a newly established Supreme Court would exercise the jurisdictions and powers both of the Supreme Constitutional Court

[70] Report of the Secretary-General to the Security Council of 10 September 1964, UN Doc S/1964/5950.

[71] M Droushiotis, *Η πρώτη διχοτόμηση, Κύπρος 1963–1964* [The First Partition, Cyprus 1963–1964] (Nicosia, Alfadi, 2005).

[72] *Attorney General of the Republic v Mustafa Ibrahim* [1964] CLR 195. For a more detailed account see generally Chrysostomides (n 1) 100–110; F Hoffmeister, *Legal Aspects of the Cyprus Problem, Annan Plan and EU Accession* (Leiden, Martinus Nijhoff Publishers, 2006).

and the High Court 'until such time as the people of Cyprus may determine such matters'.[73] The allegation was that such Law, which was merging two Courts into one Supreme Court, was not enacted in accordance with the Constitution.

The Court held that the doctrine of necessity should be considered to be included in the provisions of a strict and written constitution, and is therefore part of the constitutional order in Cyprus. It allows the country to safeguard its interests whenever the Constitution, due to its rigidity, one-sidedness and narrow ambit, contains no provisions giving satisfactory solutions to extraordinary situations 'of a public necessity of the first magnitude'.[74] Most importantly, the Court decided that there are four prerequisites in order to determine whether the said doctrine could be applied in a particular case:

1. There is an imperative and inevitable necessity or exceptional circumstance;
2. There is no other remedy;
3. The measure taken must be proportionate to the necessity;
4. The measure must be of a temporary character limited to the duration of the exceptional circumstances.[75]

The doctrine of necessity, as defined in the *Mustafa Ibrahim* case, not only has provided the necessary legal basis in order for the Cypriot State to deal with the absence of the Turkish Cypriots in the Government, and their subsequent substitution with Greek Cypriots,[76] but also, has allowed the amendment of non-fundamental Articles of the Constitution.[77]

3.3 The International Legitimacy of RoC

Despite the break-up and the 'hellenisation' of the Republic, on 4 March 1964, the UN Security Council maintained the view that the Republic of Cyprus continuously existed in its entirety and it also recognised the legitimacy of Government of the Republic which was, at the time, comprised only of Greek Cypriots with the unanimous adoption of Resolution 186 (1964). The said Resolution laid down the original mandate of the UN Force in Cyprus (hereafter UNFICYP).[78] The General Assembly was even more explicit. It declared that 'Cyprus, as an equal member of

[73] *Ibid*, 201 and 225.

[74] *Ibid*, 234.

[75] *Ibid*, 265.

[76] For a more detailed account see generally AC Emilianides, 'Accession of the Republic of Cyprus to the EU, the Constitution and the Cypriot Doctrine of Necessity' (2007) *The Cyprus Yearbook of International Relations* 65; N Kyriakou, 'Report on Cyprus' in G Martinico and O Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws: A Constitutional Comparative Perspective* (Groningen, Europa Law Publishing, 2010) 191.

[77] *Nicolaou v Nicolaou* [1992] 1 CLR 1338.

[78] The original mandate of UNFICYP was described in a document prepared on 29 April 1964 by the UN Secretary-General (S/5671, 29 April 1964, Annex I). It was to exert its best efforts (a) to prevent a recurrence of fighting; (b) to contribute to the maintenance and restoration of law and order; and (c) to contribute to a return to normal conditions.

the UN, is, in accordance with the Charter of United Nations, entitled to enjoy, and should enjoy, full sovereignty and complete independence without foreign intervention or interference'.[79] The adoption of such a Resolution has been characterised as a 'diplomatic triumph for Makarios'.[80] Thus, despite the obvious constitutional issues which have arisen because of the collapse of the bi-communal constitutional structure, with the exception of Turkey, the international community has always recognised the Government of the Republic as the only legitimate Government on the island. This will be even more obvious when the eligibility of Cyprus' Union membership is addressed.

4. THE 1974 TURKISH MILITARY INTERVENTION AND THE CONTINUED PRESENCE OF TURKEY ON CYPRUS

4.1 The 1974 Turkish Military Intervention

From 1963 on, and until 1974, the two communities, along with the three Guarantor States and the UN, were engaged in negotiations in order to find a viable solution for Cyprus while disorder and anarchy prevailed on the island. On 2 July 1974, Makarios addressed a public letter to Gizikes, the President of Greece appointed by the colonels' regime. With this letter he denounced the regime in Athens as a dictatorship that was fomenting civil war in Cyprus and demanded the withdrawal of the Greek officers from the Cyprus National Guard since they consisted of a threat to the elected Government. Two weeks later, there was a coup against the President of Cyprus orchestrated by the military regime in Greece.

The coup undoubtedly being a breach of the Treaty of Guarantee and given the British denial for a joint intervention to restore the 'constitutional order' in accordance with Article IV of the Treaty of Guarantee, Turkey seized the opportunity to invade the island in the morning of 20 July 1974. The very same day the Security Council adopted Resolution 353 (1974)[81] which was meant to mainly address the coup. Having learnt of Turkey's military intervention, the Security Council called upon all States to respect the sovereignty and territorial integrity of Cyprus and demanded an immediate end to foreign military intervention on the island that was contrary to this respect for sovereignty. Nevertheless, on 21 July, the Turkish army seized Kyrenia. One day later Greece and Turkey agreed on a ceasefire and on 23 July the Greek dictatorship collapsed.

On 8 August 1974, inter-communal talks started in order for a political settlement to be reached. In the course of those negotiations, the Turkish Cypriots, officially for the first time, asked for some form of geographical separation of the two communities. Makarios rejected the demand and insisted that Cyprus should remain a unitary State. The talks unsurprisingly collapsed on 14 August 1974. Within hours,

[79] UN General Assembly Resolution 2077 (XX) of 18 December 1965, para 1.
[80] P Anderson, *The New Old World* (London, Verso, 2009) 369.
[81] UN Security Council Resolution 353 (1974).

Turkey seized 36 per cent of the island including 57 per cent of the coastline[82] up to an 'Attila Line' running from Morphou Bay to Famagusta. The occupied territory included about 60 per cent of its industry, 65 per cent of its agriculture and 80 per cent of its tourism. The result was a humanitarian catastrophe for the population of the island. Thousands of Cypriots had been killed and wounded and many were missing. One third of the Greek Cypriot community and another 50,000 Turkish Cypriots had been displaced. Varosha, the predominantly Greek Cypriot region of Famagusta, became a 'ghost-city' and Nicosia a 'Mediterranean Berlin, divided by barbed wires and barricades'.[83]

During the second phase of the Turkish military intervention, the UN Security Council adopted four Resolutions with which it called on both sides not to violate the ceasefire agreement[84] and not to kill members of the UNFICYP.[85] It also recorded 'its formal disapproval of the unitary military action undertaken against the Republic of Cyprus'.[86] More importantly, it extended the functions of UNFICYP to offering humanitarian relief[87] in addition to performing its task of limiting fighting and protecting the civilian population in accordance with its original mandate, as well as undertaking, as far as possible, the tasks of observing the ceasefire called for by Resolution 353 (1974) issued on the day that armed conflict commenced. The UN Secretary-General has described the latter function of the UNFICYP as trying 'pragmatically to maintain surveillance over the cease-fire'.[88] Recital (9) of the Green Line Regulation recognises the abovementioned mandate of the UN in the area between the ceasefire lines, which extends approximately 180 kilometres from east to west across the island and is known as the UN buffer zone, by providing that the Regulation does not affect this mandate in any way.

Unsurprisingly, the legality and legitimacy of the Turkish military intervention in Cyprus has provided enough ground for a heated debate.[89] For the purposes of the present research it suffices to mention the following. Turkey has claimed that Article IV of the Treaty of Guarantee, and especially its second paragraph, contains an authorisation for its action. Article IV provides that:

> In the event of a breach of the provisions of the present Treaty, Greece, Turkey and the United Kingdom undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions.
>
> In so far as common or concerted action may not prove possible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the State of affairs created by the present Treaty.

[82] Borowiec, *Cyprus a Troubled Island* (above n 1).
[83] Anderson, *The New Old World* (above n 80) 373.
[84] UN Security Council Resolution 357 (1974); UN Security Council Resolution 358 (1974).
[85] UN Security Council Resolution 359 (1974).
[86] UN Security Council Resolution 360 (1974).
[87] UN Security Council Resolution 359 (1974).
[88] S/11717, 9.6.1975.
[89] For a more detailed account see generally Chrysostomides (n 1); Z Negatigil, *The Cyprus Question and the Turkish Position in International Law*, 2nd Revised Edition (Oxford, Oxford University Press, 1996).

It is obvious that the coup orchestrated by the Greek junta is a breach of the Treaty. One may also argue that Turkey asked for concerted action by making an effort to consult with the UK in London while the non-consultation with the Greek Government is justifiable given the chaotic political environment in Athens. It could even be accepted, for the sake of the argument, that Article IV(2) provides for a right of unilateral military intervention of the Guarantor States, although Article 2(4) of the UN Charter prohibits the use of force and the UN Security Council has labelled the first phase of the Turkish operation as 'foreign military intervention'[90] and has also found that the second phase constituted a 'unilateral military action against the Republic of Cyprus'.[91] However, the aim of the 'Attila' operation was not to re-establish 'the state of affairs created by the' Treaty of Guarantee as Article IV(2) provides. Instead, the 'Attila' operation created facts, on the ground, that have completely altered the *status quo ante*. Even a former 'Advocate-General' of the TRNC, Necatigil, has accepted that the second phase did not serve the purpose of re-establishing the previous state of affairs. Instead, he has argued to justify that the re-establishment of 'the state of affairs' was impracticable after the 1960 break-up of the Republic and especially in a situation where UN led negotiations about a new *status quo* had already started.[92] This argument is completely unconvincing. Instead of protecting the territorial integrity and the constitutional order of the Republic of Cyprus as it has undertaken under the Treaty of Guarantee, Turkey was aiming at territorially dividing the island and exercising effective control over the northern part of Cyprus. Although Greece has not respected its obligations as Guarantor State undoubtedly the 1974 Turkish military invasion was a grave violation of international law and of its Treaty obligations and thus unlawful.

4.2 The 'Turkish Republic of Northern Cyprus' (TRNC)

Unsurprisingly, in the aftermath of the Turkish intervention and the consequent territorial segregation of the two communities, a settlement based on some form of 'functional federation', like the one designed by the 1960 Cyprus Agreements, has been out of the question. From then on, any proposal for a settlement has to include some form of Turkish Cypriot territorial entity. This became even clearer on 13 February 1975 when the Turkish Federated State of Cyprus was proclaimed in the area occupied by Turkish forces. Although the UN Security Council has regretted such a unilateral decision,[93] one might argue that given that such an entity perceives itself as a federated State within the Republic, such a proclamation did not raise serious issues from an international point of view. The unilateral declaration of independence of the purported State of the TRNC, however, is a matter that should be examined under international law.

[90] UN Security Council Resolution 353 (1974), para 1.
[91] UN Security Council Resolution 360 (1974), para 2.
[92] Necatigil, *The Cyprus Question and the Turkish Position in International Law* (above n 89) 132.
[93] UN Security Council Resolution 367 (1975), para 2.

On 15 November 1983, the Turkish Cypriots proclaimed their independence as the so-called 'Turkish Republic of Northern Cyprus'. In the preamble of the 'constitution' of the internationally unrecognised TRNC it is mentioned that, since the Republic of Cyprus has lost its legitimacy after the 1963 events, the Turkish Cypriot People has, 'in exercise of its right of self-determination', proclaimed the independence of the TRNC. However, the UN Security Council deplored 'the purported secession of part of the Republic of Cyprus' and called upon all States 'not to recognise the purported State of the "Turkish Republic of Northern Cyprus" set up by secessionist acts'.[94] This was reiterated in Security Council Resolution 550 (1984).[95] In other words, the UN Security Council has rejected *de facto* the Turkish Cypriot claim for self-determination. Similarly, by declarations of 16 and 17 November 1983, the European Parliament, the Commission and the Foreign Ministers of the Member States, in the framework of European Political Cooperation, rejected the Turkish Cypriot declaration of independence and expressed their continued recognition of the Government of the then President Kyprianou as the legitimate Government of the Republic.[96]

More importantly, the European Court of Human Rights held, in *Loizidou v Turkey,* that

> 'it is obvious from the large number of troops engaged in active duties in northern Cyprus' that the Turkish 'army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case', entails Turkey's 'responsibility for the policies and actions of the "TRNC" '.[97]

The Strasbourg Court upheld this finding in the fourth inter-State application of Cyprus against Turkey and went a step further by stating that Turkey

> [h]aving effective overall control over northern Cyprus, its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support.[98]

The European Convention of Human Rights being the 'constitutional instrument of European public order',[99] the decisions of its Court provide an authoritative answer on the international law questions raised by the unilateral declaration of independence of the secessionist entity called the TRNC. The breakaway State in northern Cyprus not only is not an independent State founded as an expression of the right of self-determination of the Turkish Cypriot People, but rather it is the

[94] UN Security Council Resolution 541 (1983).

[95] UN Security Council Resolution 550 (1984).

[96] See *EC Bulletin* 11-1983, points 2.2.34, 2.4.1 and 2.4.2; and OJ 1983 C 342/52. On recognition of the Government of the Republic, see also *EC Bulletin* 3-1984, point 2.4.3 and OJ [1994] C 289/13.

[97] *Loizidou v Turkey (Merits and Just Satisfaction)* (Application No 15318/89) (judgment 18 December 1996), ECHR Reports 1996-VI, para 56.

[98] *Cyprus v Turkey* (Application No 25781/94) (judgment 10 May 2001), ECHR Reports 2001-IV, para 77.

[99] *Chrysostomos, Papachrysostomou, Loizidou v Turkey* (Application Nos. 15299/89, 15300/89, 15318/89) (decision as to the admissibility 4 March 1991) DR 68, 216.

result of a secessionist act that has created a Turkish local administration in northern Cyprus. Despite the fact that under international law the Republic of Cyprus is the sole legitimate Government of Cyprus,

> international law recognises the legitimacy of certain legal arrangements and transactions in such a situation, for instance as regards the registration of births, deaths and marriages, 'the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory'.[100]

In any case

> the obligation to disregard acts of *de facto* entities is far from absolute. Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the *de facto* authorities, including their courts; and in the very interest of the inhabitants, the acts of these authorities related thereto cannot simply be ignored by third States or by international institutions, especially courts, including this one.[101]

To that effect, in a recent judgment, the Strasbourg Court decided that the temporary deprivation of the liberty of Eleni Foka, a teacher living and working in a Greek Cypriot enclave in the Karpas peninsula, because she had resisted a search of her bag by TRNC officers at Ledra Palace crossing point, was in accordance with a procedure prescribed by law within the meaning of Article 5(1)(b) ECHR.[102] Moreover, in *Protopapa v Turkey*, a criminal trial before a court of the secessionist entity in the North was found to be in accordance with Article 6, there being no ground for finding that these courts were not independent or impartial or that they were politically-motivated.[103] As shall be illustrated in the following chapter such legal arrangements may even include decisions of a Committee on property rights of Cypriots that have been affected by the post-1974 *status quo*.[104]

No State other than Turkey has thus far recognised the TRNC. Therefore, the travel documents issued by the 'authorities' of the purported independent State are not recognised as valid by any other State than the Turkish Republic. Moreover, following the Turkish military invasion, the Government of the Republic declared the closure of all ports of entry into the Republic which are situated in the areas not under its effective control.[105] Hence, practically, no movement of persons and

[100] *Loizidou v Turkey (Merits and Just Satisfaction)*, (above n 97) para 45 citing the Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, [1971] International Court of Justice Reports 16, 56, para 125.

[101] *Cyprus v Turkey*, (above n 98) para 96.

[102] *Foka v Turkey* (Application No 28940/95) (judgment 24 June 2008) [not yet reported], paras 85–86.

[103] *Protopapa v Turkey* (Application No 16084/90) (judgment 24 February 2009) [not yet reported], para 87.

[104] See generally part 3 of ch 3; see also *Demades v Turkey (Just Satisfaction)* (Application No 16219/90) (judgment 22 April 2008) [not yet reported] para 22; *Demopoulos and Others v Turkey* (Application Nos 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04) (judgment 1 March 2010) [not yet reported].

[105] In the Letter dated 19 August 2005 from the Chargé d'affaires a.i. of the Permanent Mission of Cyprus to the UN addressed to the Secretary-General it was stated: 'On the specific matter of airports and ports in the occupied area of Cyprus, it should be stressed that, following the Turkish military invasion and occupation of the northern part of the island, the Government of the Republic of Cyprus

goods can take place through the relevant ports and airports which are situated to the North of the UN Buffer zone with the exception of movements whose destination or point of origin is Turkey. Until 23 April 2003, when, after massive demonstrations had taken place, the regime in the North decided to partially lift the strict restrictions it had posed on the inhabitants in the North with regard to the crossing of the Green Line towards the South, the crossing of persons and goods had been extremely limited.

5. THE ROC AS A CANDIDATE FOR EU ACCESSION

5.1 The Association Agreement

With regard to EU-Cyprus relations, on 19 December 1972 an Agreement Establishing an Association Between the European Community and the Republic of Cyprus and the Protocols Thereto (Association Agreement) was signed.[106] Unlike the Association Agreements with Turkey and Greece, no reference was made to the EU membership prospects of Cyprus. The Association Agreement provided for the bilateral legal basis of the relationship between Cyprus and the EEC/EU insofar as it concerned the dispute resolution, trade and accompanying provisions on services, persons and capital and other common provisions. According to Article 2(1) of the Association Agreement, its original scope was the progressive elimination of trade obstacles through a process of reciprocal liberalisation of trade. Two five-year phases of liberalisation should have led to the establishment of a customs union. The first phase was to come to an end on 30 June 1977. However, it was extended twice and it was only on November 1980 that the Association Council decided to start negotiating the conditions and procedures for the second phase as

declared the closure of all ports of entry into the Republic of Cyprus which are situated in those areas as closed. In particular with regard to airports, it should be noted that the Government of the Republic of Cyprus acted in accordance with the Chicago Convention on International Civil Aviation, which provides that "the contracting States recognise that every State has complete and exclusive sovereignty over the airspace above its territory", including designation of official ports of entry. Moreover, according to International Civil Aviation Organisation decisions of 1974, 1975 and 1977, a country not exercising, temporarily, effective control over its territory by reasons of military occupation, does not lose its sovereign rights over its territory and the airspace above it. In that context, the two airports operating in the occupied area of the island [. . .] are illegal and pose potential safety concerns to civil aviation. Furthermore, with regard to ports, the relevant ports were declared closed as from 3 October 1974 by an order of the Council of Ministers which was communicated to the International Maritime Organisation on 12 December 1974 for distributions to its Member States'.

[106] Agreement establishing an Association between the European Economic Community and the Republic of Cyprus, signed at Brussels, December 19, 1972 [1973] OJ L133/1. For a more comprehensive analysis of the Association Agreement, see generally I Kranidiotis, 'Relations Between Cyprus and the European Community' (1992) 8 *Modern Greek Studies Yearbook* 165; S Laulhé Shaelou *The EU and Cyprus: Principles and Strategies of Full Integration* (Leiden, Brill / Martinus Nijhoff, 2010), ch 1; C Lycourgos, *L' association de Chypre a la CEE* (Paris, Presses Universitaires de France, 1989); C Tsardanidis, 'The EEC-Cyprus Association Agreement: Ten Years of a Troubled Relationship, 1973–1983' (1984) 23 *Journal of Common Market Studies* 351; C Tsardanidis, *The Politics of the EEC-Cyprus Association Agreement: 1972–1982*, (Nicosia, Cyprus Research Center, 1988).

from 1982.[107] The second phase was eventually agreed upon between the then EEC and Cyprus with the additional protocol of 19 October 1987.[108]

The signing of the Association Agreement was deemed necessary in order to maintain the stability of the Cypriot economy. Following the UK accession to the EEC and the consequent adoption of the CAP, the exports of Cypriot agricultural products to the UK, which exceeded 50 per cent of the total number of exports, would lose the commonwealth benefits and would face limitations provided under the Common Agricultural Policy. The Association Agreement was securing a satisfying level of exports for Cypriot agricultural products to the EEC market and especially the UK and Irish markets for some years.[109] More importantly, it was an obvious political manoeuvre in order for the Cyprus problem to be discussed in the Community framework. The intention of the Greek Cypriot community to 'Europeanise' the Cyprus problem became clearer with the application for accession of the Republic. It has been widely accepted that it was exactly the dynamic created by the EU accession negotiations that created the window of opportunity which led to the Annan Plan.[110]

5.2 The Application for Union Membership

On 4 July 1990, the Foreign Minister of the Republic of Cyprus, George Iacovou, on behalf of the whole island, presented an application for membership to the European Community in accordance with the then Article 237 EEC to the Italian Foreign Minister de Michelis. However it was only in late 1992, after the failure of the Boutros Ghali's Set of Ideas, that the Commission started to prepare its Opinion, which was issued on 30 June 1993[111] and endorsed by the Council on 17 October.

In its Opinion, the Commission considered Cyprus to be eligible for membership[112] but noted that:

> as a result of the *de facto* division of the island into two strictly separated parts, the fundamental freedoms laid down by the Treaty, and in particular freedom of movement of goods, people, services and capital, right of establishment and the universally recognised political, economic, social and cultural rights could not today be exercised over the entirety of the island's territory. These freedoms and rights would have to be guaranteed as part of a comprehensive settlement restoring constitutional arrangements covering the whole of the Republic of Cyprus.[113]

[107] Association Council EC-Cyprus, Decision 1/80 of 24 November 1980.
[108] Protocol of 19 October 1987, [1987] OJ L393/2.
[109] E Michael, *Cyprus: The Race for Accession. Is the 1960 Constitution a Barrier?* (Florence, EUI LL.M. Thesis, 1998), 50.
[110] T Diez (ed), *The European Union and the Cyprus Conflict: Modern Conflict, Postmodern Union* (Manchester, Manchester University Press, 2002); Ker-Lindsay, *EU Accession and UN Peacemaking in Cyprus*, (above n 1); Tocci (n 1).
[111] COM (93) 313, Bulletin EC, Supplement 5/93, Luxembourg 1993.
[112] *Ibid*, para 48.
[113] *Ibid*, para 10.

This is the main reason why the Commission concluded that: 'Cyprus's integration with the Community implies a peaceful, balanced and lasting settlement of the Cyprus question'.[114] It felt, however, that it was necessary to clarify that in case of a failure to reach a settlement through the inter-communal talks under the UN auspices, the situation should be reassessed.[115]

The intransigence of Turkey and the regime in northern Cyprus, as reported by the EU special envoy,[116] coupled with the political manoeuvres of Greece inside the Community framework, pushed the Corfu European Council on 24 June 1994 to decide to include Cyprus and Malta in the next round of enlargement. Moreover, in 1995, it convinced the Council to start accession negotiations with the Republic of Cyprus and in exchange establishing a customs union with Turkey. In its historic Report,—Agenda 2000: The Challenge of Enlargement', containing its final recommendations on accession negotiations, the European Commission expressed the Union's support for a settlement within the UN framework and in accordance with the principles of bi-zonality and bi-communality. More importantly, it stressed that '[t]he Union is determined to play a positive role in bringing about a just and lasting settlement in accordance with the relevant United Nations Resolutions'.[117]

At the same time, building on the momentum created by the G-8 meeting in Cologne, in June 1999, in which the leaders of the eight wealthiest nations in the world invited the parties in the conflict to resume negotiations without preconditions and hoping to use the carrots and sticks offered by the accession negotiations, the UN Secretary-General Koffi Annan invited the two communities to re-launch the talks on the basis of Resolution 1250.[118] In December 1999, the Helsinki European Council,[119] commenting on those important developments, expressed its 'strong support for the UN Secretary-General's efforts to bring the process to a successful conclusion'. It also underlined that a political settlement would 'facilitate the accession of Cyprus to the European Union' but clarified that, in case a settlement was not reached by the completion of the negotiations, the Council's decisions would 'be made without the above being a precondition. In this, the Council would 'take all the relevant factors' into account.[120] In exchange, Turkey became a candidate State for accession to the EU.

During all this time, the regime in northern Cyprus, led by Denktash, was challenging the application of the Republic of Cyprus mainly on the ground that the Cypriot Government did not have a right to speak for the whole Cyprus and that the application was illegal under international and constitutional law. In a joint declaration, Turkey and the breakaway State of the TRNC declared that Cyprus could

[114] *Ibid*, para 47.
[115] *Ibid*, para 51.
[116] European Observer's Report on Cyprus, 23 January 1995.
[117] European Commission, *Agenda 2000 Strengthening the Union and Preparing Enlargement* (July 15 1997); ec.europa.eu/agenda2000/index_en.htm.
[118] UN Security Council Resolution 1250 (1999).
[119] Helsinki European Council Presidency Conclusions (10 and 11 December 1999); http://www.europarl.europa.eu/summits/hel1_en.htm.
[120] *Ibid*, para 9.

not join 'international political and economic unions to which Turkey and Greece are not members'.[121] It was the issue of the legality of Cyprus' application that was the subject of an interesting legal debate during the late 1990s. On the request of Turkey, Professor Mendelson published a legal opinion in June 1997,[122] according to which the future EU accession of Cyprus would be illegal. A couple of months later, Professors Crawford, Hafner and Pellet, commissioned by the Republic of Cyprus, rebutted this opinion.[123] Four years later, in 2001, Professor Mendelson published an additional opinion[124] to which Professors Crawford, Hafner and Pellet replied.[125] The main arguments of the debate[126] relate to the interpretation of Article I(2) of the Treaty of Guarantee and Articles 50 and 170 of the Cypriot Constitution.

Firstly, Article I(2) of the Treaty of Guarantee reads as follows:

> The Republic of Cyprus undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever. It accordingly declares prohibited any activity likely to promote, directly or indirectly, either union with any other State or partition of the island.

Mendelson argues that EU membership would amount to an economic and political union with 24 (now 26) other States and in particular with Greece.[127] In other words, the long-dead aspiration of Greek Cypriots for *Enosis* would be indirectly resurrected through the EU accession.

However, Article I(2) should be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, as provided by Article 31(1) of the Vienna Convention on the Law of the Treaties of 1969, which reflects a rule of customary international law that preceded the Vienna Convention. If this rule is applied to the provision in question, it would be easy to conclude that Mendelson's interpretation is rather erroneous. Firstly, such an interpretation would condemn Cyprus to almost absolute isolation in the world scene. However, when the Cyprus Agreements were signed, it was not meant that Cyprus would remain an outsider in the international community abstaining from any international organisation or structure. This is obvious from Article 50

[121] Joint Declaration of the Republic of Turkey and the 'Turkish Republic of Northern Cyprus' of 28 December 1995, para 5.

[122] MH Mendelson, *The Application of the 'Republic of Cyprus' to Join the European Union*, Opinion of 6 June 1997, UN Doc A/52/481, S/1997/805.

[123] J Crawford, G Hafner, A Pellet, *Republic of Cyprus: Eligibility for EU Membership*, Opinion of 14 October 1997 reprinted in A Markides (ed), *Cyprus and EU Membership: Important Legal Documents* (Nicosia, PIO, 2002).

[124] MH Mendelson, *Further Opinion on the Application of the 'Republic of Cyprus' to join the European Union of 12 September 2001*, UN Doc A/56/451/, S/2001/953.

[125] J Crawford, G Hafner, A Pellet, *Republic of Cyprus: Eligibility for EU Membership*, *Further Opinion of 17 November 2001* reprinted in A Markides (ed), *Cyprus and EU Membership: Important Legal Documents* (Nicosia, PIO, 2002).

[126] For a discussion of the debate see eg C Tomuschat, 'The Accession of Cyprus to the European Union' in P Haberle, M Morlok, V Skouris (eds), *Festschrift für Dimitris Th. Tsatsos* (Baden-Baden, Nomos, 2003) 672; Hoffmeister, *Legal Aspects of the Cyprus Problem,* (above n 72) 91–95; Chrysostomides, (n 1) 443–477; Michael, *Cyprus: The Race for Accession*, (above n 109).

[127] Mendelson, Opinion of 6 June 1997, (above n 122) 36.

of the Cypriot Constitution which was framed in full cognisance of the Treaty of Guarantee. According to Article 50, the membership of Cyprus in international organisations is permissible provided that, in the case of accession to organisations in which either Greece or Turkey do not participate, there must be a consensus of both ethno-religious segments of Cyprus, expressed by an agreement between the Greek Cypriot President and the Turkish Cypriot Vice-President of the Republic. Thus, a clear distinction between a 'political and economic union with any State' on the one hand and accession to 'international organisations and pacts of alliance' exists in the Cyprus Agreements.[128]

Such an interpretation is also compatible with the history and the context of this provision. The history of the provision shows that its scope is to outlaw *Enosis* and *Taksim*.[129] On this, the opinions expressed by the Greek and Turkish negotiators on 12 February 1959, after the Zurich deliberations and on 19 October 1959 during the London Joint Committee, shed light on the scope of the provision.

> The Secretary of State . . . turned to the Zurich documents beginning with the Treaty of Guarantee. Was the second paragraph of Article I intended to preclude Cypriot membership of all international associations, as for example the Free Trade Area if that ever came into existence? M. Zorlu explained that the paragraph was intended to prohibit partition and *Enosis* (whether with Greece or with any other country). M. Averoff agreed; he explained that the wording was specifically designed to exclude possible Greek devices in the direction of *Enosis*, such as a personal union of Cyprus and Greece under the Greek Crown. M. Zorlu and M. Averoff both made it clear that there would be no objection to Cypriot membership of international associations.[130]
>
> Sir Knox Helm then asked if, apart from the proposed Article V Mr Rossides accepted the draft text.
>
> Mr Rossides replied affirmatively. He then asked the meaning of Article I(2). He presumed it referred to union with Greece or Turkey, but it seemed rather sweeping, as he supposed that Cyprus could for instance join an economic organisation or the Commonwealth.
>
> Sir Knox Helm observed that that was coming near to re-examining the wording of the Treaty, and that it was perhaps better not to start to try to interpret the various Articles.
>
> M. Roumos said he thought they could assure Mr Rossides and put on record that it was certainly not intended that Cyprus should be precluded from membership of the Free Trade Area or multilateral organisations. What was meant was that Cyprus should not be politically united with Greece or Turkey, or even economically in the narrow sense of customs union; but that could not really be said in the Treaty.
>
> M. Bayulken confirmed that the wording did not refer to any international organisations, such as FAO, GATT, etc.
>
> Mr Rossides thanked M. Roumos and M. Bayulken for their explanation, and then said that he must reply to Sir Knox Helm's remark that he was trying to open discussion of the

[128] Crawford, Hafner, Pellet, Opinion of 14 October 1997, (above n 123) 6.
[129] *Ibid*, 9–11.
[130] Record on a meeting held at the Foreign Office on 12 February 1959, FO 371/144640, 2, cited in Crawford, Hafner, Pellet, (n 122) 8–9.

> Treaty. When starting, he had said that he did not dispute it, and had asked for elucidation . . . His Delegation had received a constructive reply from Greeks and Turks and had thought it proper to raise the issue.[131]

The proposed interpretation of the Cyprus Agreements, according to which there is a distinction between Cyprus' accession to the Union and 'union in whole or in part with any other country', is also consistent with the practice of the UN Security Council. In Resolution 1092 of 1996, the Security Council welcomed the start of the EU accession negotiations while at the same time stressing that any comprehensive political settlement of the Cyprus issue must exclude union in whole or in part with any other country[132] and thus adopted this distinction.

Interestingly enough, Mendelson refers[133] to the advisory opinion[134] of the Permanent International Court of Justice of 1931, according to which a proposed Austro-German Customs Union was deemed to constitute an alienation of Austria's economic independence contrary to treaty obligations that existed at the time. What he belittles, however, in his opinion, are the implications of Article 4 of the Austrian State Treaty of 1955 to Austria's Accession to the EU. The said Article, whose scope was to prevent a new *Anschluss*,[135] obliges Austria not to 'enter into political or economic union with Germany in any form whatever'.

Obviously, one may draw interesting historical and contextual analogies between Articles 4 of the State Treaty and I of the Treaty of Guarantee not least because the compatibility of Austria's accession with Article 4 was widely discussed following Austria's application in 1989 to join the EEC. Austria, however, acceded to the Union without an amendment of the relevant Article and this is an important precedent for the compatibility of Cyprus' accession with the Treaty of Guarantee.[136]

Moreover, as previously mentioned, Article 50 of the Constitution provides that the Greek Cypriot President and the Turkish Cypriot Vice-President could veto the accession of Cyprus to an international organisation in which either Greece or Turkey do not participate. This constitutes an institutional safeguard for both ethno-religious segments, to be exercised by their elected representatives in the executive. According to Mendelson, Article 50 provided a veto power to the Turkish Cypriot community and not the Vice-President *ad personam*. Given that in the TRNC Memorandum of 1990, the regime in northern Cyprus expressed its opposition to the EU membership, the application of Cyprus was clearly in breach of the Constitution.[137] This argument, however, clearly violates the principle *dolo petit*. The Turkish Cypriot community cannot insist on a veto right provided by a Constitution from which they have withdrawn, almost 35 years ago.

[131] London Committee on Cyprus, Corrected Minutes of the 26th Meeting of the Committee of Deputies, LC (MD), 19 October 1959, 6.

[132] UN Security Council Resolution 1092 (1996), paras 14 and 17.

[133] Mendelson (n 123), 36.

[134] (1931) PCIJ Ser. A/B, no 41, 37.

[135] *Anschluss*, meaning German annexation, refers to the 1938 annexation of Austria into Greater Germany by the Nazi regime.

[136] Tomuschat, 'The Accession of Cyprus to the European Union', (above n 126) 681.

[137] Mendelson, (n 122), 41.

Furthermore, Mendelson, as the counsel of the Turkish Cypriot community, has argued that the accession of Cyprus to the Union would be incompatible with the obligations provided by Article 170 of the Constitution.[138] The scope of Article 170 is to ensure substantive equality between the three Guarantor States after Cyprus' independence. Thus, Cyprus, by agreement, should accord most-favoured-nation treatment to the three Guarantor States. Unsurprisingly, the Union membership would disfavour Turkey since the other two Guarantor States, as EU Member States, would receive better treatment in the entire field of application of the Community Treaties. Tomuschat rightly points out that the term most-favoured-nation, as term of international trade, appears in Article I GATT 1947. According to Article XXIV(5) GATT, no State joining a customs union like the EU Single Market has an obligation to accord such a treatment to any third State. Hence, Cyprus is exonerated from the obligation to extend all the rights that it grants to the EU Member States, including Greece and the UK, their citizens and other legal persons established in them under EU law, to Turkey, its citizens and other legal persons.[139] In any case, one has to point out that, even if Article 170 obliges the Republic to accord the same rights that Greece and the UK enjoy after the accession of the island to the Union, it would be far-fetched to argue that, accordingly, the accession is per se incompatible with the Cypriot Constitution. The Republic could, for example, have even negotiated for the drafting of a provision in the Accession Treaty that would have allowed it to accede to the Union without breaching its own Constitution.

Finally, with regard to the power of the Cypriot Government to represent both communities in the international scene and thus to apply in the name of both communities for EU membership, for the purposes of the present research it suffices to mention the following. Since the UN Security Council Resolution 186 (1964), the international community has never challenged the power of representation of the Cypriot Government. On the contrary, they have dealt with it as the only effective Government of Cyprus. To that effect, the European Commission and the Strasbourg Court have affirmed that any Greek Cypriot Government has international standing as the Government of Cyprus.[140] Likewise, the European Parliament has declared that the Republic of Cyprus is the 'only State entitled to represent the island as a whole'.[141] The Council reaffirmed this position shortly after the TRNC declaration of independence.[142] In any case, according to Article 46 of the Vienna Convention on the Law of Treaties, which codifies a customary international law rule, internal irregularities do not in principle affect the power which a government enjoys to enter into binding commitments with other States.

[138] *Ibid*, 38.
[139] Tomuschat, (n 126), 683.
[140] See generally *Cyprus v Turkey* (above n 98).
[141] Resolutions on Cyprus' application for membership of the European Union and the state of negotiations, 4 October 2000 and 5 September 2001.
[142] See above n 96.

The aforementioned legal analysis shows clearly that the application of the Republic of Cyprus for accession to the Union was legal. Furthermore, although the Greek Cypriot community massively rejected the Annan Plan, the very fact that it was drafted during that period proves that the rationale, according to which the 'Europeanisation' of the Cyprus problem may lead to its solution was, at least, partially right. Ironically enough, the very same procedure that led to the designing of the plan, also offered most of the arguments that the 'rejectionist' school of thought used in April 2004.

6. THE UN PLAN FOR A UNITED CYPRUS REPUBLIC (UCR)

Since 1963, numerous attempts have taken place to solve the Gordian knot of the Cyprus problem. There have been High-Level Agreements, an Interim Agreement, the Gobbi Initiative, the Proximity Talks, the Draft Framework Agreement, the First and Second Sets of Ideas and finally the UN-sponsored plan for the Comprehensive settlement of the Cyprus problem, commonly known as the Annan Plan.[143] The principles of bi-zonality, bi-communality and political equality of the two communities were embodied, on all those attempts, as fundamental elements of the envisaged solution for Cyprus' Gordian knot.

The Annan Plan, which was presented to the two communities on 31 March 2004 in Burgenstock (Switzerland), consists of the most holistic attempt to solve the problem since the 1960 Cyprus Agreements. The reasons why it was only in 2004, 40 years after the break-up of the Republic, that the international community finally managed to design a proposal for a comprehensive settlement of this age-old dispute should be found in what has been called the 'catalyst effect' of the EU accession negotiations.[144] According to this rationale, which is based on a somewhat realist logic of conflict resolution, although there was no formal cooperation between the two international organisations, the Union was offering the necessary carrots and sticks for all actors in the conflict in order for the UN settlement efforts to be successful.

The Annan Plan embodies the main principles of the de Cuellar's and Boutros-Ghali's sets of ideas and follows the relevant guidelines of the UN Security Council. According to them,

> [a] Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded, and comprising two politically equal communities as described in the relevant Security Council resolutions, in a bi-communal and bi-zonal federation, and that such a settlement must exclude union in whole or in part with any other country or any form of partition or secession.[145]

[143] www.unficyp.org/nqcontent.cfm?a_id=1637.

[144] For a detailed account of this theory see eg Diez, *The European Union and the Cyprus Conflict* (above n 110); Ker-Lindsay (n 1); Tocci (n 1).

[145] UN Security Council Resolution 1251 (1999), para 11.

The United Cyprus Republic, as envisaged in the Annan Plan, would have been a federal State modelled on the principle of consociational democracy[146] as it has successfully been adopted in the constitutions of Switzerland and Belgium.

In the case of the United Cyprus Republic, segmental autonomy would have been institutionalised in the form of federalism in accordance with the principle of bi-zonality. Articles 2(1)(a) of the Foundation Agreement and 1(1) of the Constitution provided that the State envisaged in the Annan Plan would have been an independent and sovereign State, which would have consisted of two constituent States, namely the Greek Cypriot Constituent State and the Turkish Cypriot Constituent State. The status and relationship of the United Cyprus Republic, its federal Government, and its constituent States, was modelled on the status and relationship of Switzerland, its federal Government, and its cantons[147] and thus in accordance with the principle of consociational democracy.

On the other hand, bi-communality would have served as the basic standard of political representation, public service appointments,[148] and allocation of public funds. More specifically, the overrepresentation of the Turkish segment was adopted as a safeguard of the viability of the new State since, by Main Article iii of the Foundation Agreement, the two communities had acknowledged each other's distinct identity and integrity and that their relationship is not one of majority and minority but of political equality.

The political equality and the autonomy of the two ethno-religious segments inside the political system of the envisaged United Cyprus Republic were also reflected in Articles 3 and 12 of the Foundation Agreement and the Constitution respectively, concerning the citizenship of the new State. Although there was a single Cypriot citizenship, every person holding it would also have enjoyed internal constituent State citizenship status as provided for by the *Constitutional Law on Internal Constituent State Citizenship Status and Constituent State Residency Rights.*[149] Despite the fact that such a status would have been complementary to, and would not have replaced, the Cypriot citizenship, it would have consisted of the deciding criterion for any provision[150] that would refer to the constituent State

[146] For a more detailed account of consociational democracy theory see generally: SM Halpern, 'The Disorderly Universe of Consociational Democracy' (1986) 9 *West European Politics* 181; A Lijphart, *Democracy in Plural Societies* (New Haven, Yale University Press, 1977); A Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven, Yale University Press, 1999); A Lijphart, 'The Power-Sharing Approach' in JV Montville, *Conflict and Peacemaking in Multiethnic Societies* (Lexington MA, Lexington Books 1991); KD McRae (ed), *Consociational Democracy* (Toronto, Mc Clelland and Stewart Limited, 1974).

[147] Art 2(1) of the Foundation Agreement.

[148] According to Art 30 of the Constitution, the composition of the public service would be proportional to the population of the constituent States, although at least one third of the public servants, at every level of the administration, should hail from each constituent State—with the exception of the federal police, which would be composed of an equal number of personnel hailing from each constituent State (Art 31 of the Constitution).

[149] Annex II, Attachment 3 of the Annan Plan.

[150] For example Art 3(3) of the Foundation Agreement provides that: 'Other than in elections of Senators, which shall be elected by Greek Cypriots and Turkish Cypriots separately, political rights at the federal level shall be exercised based on internal constituent State citizenship status'.

origins of a person. Thus it would have been a clear depiction of the autonomy of the two ethnic groups of the United Cyprus Republic.[151]

More analytically, the federal Government sovereignly would have exercised the powers specified in the Constitution.[152] The Office of the Head of State would have been vested in a Presidential Council which would have exercised the executive power.[153] The Council would have had six voting members, which would have been elected by Parliament for a fixed five-year term on a single list by special majority.[154] Parliament could also elect additional non-voting members. According to Article 26(6) of the Constitution, the composition of the Council would have been proportional to the population of each constituent State, although at least one third of the members should have hailed from each constituent State. Given the numbers of the Greek Cypriot and the Turkish Cypriot population, this rule would practically mean that the Presidential Council of the United Cyprus Republic would have comprised of four Greek Cypriot and two Turkish Cypriot voting members.

In addition to the rule about the composition of the Council, in which the characteristic of power-sharing was clearly reflected, the Constitution was providing for a rule according to which the Council would have strived to reach all decisions by consensus.[155] Where it would have failed to reach consensus, it would have made decisions by simple majority of members present and voting. Such majority, however, should have, in all cases, comprised of at least one member from each constituent State. Practically, this would have meant that the two Turkish Cypriot voting members of the Presidential Council could have been able to block a decision in order to protect the interests of the Turkish Cypriot community, in accordance with the principle of political equality.

According to Articles 2(1)(c) of the Foundation Agreement and Articles 2 and 15 of the Constitution, the constituent States were of equal status in order for the principle of political equality of the two ethno-religious communities to be strengthened. Within the limits of the Constitution and within their territorial boundaries, they

[151] Related to that, Greek Cypriots residing in the Karpas villages (Rizokarpaso / Dipkarpaz, Agialousa / Yeni Erenkoy, Agia Trias / Sipahi, Melanarga / Adacay), situated in the Turkish Cypriot constituent State and Turkish Cypriots residing in the Tillyria villages (Amadhies / Gunebakan, Limnitis / Yesilyirmak, Selemani / Suleymaniye, Xerovounos / Kurutepe, Karavostasi / Gemikonagi, Agios Georgios / Madenlikoy and Kokkina / Erenkoy) as well as the Mesaoria villages (Pyla / Pile, Skylloura / Yilmazkoy and Agios Vasilios / Turkeli), situated in the Greek Cypriot constituent State, would have enjoyed, within the respective constituent State, the right to administer their own cultural, religious and educational affairs and to be represented in the constituent State legislature and to be consulted on matters of zoning and planning their villages.

[152] Art 2(1)(b) of the Foundation Agreement.

[153] Art 26 of the UCR Constitution.

[154] Art 5(b) of the Foundation Agreement provides that: '[d]ecisions of Parliament shall require the approval of both Chambers, including one quarter of voting Senators from each constituent State. For specified matters, a special majority of two-fifths of sitting Senators from each constituent State shall be required'. Art 25(2) of the Constitution provides for an exclusive list of matters which specifically require special majority approval.

[155] Art 26(7) of the UCR Constitution.

would have sovereignly exercised all powers not vested in the federal Government[156] in conformity with the basic principles of rule of law, democracy, and representative republican Government under their own Constitutions. The institutionalised segmental autonomy, in the form of federalism, was also reflected in Articles 1 and Articles 1 and 2 of the Constitutions of the Greek Cypriot and Turkish Cypriot Constituent States respectively, which repeat *verbatim* the aforementioned provisions concerning the limits of their powers. Articles 3 of the Constitution of the Greek Cypriot Constituent State and Article 4 of the Constitution of the Turkish Cypriot Constituent State, however, were declaring the fidelity of those entities to the Constitution of the United Cyprus Republic.[157]

On the other hand, in accordance with Articles 2(2) and 16 of the Foundation Agreement and the Constitution respectively, the constituent States would cooperate and co-ordinate with each other and with the federal Government on matters[158]

[156] Art 14(1) of the UCR Constitution on the *Competences and functions of the federal government* reads as follows: 'The federal government shall, in accordance with this Constitution, sovereignly exercise legislative and executive competences in the following matters:

a. External relations, including conclusion of international treaties and defence policy;
b. Relations with the European Union;
c. Central Bank functions, including issuance of currency, monetary policy and banking regulations;
d. Federal finances, including budget and all indirect taxation (including customs and excise), and federal economic and trade policy;
e. Natural resources, including water resources;
f. Meteorology, aviation, international navigation and the continental shelf and territorial waters of the United Cyprus Republic;
g. Communications (including postal, electronic and telecommunications);
h. Cypriot citizenship (including issuance of passports) and immigration (including asylum, deportation and extradition of aliens);
i. Combating terrorism, drug trafficking, money laundering and organised crime;
j. Pardons and amnesties (other than for crimes concerning only one constituent state);
k. Intellectual property and weights and measures; and
l. Antiquities'.

[157] Art 2(3) of the Foundation Agreement also provides that: 'The federal government and the constituent States shall fully respect and not infringe upon the powers and functions of each other'.

[158] Art 16(3) of the UCR Constitution reads as follows:

'The constituent states shall strive to coordinate or harmonise their policy and legislation, including through agreements, common standards and consultations wherever appropriate, in particular on the following matters:

a. Tourism;
b. Protection of the environment and use and conservation of energy;
c. Fisheries and agriculture;
d. Industry and commerce, including insurance, consumer protection, professions and professional associations;
e. Zoning and planning, including for overland transport;
f. Sports and education;
g. Health, including regulation of tobacco, alcohol and drugs, and veterinary matters;
h. Social security and labour;
i. Family, company and criminal law; and
j. Acceptance of validity of documents'.

within the competence of the parties through Cooperation Agreements,[159] as well as through Constitutional Laws approved by the federal Parliament and both constituent State legislatures. In particular, the constituent States would have participated in the formulation and implementation of policy in external relations[160] and European Union affairs[161] on matters within their sphere of competence, in accordance with Cooperation Agreements modelled on the Belgian example.

According to Articles 5(1) of the Foundation Agreement and Article 22 of the Constitution, the federal parliament would have been composed of the Chamber of Deputies and the Senate. Each Chamber would have had 48 members. The Chamber of Deputies would have been composed of deputies from both constituent States, with seats attributed on the basis of the number of persons holding internal constituent State citizenship status provided that each constituent State would have been attributed a minimum of one quarter of the seats. The minorities, being the Maronites, the Latins and the Armenians, would have been represented by one deputy at least.[162] The Senate would have been a paritarian body composed of an equal number of Greek Cypriot and Turkish Cypriot senators. The Senate would have been elected by the Cypriot citizens, voting separately as Greek Cypriots and Turkish Cypriots, irrespective of the constituent State citizenship they would have held. Although such a provision would have resulted in the preservation of the ethnic cleavages in the new State, it was included by the drafters in order for the bi-communal character of the State not to be threatened. According to Articles 2(1)(5) of the Foundation Agreement and Article 25 of the Constitution, decisions of Parliament would have needed the approval of both Chambers with a simple majority of members present and voting, including one quarter of the senators

[159] Annex IV of the Annan Plan contains Cooperation Agreements between the Federal Government and the constituent States on External Relations, on European Union Relations and on Police Matters.

[160] Art 2(3) of the Foundation Agreement and Art 16 of the UCR Constitution provided for the constituent States to conclude agreements on commercial and cultural matters with authorities of States, provided that such agreements would not cause prejudice to the federal State, the authority of the federal Government, or the constituent State, and would be compatible with the *acquis communautaire*.

[161] Practically, this would mean that Cyprus would have been represented in the EU by the federal Government in its areas of competence or where a matter fell predominantly or exclusively into an area of its competence. However, where a matter fell predominantly or exclusively into an area of competence of the constituent States, Cyprus would have been represented either by a representative of the federal Government or a constituent State, provided that the latter is able to commit on behalf of the Republic (Art 19(3) of the Constitution). Moreover, Art 19(4) provided that the obligations of the Republic arising out of EU membership would have been implemented by the federal or constituent State authority that enjoyed legislative competence for the subject matter to which an obligation pertained. Thus, if a constituent State failed to fulfil its obligations of the Republic vis-à-vis the EU within its area of competence, the federal Government could have, after 90 days notification, taken necessary measures in lieu of the defaulting constituent State, to be in force until such time as that constituent State discharges its responsibilities (Art 19(5) of the Constitution). Finally, it is worth mentioning that, any new Treaty on the European Union or amendment to the EU Treaties would have been ratified by Cyprus unless opposed by the federal Parliament and both constituent State legislatures (Art 19(7) of the Constitution).

[162] With regard to the representation in the European Parliament, Art 7 of the *Draft Act of Adaptation of the Terms of accession of the United Cyprus Republic to the European Union* (Appendix D of the Annan Plan) provided that Cyprus would have been represented in the European Parliament according to proportional representation, provided that each constituent State was attributed no less than one third of the Cypriot seats in the European Parliament.

present and voting from each constituent State and two-fifths in the case of matters where the decision requires a special majority. Hence, it would have also been possible for the Turkish Cypriot senators to veto an unfavourable decision.

With regard to the judiciary, the Supreme Court of Cyprus, whose role would have been to uphold the Constitution and ensure its full effect, would have been comprised of an equal number of judges from each constituent State and three non-Cypriot judges.[163] The Annan Plan was providing[164] for a system of judicial review since the Supreme Court of the United Cyprus Republic would have had exclusive jurisdiction over disputes between the constituent States, between one or both constituent States and the federal Government and between organs of the federal Government.[165] Moreover, it would have had exclusive jurisdiction to determine the validity of any federal or constituent State law under the Constitution of the United Cyprus Republic[166] and primary jurisdiction over violations of federal law.[167]

Given that deadlock is almost inevitable in such a binary system of governance, the existence of a mechanism that would prevent a paralysis of the State was deemed essential. According to Article 36(5) of the Constitution, in such cases the arbiter would have been the Supreme Court. Thus, in case of a deadlock in any of the federal institutions—with the exception of the Central Bank[168]—which would prevent a decision from being taken and thereby prevent the federal Government from functioning properly, it was the Supreme Court of Cyprus that would have taken an interim decision on the matter, to remain in force until such time as a decision on the matter would have been taken by the institution in question. Thus, according to the constitutional design of the Annan Plan, the body that would have been meant to exercise judicial review in the new legal order would also have been the body that would decide on the most divisive issues.

The attribution of such a role to the judiciary would have raised some questions with regard to the rule of law in the United Cyprus Republic. The reason for this is that, in European constitutional law, decisions of the executive and legislative branches should be susceptible to review by the judicial branch to ensure against violation of fundamental principles of the Constitution such as fundamental rights, separation of powers, and divisions of competences. However, in the UCR, there would have been a fusion of powers between the executive and the judicial branch. Furthermore, given the presence of the three foreign judges whose role would have been to lift possible deadlocks within the Court, one could also question the democratic legitimacy of that body.

Finally, Article 2(4) of the Foundation Agreement and Article 37 of the Constitution provided for the procedure for constitutional amendments. Apart

[163] Art 6 of the Foundation Agreement and Art 36 of the UCR Constitution.
[164] Art 6 of the Foundation Agreement and Art 36 of the UCR Constitution.
[165] Art 36(2) of the UCR Constitution.
[166] Art 36(3) of the UCR Constitution.
[167] Art 36(4) of the UCR Constitution.
[168] Art 36(5) provides inter alia that '[t]he Law on the Central Bank may exempt the Central Bank from this provision'.

from Articles 1 and 2 of the Constitution, which are regarded as basic and thus cannot be amended,[169] any constitutional amendment would have been considered and adopted by the federal Parliament after consultation with the constituent State Governments and interested sectors of society. After their adoption by both Chambers of Parliament, proposed amendments would have been submitted to referendum for approval by a separate majority of the people in each constituent State.

The complex constitutional structure of the UCR and the larger say enjoyed by the Turkish Cypriot community, in comparison to the Cyprus Agreements, were not the main reasons that an overwhelming 75.8 per cent of the Greek Cypriots rejected the Annan Plan.[170] The vast majority of the Greek Cypriots rejected the Annan Plan because satisfactory international Guarantees for the implementation of the Agreement were not provided, the Treaty of Guarantee would have continued applying *mutatis mutandis* in the new state of affairs,[171] the withdrawal of the Turkish troops was not taking place soon enough, a satisfactory proportion of each refugee's property that would have lied in areas belonging to the other constituent State was not provided under the sophisticated restitution scheme,[172] Turkey was not contributing substantially for the compensation of the refugees' property and a rather small number of 'settlers' were leaving.[173]

Those were some of the reasons to which the then President of the Republic, Tassos Papadopoulos, referred in his dramatic speech on 7 April 2004. In this speech, he asked the Greek Cypriots to say 'a resounding NO on 24 April' 2004.[174] And they did, while at the same time 64.9 per cent of the Turkish Cypriots declared their willingness for the establishment of the United Cyprus Republic. A week later the Republic of Cyprus, as envisaged in 1960, became an EU Member State despite the fact that its Government could not exercise effective control over the whole island.

7. CYPRUS' ACCESSION TO THE EU

7.1 The Suspension of the Acquis

On 16 April 2003 in Athens, the President of the Republic of Cyprus, Mr. Tassos Papadopoulos, signed the Treaty of Accession of the Republic to the European

[169] Art 37(2) of the UCR Constitution.

[170] A Lordos, *Can the Cyprus Problem be Solved? Understanding the Greek Cypriot Response to the UN Peace Plan for Cyprus*, www.cypruspolls.org.

[171] Annan Plan, Appendix C: Treaty on Matters Related to the New State of Affairs, Annex III: Additional Protocol to the Treaty of Guarantee, Article 1. The relevant provision was extending the meaning of the term 'constitutional order' appearing in the Treaty of Guarantee to also mean the Constitution of each constituent State.

[172] See generally s 3.5 of ch 3.

[173] A Lordos, *Can the Cyprus Problem be Solved?* (above n 170).

[174] Press Release, Press and Information Office, Republic of Cyprus, 7 April 2004.

Union. Cyprus became an EU Member State on 1 May 2004, a week after the Greek Cypriots massively rejected the UN Plan for The Comprehensive Settlement of the Cyprus Problem, on terms provided inter alia in Protocol No 10 on Cyprus of the Act of Accession 2003.

The unprecedented (for an EU Member State) situation of not controlling part of its territory is acknowledged in Protocol No 10. Given that it was signed at a period when there was huge optimism about the reunification of the island, the EU Member States and the acceding States reaffirm their commitment to a comprehensive settlement of the Cyprus problem, consistent with relevant UN Security Council Resolutions[175] and their strong support for the efforts of the UN Secretary-General in the preamble of Protocol No 10. However, since such a comprehensive settlement had not yet been reached, they considered that it was necessary not only to provide for the suspension of the application of the *acquis* in the 'Areas', a suspension which shall be lifted in the event of a solution, but also for the terms under which the relevant provisions of EU law will apply to the line between the 'Areas' and both the Government Controlled Areas and the UK Eastern Sovereign Base Area.

Thus, Article 1(1) of the Protocol provides that the application of the *acquis* is suspended in those 'Areas'. The main scope of Article 1 is to limit the responsibilities and liability of Cyprus as a Member State under EU law. Although Cyprus joined the Union with its entire territory, its Government cannot guarantee effective implementation of the EU law in the North.[176] In fact, according to international courts,[177] Turkey exercises effective control in those areas. Interestingly enough, Tomuschat has argued in favour of a tacit suspension of the *acquis*.[178] Given that under such a legal arrangement, the *status quo* could have been challenged in front of the Court of Justice, a more legally certain solution—ie the explicit suspension of the *acquis* in northern Cyprus—was rightly chosen in order to deal with the initial impossibility of performance on the Cypriot side.[179]

Moreover, although the term *acquis* is neither a *terminus technicus* nor is it defined by Union legislation, one should note that it has been defined by the Commission in texts adopted during the course of, or at the end of, each enlargement process.[180] For example, in a common declaration on the Common Foreign and Security Policy (CFSP), annexed to the Act on the conditions of accession of Austria, Sweden, Finland and Norway, the Union has noted the confirmation by these States

[175] For a detailed list of the UN Security Council Resolutions about the Cyprus question see generally www.unficyp.org/nqcontent.cfm?a_id=1636&tt=graphic&lang=l1.

[176] Case C-420/07 *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams* (Opinion of AG Kokott delivered on 18 December 2008) [2009] ECR I-3571 (hereafter AG Opinion in *Apostolides v Orams*), paras 40–41.

[177] See *Cyprus v Turkey* (above n 98) para 77.

[178] Tomuschat (n 127) 685.

[179] *Ibid*, 684.

[180] For a comprehensive analysis of the term *acquis* see C Delcourt, 'The Acquis Communautaire: Has the Concept had its Day?' (2001) 38 *Common Market Law Review* 829.

> of their full acceptance of the rights and obligations attaching to the Union and its institutional framework, known as the acquis communautaire, as it applies to present Member States. This includes in particular the content, principles and political objectives of the Treaties, including those of the Treaty on European Union.[181]

More recently, in its opinion on the accession of Cyprus and the other nine then candidate States to the EU, the Union has stressed that the then applicant States have accepted, without reserve,

> the Treaty on European Union and all its objectives, all decisions taken since the entry into force of the Treaties establishing the European Communities and the Treaty on European Union and the options taken in respect of the development and strengthening of those Communities and of the Union.[182]

More importantly, however, it should be noted that the scope of the suspension is territorial. This means that the citizens of the bi-communal Cyprus Republic residing in the northern part of the island should be able to enjoy, as far as possible, the rights attached to Union citizenship that are not linked to the territory as such.[183] This indirect partial application of the *acquis* is the subject of the following chapter.

Moreover, as rightly pointed out by Advocate General Kokott, according to Article 1(1) of Protocol No 10, the *acquis* 'is to be suspended *in* that area and not *in relation* to that area'.[184] This reading of the provision is in accordance with the settled case law[185] of the Court of Justice, according to which 'provisions in an Act of Accession which permit exceptions to or derogations from rules laid down by the Treaty must be interpreted restrictively with reference to the Treaty provisions in question and must be limited to what is absolutely necessary',[186] and clearly sets a limit to the suspension.

It is not surprising that this finding was also upheld by the Grand Chamber of the Court of Justice,[187] which also pointed out that 'Protocol No 10 constitutes a transitional derogation based on the exceptional situation in Cyprus'.[188] More importantly, the Court stressed the need to interpret the suspension provided by Protocol No 10 as restrictively as possible and to limit any exceptions / derogations to what is absolutely necessary.[189] In that particular case, which was about the application of Regulation 44/2001 to a judgment given by a Cypriot court sitting in the Government-controlled area but concerned land situated in the northern area, this meant that the suspension of the *acquis* 'cannot be interpreted as meaning that it

[181] Joint Declaration on CFSP adopted by the plenipotentiaries, [1994] OJ C241/381.

[182] COM (2003) 79 final of 19 February 2003, point (9).

[183] M Uebe, 'Cyprus in the European Union' (2004) 46 *German Yearbook of International Law* 375, 384.

[184] AG Opinion in *Apostolides v Orams* (above n 176) para 34.

[185] Case 231/78 *Commission v United Kingdom* [1979] ECR 1447, para 13; Joined Cases 194/85 and 241/85 *Commission v Greece* [1988] ECR 1037, paras 19–21; Case C-3/87 *Agegate* [1989] ECR 4459, para 39; and Case C-233/97 *KappAhl* [1998] ECR I-8069, para 18.

[186] AG Opinion in *Apostolides v Orams* (n 176) para 35.

[187] Case C-420/07 *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams* (Grand Chamber judgment 28 April 2009) [2009] ECR I-3571, paras 33 and 35.

[188] *Ibid*, para 34.

[189] *Ibid*, para 35

precludes the application of Regulation 44/2001 to the judgments concerned given by the Cypriot court'.[190] Overall, it has been argued that the suspension should be understood as limiting 'any unrealisable obligations for the Republic of Cyprus in relation to northern Cyprus which bring it into conflict with Community law'.[191]

Concerning the withdrawal of the suspension we have to note that according to the second paragraph of Article 1 it is the Council, acting unanimously on the basis of a proposal from the Commission, that will eventually decide. Nothing in this provision prevents the partial withdrawal of the suspension of the *acquis*. It should also be noted that, according to the preamble, a 'comprehensive settlement', to which the first two recitals refer, is not a prerequisite for the withdrawal of the suspension. A 'solution' to the Cyprus problem is deemed enough.[192]

Until the withdrawal of the suspension takes place, Article 2 allows the Council, acting unanimously on the basis of a proposal from the Commission, to define the terms under which the provisions of EU law shall apply to the 'Green Line'.[193] This provision, together with Article 6 of Protocol No 3 of the Act of Accession, provided the legal basis for the adoption of the Green Line Regulation, which consists of the main legislative device for the partial application of the *acquis* in the northern part of the island.

The Commission, however, has pointed out that it was not the intention of the drafters of Protocol No 10 'to exclude the application of all provisions of Community law with a bearing on areas under the control of the Turkish Cypriot community'.[194] To that effect, Article 3 allows measures with a view to promoting the economic development of those areas and provides that such measures shall not affect the application of the *acquis* in any other part of the Republic. The existence of such a provision clarifies that the division of the island should not rule out the economic assistance from the Union to those areas. Indeed, on 27 February 2006, the Council unanimously adopted Regulation 389/2006 which establishes an instrument for encouraging the economic development of the Turkish Cypriot community.[195] Although the legal basis for this Regulation was Article 308 TEC [now Articles 352 and 353 TFEU], in the preamble there is also a reference to Article 3 of Protocol No 10.

Finally, in the event of a settlement, the Protocol provides for the Council to decide unanimously on adaptations of the terms concerning the accession of

[190] *Ibid*, para 36. However, an earlier judgment of the Supreme Court of Cyprus in *Loukas Mitrou v Cyprus Agricultural Payments Organisation*, No 1228/2007 (judgment 5 September 2008) [not yet reported] upheld the decision of the Cyprus Agricultural Payments Organisation according to which Mr Mitrou was not eligible to receive subsidies—in accordance with the CAP—for a piece of land he owns in northern Cyprus because of the suspension of the *acquis*.

[191] AG Opinion in *Apostolides v Orams*, (n 176), para 42.

[192] Recital (4) of Protocol No 10 of the Act of Accession 2003. The distinction between a 'comprehensive settlement' and a 'solution' is a rather fine one. According to Uebe it implies that a 'solution' to the Cyprus issue requires something less than a fully-fledged 'comprehensive settlement' plan such as the Annan Plan. Uebe, 'Cyprus in the European Union', (above n 183) 386.

[193] Article 2(1) of Protocol No 10 of the Act of Accession 2003.

[194] AG Opinion in *Apostolides v Orams*, (n 176), para 40.

[195] [2006] OJ L65/5.

Cyprus with regard to the Turkish Cypriot community. Article 4 clearly depicts the willingness of the Union to accommodate the terms of a solution of the Cyprus issue in the Union legal order. Indeed, if the April 2004 referendums had approved the new state of affairs envisaged in the Annan Plan, the Council of the European Union, having regard to that Article, would have unanimously adopted the Draft Act of Adaptation of the Terms of Accession of the United Cyprus Republic to the European Union as a Regulation.

It is worth noting that the Draft Act of Adaptation that was included in the Annan Plan as its Appendix D provides for a good example of the potential incompatibilities of a solution—based on the well-known framework of a bi-zonal and bi-communal federation—with the *acquis*. Such incompatibilities could be summarised in three different aspects: restrictions on the right of non-residents in the constituent States to purchase immovable property; restrictions on the right of Cypriot citizens to reside in a constituent State of which they do not hold the internal constituent State citizenship status; restrictions on the right not only of Greek and Turkish nationals but also of Union citizens to reside in Cyprus, after the comprehensive settlement takes place, in order for the demographic ratio between permanent residents, speaking either Greek or Turkish as mother tongue, not to be substantially altered.[196]

In any case it should be mentioned that such an enabling clause provides for a simplified procedure for the amendment of the Act of Accession. Therefore, the relevant Council acts, adopted on the basis of Article 4 and accommodating the terms of a future comprehensive settlement, would constitute primary law.[197] In the light of the current bi-communal negotiations this is of particular significance. The reason for this is that if the bi-zonality of the future unified federal Cyprus were to be reflected in the fact that each 'federated state would be administered by one community which would be guaranteed a clear majority of the population and of land ownership in its area',[198] as was the case in the Annan Plan, it is almost definite that certain permanent restrictions to the free movement of persons and capital will be deemed necessary in order for the particular national identity of the unified, bi-zonal and bi-communal Cyprus to be protected. So, such an enabling clause means that possible derogations, which a future settlement plan could entail, could be accommodated in the Union legal order, as part of primary law, by the adoption of relevant legislation under Article 4.

7.2 A Unique Case?

Despite the obvious historical and political connotations that the suspension of the *acquis* in northern Cyprus carries, one has to note that it is not the only territorial/

[196] See generally s 3 of ch V and M Cremona and N Skoutaris, 'Speaking of the de . . . rogations' (2009) 11(4) *Journal of Balkan and Near Eastern Studies* 387

[197] Uebe (n 183), p 390.

[198] Report of the Secretary-General of 3 April 1992, UN Doc S/1992/23780, para 20.

geographical exception to the application of EU law.[199] Most recently, the UK and Poland negotiated and achieved the signing of a Protocol, annexed to the Treaty of Lisbon, which contains certain derogations from the application of the Charter of Fundamental Rights.[200] In addition to those derogations that apply to the whole territory of a Member State, for the purposes of the present research, it should be noted that, in many Member States, there are special territories which for either historical, geographical or political reasons have differing relationships with their national Governments—and consequently also the European Union—than the rest of the Member State's territory. Many of these special territories do not participate in all or any EU policy areas and programs. Some have no official relationship with the EU while others participate in EU programs in line with the provisions of European Union directives, regulations or protocols attached to the European Union treaties, and especially the relevant Treaties of Accession.[201]

First of all, there are seven regions of EU Member States—the French Guadeloupe, French Guiana, Martinique, and Réunion, Saint-Barthélemy, Saint-Martin, the Spanish Canary Islands and the Portuguese Azores and Madeira, called the Outermost regions, where the *acquis*, generally speaking, applies by virtue of Article 355(1) TFEU [ex Article 299(2) TEC]. However, the Council, 'taking account of the structural social and economic situation' of these regions and 'their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development', has adopted 'specific measures aimed, in particular, at laying down the conditions of application' of the Treaties to those regions, including common policies (acting by a qualified majority on a proposal from the Commission and

[199] For a comparative approach of the suspension of the *acquis* in northern Cyprus see generally N Skoutaris, 'The Status of Northern Cyprus under EU Law. A Comparative Approach to the Territorial Suspension of the *Acquis*' in D Kochenov (ed), *On Bits of Europe Everywhere. Overseas Possessions of the EU Member States in the Legal-Political Context of European Law* (The Hague, Kluwer Law International, *forthcoming*).

[200] Article 1(2) of the Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom provides that 'nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law'.

[201] For a comprehensive analysis of the application of Union law to Overseas Countries and Territories (OCTs) and to Outermost Regions see generally D Kochenov (ed), *On Bits of Europe Everywhere* (above n 199); D Kochenov, 'Substantive and Procedural Issues in the Application of European Law in the Overseas Possessions of European Union Member States' (2008) 17 *Michigan State of International Law* 195; D Kochenov 'The Impact of European Citizenship on the Association of the Overseas Countries and Territories within the European Community' (2009) 36 *Legal Issues of Economic Integration* 239; F Murray, *EU and Member State Territories, The Special Relationship under Community Law* (London, Sweet & Maxwell, 2004); J Ziller, 'Flexibility in the Geographical Scope of EU Law: Diversity and Differentiation in the Application of Substantive Law on Member States' Territories' in G de Búrca and J Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility* (Oxford, Hart Publishing, 2000) 113; J Ziller, 'Les collectivités des outre-mer de l'Union européenne'in JY Faberon (ed), *L' Outre-mer Français: La nouvelle donne institutionelle* (Paris, Documentation française, 2004); J Ziller, 'L' Union européene et l'outre-mer' (2005) 113 *Pouvoirs* 145; J Ziller, 'The European Union and the Territorial Scope of European Territories' (2007) 38 *Victoria University Wellington Law Review* 51.

after consulting the European Parliament).[202] So, in practical terms, while EU law applies fully, there are derogations to the application of Union law in the Outermost regions.[203]

It is important to note, however, that while the Council enjoys wide discretion to decide the derogations that apply in the Outermost regions,[204] the Court has clarified that encroachment on the core principles of Union law is not permissible.[205] Moreover, the relevant derogations should be limited in time and strictly construed in order to guarantee that they deviate from the *acquis* only in so far as it is absolutely necessary;[206] a finding that is in full accordance with previous case law of the Court on derogations.[207] So, for instance, both the Canary Islands and the French Overseas Territories are outside the European Union Value Added Tax Area.[208] Moreover, with regard to the latter, the *Schengen acquis* also does not apply.[209]

Apart from the Outermost regions, there are some other territories that enjoy *ad hoc* arrangements in their relationship with the EU. In most of those cases, their status is governed by protocols attached to their respective countries' accession treaties. The rest owe their status to European Union legislative provisions which exclude the territories from the application of the legislation concerned.

More analytically, according to Article 355(3) TFEU [ex Article 299(4) TEC], the Treaty applies to 'the European territories for whose external relations a Member State is responsible'. In practice, Gibraltar is the only territory covered by this clause. Gibraltar, a British overseas territory, is part of the EU, having joined the European Economic Community with the UK in 1973. By virtue of Article 28 of the UK Accession Treaty, Gibraltar is outside the Customs Union and VAT Area and is excluded from the Common Agricultural Policy. With regard to the Union citizen-

[202] Article 349 TFEU [ex Article 299(2) TEC]. In June 2001 the Council adopted two sets of Regulations based on the priorities identified in the Commission Report on the measures to implement Art 299(2) TEC: the Outermost regions of the European Union, COM(2000) 147, 14 March 2000. The first set of Regulations (Council Regulations 1447/2001, 1448/2001, 1449/2001, 1450/2001, 1451/2001, [2001] OJ L198/1) aimed to take fuller account of the specific nature of the Outermost regions, under the Structural Funds, as defined in Article 349 TFEU [ex Article 299(2) TEC], while the second set (Council Regulations 1452/2001, 1453/2001, 1454/2001, [2001] OJ L198/11) aimed to amend the CAP in order to take greater account of the specific local conditions of the region.

[203] For a comprehensive analysis of the application of the *acquis* in the Outermost Regions see generally Kochenov, 'Substantive and Procedural Issues in the Application of European Law in the Overseas Possessions' (above n 201) 227–244 and 268–286.

[204] Case C-48/77 *H. Hansen Jun. & O.C. Balle GmbH & Co. v Hauptzollamt de Flensburg* [1978] ECR 1787.

[205] Joined Cases C-363/93, C-407/93, C-408/93, C-409/93, C-410/93, C-411/93, *René Lancry SA v Direction Générale des Souanes and Société Dindar Confort; Christian Ah-Son, Paul Chevassus-Marche, Société Conforéunion and Socété Dindar Autos v Conseil Régional de la Réunion and Direction Régionale des Douanes de la Réunion* [1994] ECR I-3978.

[206] Case C-212/96 *Paul Chevassus-Marche v Conseil régional de la Réunion* [1998] ECR I-743.

[207] Case C-58/83 *Commission v Greece* [1984] ECR 2027; Case C-192/84 *Commission v Greece*, [1985] ECR 3967.

[208] Article 6 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, [2006] OJ L 347/1.

[209] Article 138 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders, [2000] OJ L 239/19.

ship of the Gibraltarians it is interesting to point out that it was only in the aftermath of *Matthews v United Kingdom*[210] that they could finally exercise their right to vote for the European Parliament elections, although they were British nationals for the purposes of Community law since 1972.[211]

Furthermore, pursuant to Article 355(4) TFEU [ex Article 299(5) TEC] the Treaties apply to the Åland Islands, a group of Swedish-speaking Finnish islands off the Swedish coast, in accordance with Protocol No 2 of the Finnish Act of Accession 1994. There, derogations to the free movement of people and services, the right of establishment and the purchase or holding of real estate are provided.[212] Moreover, those islands are outside the VAT area.[213] The Treaties also apply to the Channel Islands and the Isle of Man but to the extent necessary to ensure implementation of the 'arrangements for those islands set out' in Protocol No 3 of the Act of Accession 1972.[214] This effectively means that they are part of the Union only for the purposes of customs and the free movement of goods and in relation to some aspects of the CAP. In contrast to the formerly mentioned areas, the Treaties do not apply in the Faeroe Islands pursuant to Article 355(5)(a) [ex Article 299(6)(a) TEC]. They have, however, the status of a third country enjoying preferential treatment with respect to the Union. Such a status is regulated by two basic agreements one concerning fisheries[215] and the other trade.[216]

Overall, we should stress the difference between the situation in the majority of the aforementioned areas where there are derogations to the application of the *acquis* and in northern Cyprus where there are 'derogations' to the suspension of the application of the *acquis*. The main reason for this partial application of Union law in northern Cyprus is the territorial character of the suspension as we mentioned before. This allows the citizens of the Republic of Cyprus residing in the northern part of the island to enjoy, as far as possible, the rights attached to Union citizenship that are not linked to the territory as such; a situation that is similar to the status under Union law of the inhabitants in the Overseas Territories.[217]

[210] *Matthews v United Kingdom (Merits)* (Application No 24833/94) (judgment 18 February 1999) ECHR Reports 1999-I.

[211] Declaration by Government of United Kingdom of Great Britain and Northern Ireland on the Definition of 'Nationals', [1972] OJ 1972 L73/196. In view of the entry into force in the United Kingdom of new legislation on nationality, that declaration was replaced in 1982 by a further declaration ([1983] OJ C23/1) which did not alter significantly the status of the Gibraltarians.

[212] Act concerning the condition of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded [1994] OJ C 241/21.

[213] Kochenov, 'Substantive and Procedural Issues in the Application of European Law in the Overseas Possessions' (above n 201) 227–244 and 268–286.

[214] Article 355(6)(c) TFEU [ex Article 299(6)(c) TEC].

[215] Council Regulation (EEC) No 2211/80 of 27 June 1980 on the conclusion of the Agreement on fisheries between the European Economic Community and the Government of Denmark and the Home Government of the Faeroe Islands [1980] OJ L226/1.

[216] Council Decision 97/126/EC of 6 December 1996 concerning the conclusion of an agreement between the European Community, on the one part, and the Government of Denmark and the Home Government of the Faeroe Islands, on the other [1997] OJ L53/1.

[217] Case C-300/04 *Eman and Sevinger v College van Burgemeester en Wethouders van Den Haag* [2006] ECR I-8055.

As far as it concerns the Overseas Territories, each one of them has a special relationship with one of the Member States of the Union: twelve with the UK,[218] six with France,[219] two with the Netherlands[220] and one with Denmark.[221] Part Four of the TFEU Treaty governs their relationship with the EU. They were invited to form association agreements with the EU[222] and may opt-in to EU provisions on the freedom of movement for workers[223] and freedom of establishment.[224] They are not subject to the EU's common external tariff[225] but may claim customs duties on goods imported from the EU on a non-discriminatory basis.[226] They are not part of the EU and EU law applies to them only insofar as is necessary to implement the association agreements.[227]

In other words, one could argue that while in the case of the OCTs it is their authorities in agreement with the relevant Member State which have decided the degree of their integration to the Union, in the case of northern Cyprus because of the post-1974 *status quo* it is the legitimate government of the island which cannot exercise effective control over this part of Cyprus that has accepted a very limited integration of northern Cyprus. In fact, the Republic has vetoed the further integration of the areas not under its effective control by effectively blocking the adoption of the Direct Trade Regulation, as we shall see in chapter four.

Concerning the Union citizenship status of the inhabitants of the OCTs, we could argue that although the OCTs fall *de jure* outside the territorial scope of the Treaties—as northern Cyprus does as well—their inhabitants are considered Union citizens. So for example, by virtue of the British Overseas Territories Act 2002, all the British Overseas Territories citizens became British citizens and thus Union citizens.[228] The same is true for the natives of the French OCTs. Interestingly enough, Greenlanders are also Union citizens although they voted for Greenland to leave the then EEC in the 1982 referendum.[229] With regard to the citizens of the

[218] Anguilla, Cayman Islands, Falkland Islands, South Georgia and the South Sandwich Islands, Montserrat, Pitcairn, Saint Helena and the Dependencies, British Antarctic Territory, British Indian Ocean Territory, Turks and Caicos Islands, British Virgin Islands and Bermuda (Bermuda, although formally an OCT listed in Annex II, does not benefit from the EU-OCT Association).

[219] New Caledonia and Dependencies, French Polynesia, French Southern and Antarctic Territories, Wallis and Futuna Islands (known collectively as '*Territoires d'outre mer*')and Mayotte, Saint Pierre and Miquelon.

[220] Aruba and the Netherlands Antilles (Bonaire, Curaçao Saba, Sint Eustatius and Sint Maarten)

[221] Greenland.

[222] Article 198 TFEU [ex Article 182 TEC].

[223] Article 202 TFEU [ex Article 186 TEC].

[224] Article 199(5) TFEU [ex Article 183(5) TEC].

[225] Article 200(1) TFEU [ex Article 184(1) TEC].

[226] Article 200(3) and (5) TFEU [ex Article 184(3) and (5) TEC].

[227] Article 355(2) TFEU [ex Article 299(3) TEC].

[228] With the exception of those that enjoyed this status by virtue of a connection with the UK Sovereign Base Areas in Cyprus. In addition, such a provision is rather moot with regard to the British Antarctic Territory and the British Indian Ocean Territory as neither of them has a permanent population.

[229] Treaty Amending, With Regard to Greenland, the Treaties Establishing the European Communities, [1985] OJ L29/1; F Weiss, 'Greenland's Withdrawal from the European Communities', (1985) 10 *European Law Review* 173.

Dutch OCTs, until a recent ECJ decision,[230] they were considered EU citizens but they could not exercise the relevant voting rights attached to the 'fundamental status of nationals of Member States'.[231]

At the same time, if we compare the Court findings in *Kaefer and Procacci*[232] with the Opinion of Advocate General Kokott in *Apostolides v Orams*, we realise that the status of northern Cyprus under Union law differs significantly from the relevant status of the OCTs. In *Kaefer and Procacci* the Court of Justice held that despite the fact that French Polynesia does not fall under the territorial scope of Community law, 'the Tribunal administratif, Papeete, is a French court'.[233] On the other hand, Advocate General Kokott clarified that the courts in northern Cyprus are not EU Courts by holding that neither 'the recognition and enforcement of a judgment of a court of a Member State in the northern area of Cyprus' is possible [n]or does it appear possible [. . .] for a judgment of a court situated in that area of Cyprus to be recognised and enforced in another Member State'[234] under Regulation 44/2001.[235]

Finally, for the sake of completeness, there has to be a reference to the special status of the German enclave town of Büsingen am Hochrhein and the Italian enclaves of Campione d'Italia and Livigno which are all fully surrounded by Switzerland and the Spanish enclaves of Ceuta and Melilla on the Moroccan coast. All those enclaves and the German island of Heligoland, despite their different locations, are excluded from the Customs Union[236] and the VAT area.[237]

This brief study shows, in the most emphatic way, that the application of the *acquis* has been influenced on many occasions by certain historical, political or even geographical purposes. Of course, the differences with the partial application in northern Cyprus should be highlighted. On none of those aforementioned occasions, was the suspension a consequence of a military invasion. The Governments in most of the previously mentioned cases negotiated and achieved such derogations in order to facilitate the lives and respect the sensitivities of the respective populations. On the other hand, the suspension of the *acquis* in northern Cyprus is dictated by the post-1974 *status quo* and the failure to achieve a comprehensive settlement and it is not the expression of the will of either community on the island.

Given that the suspension of the *acquis* in the areas not under the effective control of the Republic is the result of such a political anomaly, probably, the closest precedent to it is the German experience prior to the reunification of the

[230] *Eman and Sevinger* (above n 217).

[231] Case C-184/99 *Rudy Grzelczyk v Centre Public d'Aide Sociale d'Ottignes-Louvain-la-Neuve (CPAS)* [2001] ECR I-6193, para 31.

[232] Joined Cases C-100 & C-101/89 *Kaefer and Procacci v France* [1990] ECR I-4647.

[233] *Ibid*, para 8.

[234] AG Opinion in *Apostolides v Orams*, (n 176), para 31.

[235] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and enforcements of judgments in civil and commercial matters [2001] OJ L12/1.

[236] Article 3 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [1992] OJ L302/1.

[237] See n 208 above.

country.[238] However, one should not try to draw too many analogies, even with that interesting case. The main reason is that despite the fact that the western Allies recognised the Government of the Federal Republic of Germany as the sole legitimate Government of Germany as a whole, it never acted with legal effect for the territory of the German Democratic Republic. More significantly for this research, the relationship of the DDR with the Community was clarified in the judgment of the Court of Justice in Case C-14/74.[239] In that decision, the Court held that the relevant rules exonerating West Germany from applying the rules of EEC law to German Internal Trade 'does not have the result of making the German Democratic Republic part of the Community, but only that a special system applies to it as a territory which is not part of the Community'.[240] Cyprus, on the other hand, has joined the Union as a whole and its Government acts for the island as a whole. The *acquis*, however, is suspended in the areas North of the Green Line until a solution to the Cyprus issue is achieved. It remains to be seen how this unique status under Union law will evolve after the completion of the current bi-communal negotiations.

8. CONCLUSION

Once the humorist George Mikes said, 'the Cypriots know that they cannot become a world power, but they have succeeded in becoming a world nuisance, which is almost as good'. Despite his exaggerating manner, Mikes manages to depict in this phrase not only the turbulent Cypriot history but also the important implications of the conflict for the rest of the world, including the European Union. In a way, the *lacuna* in the Union legal order, created by the suspension of the *acquis* in northern Cyprus, is a 'nuisance' for the legal and political life of the EU. That is the reason, as shall be observed in the following two chapters, that the Union has tried to create a framework for the partial application of the EU law in the areas not under the effective control of the Government of the Republic of Cyprus. Furthermore, although the main scope of the present research is to provide an analytical framework of those derogations to the suspension of the *acquis*, the two following chapters will also consist of an assessment of the pragmatic approach that the Union has adopted when dealing with issues arising from the conflict. In other words, the seemingly depoliticised, overly technical approach of the Union to this international political problem, that affects the political lives of two Member States and a candidate State, will be examined.

[238] For an analysis of the Community implications of the German reunification see generally C Tomuschat, 'A United Germany within the European Community' (1990) 27 *Common Market Law Review* 415; CWA Timmermans, 'German Unification and Community Law' (1990) 27 *Common Market Law Review* 437.

[239] Case C-14/74 *Norddeutsches Vieh- und Fleischkontor GmbH v Hauptzollamt Hamburg-Jonas-Ausfuhrestattung* [1974] ECR 899.

[240] *Ibid*, para 6.

III

Union Citizenship, Fundamental Rights and Free Movement of Persons

Without consideration, without pity, without shame
they have built great and high walls around me
And now I sit here and despair
I think of nothing else: this fate gnaws at my mind;
for I had many things to do outside.
Ah why did I not pay attention when they were building the walls
But I never heard any noise or sound of builders
Imperceptibly they shut me from the outside world.

The Walls, Konstantinos Kavafis (1896)

1. INTRODUCTION

THE 'BIG-BANG' ENLARGEMENT of 2004 allowed the citizens of Lithuania, Estonia, Latvia, Hungary, Poland, the Slovak Republic, the Czech Republic, Slovenia and Malta to become European Union citizens and consequently to enjoy the rights attached to the Union citizenship concept. The situation, however, with regard to the citizens of the Cyprus Republic is somewhat different due to the suspension of the application of the *acquis* in northern Cyprus pursuant to Article 1(1) of Protocol No 10 on Cyprus of the Act of Accession 2003.[1]

The non-application of EU law in the areas not under the effective control of the Government of the Republic of Cyprus and the two competing claims of legitimate rule on the island constrain on the one hand, the access of the residents of northern Cyprus to Union citizenship status and on the other, the exercise of the relevant rights associated with the 'fundamental status of nationals of Member States'[2] by all Union citizens in those 'Areas'. In addition, the examination of the case law of the European Court of Human Rights proves that northern Cyprus is a unique case within the Union legal order. The reason is that although the area North of the Green Line is part of the Republic and thus of the EU, the protection of the fundamental rights of the Union citizens in that area falls within the jurisdiction of a

[1] [2003] OJ L236/955.

[2] Case C-184/99 *Rudy Grzelczyk v Centre Public d'Aide Sociale d'Ottignes-Louvain-la-Neuve (CPAS)* [2001] ECR I-6193, para 31.

candidate Member State and not within the legitimate Government of the Member State. This is a result of the continued presence of Turkey on the island in the aftermath of the 1974 invasion. Moreover, apart from the territorial character of the suspension which allows, in principle, the Cypriots residing in the northern part of the island to enjoy, as far as possible, the rights attached to Union citizenship that are not linked to the territory as such, the Union has provided for a legal framework for the further facilitation of free movement rights in northern Cyprus.[3] The Green Line Regulation provides for the partial application of the free movement of persons *acquis* in an area that was virtually isolated from the rest of the world until April 2003.

Thus, the *telos* of the present chapter is twofold. On the one hand, it provides for an analytical framework of the partial application of the *acquis* concerning Union citizenship, the fundamental rights and the free movement of persons in the 'Areas'. More analytically, it examines the rules concerning citizenship of the Republic of Cyprus and thus the access to Union citizenship status of residents in the North; it reviews the case law of the Strasbourg Court and other European courts with regard to the human rights situation North of the Green Line; and it analyses the exercise of the relevant rights attached to EU citizenship in an area where the application of the *acquis* is suspended. The holistic approach that the chapter has adopted when examining the partial application of the *acquis,* concerning persons in northern Cyprus, has been dictated by the fact that the ramifications of the *de facto* division of the island make it almost impossible to conduct an analysis that would treat issues arising from the suspension of the *acquis* with regard to fundamental rights and the free movement of persons separately. The recent ECJ judgment in *Apostolides v Orams*[4]—discussed in great detail in the course of the present chapter—shows how interconnected those issues are.

On the other hand, the chapter consists of a critique of the pragmatic approach adopted by the Union when dealing with issues arising from this political and historical Gordian knot. In this particular case, the Union has tried to facilitate the exercise of the free movement rights of Union citizens and people legally residing in the North in an area that has been isolated from the rest of the world for 30 years. However, it has done so in a seemingly technical, depoliticised way in order to take into account the legitimate concern of the only recognised Government on the island that any authority in those 'Areas' should not be recognised by the EU or its Member States.

[3] Council Regulation (EC) No 866/2004 of 29 April 2004 on a regime under Article 2 of Protocol No 10 of the Act of Accession 2003 [2004] OJ L206/51 [hereafter Green Line Regulation].

[4] Case C-420/07 *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams* (Grand Chamber judgment 28 April 2009) [2009] ECR I-3571 (hereafter Grand Chamber judgment in *Apostolides v Orams*).

2. EU CITIZENSHIP

2.1 The Concept of Union Citizenship

Before analysing the rules concerning different categories of residents' access to Union citizenship on the island and especially of the ones in the 'Areas', first a relevant concept shall be outlined. The symbolism of the move at Maastricht from the European Economic Community to the European Community and from Community to Union was also evident in a number of specific EC Treaty provisions, such as the introduction of a systematic concept of citizenship of the Union through Articles 8 to 8e for the first time. Although, previously, there had been no formal concept of Union/Community citizenship, most of the rights and characteristics now attached to the concept of Union citizenship were partially outlined with the scope of the Rome Treaties and the Single European Act, such as the rights of freedom of movement and residence. The Treaty on European Union (TEU) initiative took the form of a statement that all nationals of the Member States were citizens of the EU, accompanied by a short list of rights which are attached to this status ie right to free movement and residence (subject to limitations);[5] electoral rights as far as it concerns the European Parliament and municipal elections;[6] diplomatic and consular protection;[7] access to an Ombudsman;[8] and the right to petition the European Parliament.[9] The wording of the Articles relating to citizenship was altered to a small extent by the Amsterdam Treaty. Article 18 TEC, relating to the right of citizens to move and reside within the EU, has also been amended slightly under the Treaty of Nice. Finally, both Article I-10 of the Treaty establishing a Constitution for Europe and Article 20 of the Treaty on the Functioning of the Union reiterate both the definition of EU citizenship and its attached list of rights.[10]

Much of the academic commentary at the time of the TEU was critical of the inadequacy of the citizenship provisions and also tended to highlight their seemingly mere symbolic nature. It has been suggested by Wilkinson,[11] for example, that the European citizen could protest, using the words of Mark Twain, that 'rumours of his or her birth have been greatly exaggerated' and—as D' Oliveira suggests—

[5] Art 21 TFEU [ex Art 18 TEC].
[6] Art 22 TFEU [ex Art 19 TEC].
[7] Art 23 TFEU [ex Art 20 TEC].
[8] Art 24 TFEU [ex Art 21 TEC].
[9] Art 25 TFEU [ex Art 22 TEC].
[10] For a more detailed account of the relationship between fundamental rights, EU citizenship rights and fundamental freedoms, see generally C Hilson, 'What's in a Right? The Relationship between Community, Fundamental and Citizenship Rights in EU Law', (2004) 29 *European Law Review* 636; For a comprehensive study of the electoral rights granted to those who do not have the nationality of the State in which they reside, within the EU and its Member States see J Shaw, *The Transformation of Citizenship in the European Union, Electoral Rights and Restructuring of Political Space* (Cambridge, Cambridge University Press, 2007).
[11] B Wilkinson, 'Towards European Citizenship? Nationality, Discrimination, and Free Movement of Workers in the European Union', (1995) 1 *European Public Law* 417, 437.

that '[c]itizenship is, in other words, nearly exclusively a symbolic plaything without substantive content'.[12] Moreover, although citizenship, in general, is regarded as an aspirational ideal expressing a deep commitment to public, communal life, which describes the citizen's legal-political status and her/his relations with the polity, the Treaty on European Union endorsed the Spanish proposal which had differentiated the definition of the concept of citizenship (which was regarded *per se* as the basis of the democratic legitimacy) from the *status civitatis*, which is defined as a set of rights, freedoms and obligations of citizens of the European Union.[13] Hence, the notion of European *demos* was not defined accurately by adopting a fully fledged citizenship, which would have led, as Weiler[14] points out, to the democratic legitimisation of the European Union and fundamentally changed the very *telos* of European integration from its unique concept of Community to a more banal notion of nation-building.

When introducing citizenship at the Maastricht IGC, the Member States intended the introduction of a very instrumental, limited conception of citizenship, as clearly depicted by the set of rights attached to the right of citizenship. However, despite this clear intention, the subsequent jurisprudence of the ECJ in inter alia *Martinez Sala*,[15] *Grzelczyk*,[16] *Baumbast*,[17] and *Bidar*[18] might suggest that nationals of the Member States can say, to use Jacobs' adaptation of the famous words of Cicero and St Paul, that '*civis europaeus sum*'.[19]

In *Martinez Sala*, the Court held that Ms Martinez Sala, a Spanish national lawfully residing in the territory of Germany, came within the scope *ratione personae* of the Treaty provisions on EU citizenship. According to this judgment, the status of a Union citizen is linked with the right laid down in Article 12 TEC [now Article 18 TFEU] not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty. Thus, the practice of the German State, to require nationals of other Member States, authorised to reside in its territory, to produce a formal residence permit issued by the national authorities in order to receive a child-raising allowance was held to be discriminatory and, as such, precluded by Union law[20] since German nationals are only required to be permanently or ordinarily resident in that Member State.

[12] J D'Oliveira, 'European Citizenship—Pie in the Sky', in A Rosas, and E Antola (eds), *A Citizen's Europe: in Search of a New Order* (London, Sage Publications, 1995) 82.

[13] C Closa, 'The Concept of Citizenship in the Treaty on European Union' (1992) 29 *Common Market Law Review* 1137, 1160.

[14] JHH Weiler, 'To be a European Citizen: Eros and Civilisation' in JHH Weiler, *The Constitution of Europe*, (Cambridge, Cambridge University Press, 1999) 324, 337.

[15] Case C-85/96 *Maria Martinez Sala v Freistaat Bayern* [1998] ECR I-2691.

[16] *Grzelczyk* (above n 2).

[17] Case C-413/99 *Baumbast, R. v Secretary of State for the Home Department* [2002] ECR I-7091. See also, M Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship' (2006) 31 *European Law Review* 613.

[18] Case C-209/03 *The Queen (on the application of Dany Bidar) v London Borough of Ealing, Secretary of State for Education and Skills* [2005] ECR I-2119.

[19] H Toner, 'Judicial Interpretation of European Union Citizenship—Transformation or Consolidation' (2000) 7 *Maastricht Journal of European and Comparative Law* 158, 159.

[20] *Martinez Sala*, (above n 15) paras 60–65.

In *Grzelczyk*,[21] the Court reaffirmed the finding in *Martinez Sala* that an EU citizen, lawfully resident in the territory of another Member State, can rely on the then Article 12 TEC [now Article 18 TFEU] in all situations which fall within the scope of *ratione materiae* in Union law.[22] It also went one step further declaring that

> Union citizenship is destined to be the fundamental status of nationals of Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.[23]

This finding was reaffirmed in paragraph 82 of *Baumbast.*[24]

In view of those developments, the Court decided, among other things, to deviate from its previous decisions in *Lair*[25] and *Brown*,[26] and to hold in *Bidar*[27] that the situation of an EU citizen, lawfully resident in another member State, 'falls within the scope' of ex Article 12 TEC [now Article 18 TFEU] 'for the purposes of obtaining assistance for students'.[28] More recently, in *Morgan*[29] the Grand Chamber decided that

> Articles 17 TEC and 18 TEC [now Articles 20 and 21 TFEU] preclude . . . a condition in accordance with which, in order to obtain an education or training grant for studies in a Member State other than that of which the students applying for such assistance are nationals, those studies must be a continuation of education or training pursued for at least one year in the Member State of origin of those students.[30]

However, it is not just in cases concerning students that a more 'generous' interpretation of the Union citizenship provisions can be observed. For example, in *Tas Hagen,*[31] the Court held that

> Article 18(1) TEC [now Article 21 TFEU] is to be interpreted as precluding legislation of a Member State under which it refuses to grant to one of its nationals a benefit for civilian war victims solely on the ground that, at the time at which the application was submitted, the person concerned was resident, not in the territory of that Member State, but in the territory of another Member State.[32]

In any event, for the purposes of the present research, it has to be noted the fact that Union citizenship 'is destined to be the fundamental status of nationals of

[21] *Grzelczyk*, (n 2).
[22] *Ibid*, para 32.
[23] *Ibid*, para 31.
[24] *Baumbast*, (above n 17).
[25] Case C-39/86 *Sylvie Lair v Universität Hannover* [1988] ECR 3161.
[26] Case C-197/86 *Steven Malcolm Brown v The Secretary of State for Scotland* [1988] ECR 3205.
[27] Case C-209/03 *The Queen (on the application of Dany Bidar) v London Borough of Ealing, Secretary of State for Education and Skills* [2005] ECR I-2119,
[28] *Ibid*, para 42.
[29] Case C-11/06 and Case 12/06 *Morgan v Bezirksregierung Köln* and *Iris Bucher v Landrat des Kreises Düren* [2007] ECR I-9161.
[30] *Ibid*, para 51.
[31] Case C-192/05 *K. Tas-Hagen, R.A. Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad* [2006] ECR I-10451.
[32] *Ibid*, para 40.

Member States', linked with the principle of non-discrimination. What remains to be analysed, however, is the linkage between the relevant national laws and access to Union citizenship status. In the case of Cyprus, the wide discretion that the Member States enjoy with regard to the determination of their nationality legislation is critical given the existence of two claims of legitimate rule on the island.

The linkage between Union citizenship and the relevant national laws that regulate the nationalities of the Member States was apparent from the time of the introduction of this innovative concept. Article 20(1) TFEU [ex Article 17(1) TEC] provides that 'every person holding the nationality of a Member State shall be a citizen of the Union'. In addition the special 'Declaration (no 2) on nationality of a Member State', which is attached to the Maastricht Treaty, clarifies that wherever reference is made in the Treaties to 'nationals of the Member States, the question whether an individual possesses the nationality of the Member State shall be settled solely by reference to the national law of the Member State concerned'. Thus, one could assume that Union citizenship appears to be a status that could be acquired only by satisfying the condition precedent to being a national of a Member State, thereby excluding those not possessing such a nationality, but residing on its territory, from the catalogue of rights. This rule is of crucial importance for this research given the presence of an important number of Turkish 'settlers' residing in northern Cyprus, who could not claim the citizenship of the Republic and thus the EU citizenship.[33]

Moreover, according to Declaration No 2, the Member States also have the discretion to 'declare, for information, who are not to be considered their nationals for Community purposes by way of a declaration lodged with the Presidency and may amend any declaration when necessary'. Hence, according to this declaration, it could be argued that in matters of nationality the autonomy of the Member States is so extensive that they have the possibility to issue an additional declaration 'for information' regarding the persons who already possess their nationality, extending or reducing the *ratione personae* of their legislation.

Two Member States have issued special declarations on the issue of who should be regarded as their nationals for Community purposes. Germany, as far back as 1957, was the first Member State to issue such a declaration. This declaration included, for Community purposes, not only Germans within the meaning of the German Nationality Act,[34] which already included all nationals of the Democratic Republic of Germany, but also Germans within the meaning of Article 116 of the German Constitution, including ethnic Germans in Eastern Europe if they had entered Germany as refugees.[35] Apart from Germany, the UK at the occasion of

[33] See below s 2.2.

[34] *Reichs- und Staatsangehorigkeitsgesetz* 1913, with amendments.

[35] See Treaties establishing the European Communities, Office for Official Publications of the European Communities 1978, 573. This declaration, since 1 January 2000 is not of practical relevance. According to Art 7 of the German Nationality Act, as amended by the Act of 15 July 1999, anyone recognised as a German within the meaning of Art 116 German Constitution simultaneously acquires German nationality *ex lege*.

its accession to the Union, issued a special declaration[36] defining who is British for Community purposes. That declaration was replaced by another in 1981[37] because the rules on British nationality had been altered by the British Nationality Act 1981. Because of those declarations, some categories of British nationals, in particular most 'British Dependent Territories Citizens',[38] 'British Overseas Citizens', 'British Subjects without Citizenship' and 'British Protected Persons' are excluded from EU citizenship. The validity of the exclusion of certain British nationals from EU citizenship was unsuccessfully challenged in the *Kaur* case,[39] analysed below.

The aforementioned full autonomy of the Member States in matters of nationality was somewhat challenged and limited by the decision of the Court of Justice in *Micheletti*.[40] In that case, despite the fact that the Court confirmed that the determination of nationality for Community purposes rested within the exclusive competence of the Member States, it held that they had to exercise it with due regard to the requirements of Community law. In addition, the Court decided that the freedom of establishment precluded Spain from denying an Italian national, who also possessed the Argentinean nationality entitlement to that freedom on the ground that the Spanish law deemed him to be a third country national. The overall significance of the case lies in the fact that, without equivocation, the Court of Justice upheld one of the primary tenets of international law, that Member States themselves are omnipotent as far as determination of nationality is concerned. Even though such a competence had to be exercised 'having due regard to Community law'.[41]

The findings of the Court in *Micheletti*, were upheld in *Kaur*[42] and *Zhu and Chen*[43] and recently in *Rottman*.[44] As far as *Kaur* is concerned, a British Overseas Citizen of Indian extraction argued that the 1981 British declaration deprived her of EU citizenship. The Court, having observed that the British declaration was in conformity with the special Declaration attached to the Maastricht Treaty, concluded that she was not deprived of EU citizenship because she had never been an EU citizen according to the British declaration. With regard to this case, the Court of Justice reiterated that it is for each Member State, having due regard to Community law, to lay down the conditions for the loss and acquisition of nationality.[45] This, however, does not mean that a Member State may restrict the effects of another Member

[36] [1972] OJ L73/196.

[37] [1983] OJ C23/1.

[38] By virtue of the British Overseas Territories Act 2002, the 'British Dependent Territories Citizens' were renamed 'British Overseas Territories Citizens' and they became British citizens and thus EU citizens, with the exception of those who became British Overseas Territories Citizens by virtue of a connection with the Sovereign Base Areas of Akrotiri and Dhekelia.

[39] Case C-192/99 *The Queen and Secretary of State for the Home Department, ex parte Manjit Kaur* ECR [2001] I-1237.

[40] Case C-369/90 *Mario Vincente Micheletti and Others v Delegacion del Gobierno en Cantabria* ECR [1992] I-4258.

[41] *Ibid*, para 10.

[42] *Kaur*, (above n 39) paras 19 and 20.

[43] Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925, para 37.

[44] Case C-135/08 *Janko Rottman v Freistaat Bayern* (judgment 2 March 2010) [not yet reported].

[45] *Kaur* (n 39).

State granting its nationality by imposing an additional condition for the recognition of that nationality with respect to the exercise of the fundamental freedoms provided for in the Treaty. Hence, the UK Government had no right to deny Zhu her fundamental right of free movement even though she acquired her Member State nationality in order to secure a right of residence for her mother, Chen, a third-country national.[46]

Thus, in short, insofar as the determination of nationality is concerned, it seems that the Court of Justice has done very little to reduce the monopoly powers of the Member States, thereby perpetuating the iniquities which exist across the entire EU in respect of acquiring citizenship. However, the ECJ judgments in the *Gibraltar*[47] and *Eman and Sevinger*[48] cases,[49] which were decided the same day, might suggest a slightly different outcome since the Court in those cases discussed the *Micheletti* criterion concerning the 'due regard to the requirements of Community law'.

In the *Gibraltar* case, which is the ECJ sequel of *Matthews v United Kingdom*,[50] the Court of Justice reaffirmed that Union citizenship 'is destined to be the fundamental status of nationals of the Member States,' enabling those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality. Such a statement, however, does not necessarily mean that the rights recognised by the Treaty are limited to EU citizens.[51] In other words, although Union citizens are the necessary vestees of the right to vote in the EP elections, it does not mean that they are the only one. According to paragraph 78 of the *Gibraltar* judgment, in the current state of Union law the definition of persons entitled to vote and to stand as a candidate in the European Parliament elections falls within the competence of each Member State in compliance with Community law. Consequently, the Member States are not precluded from granting that right to vote and to stand as a candidate to certain persons, other than their own nationals or EU citizens resident in their territory, who have close links to that Member State. Advocate General Tizzano, opined that the exercise of such power by the Member States should take place in compliance with the general principles of the Community legal order, such as the principles of reasonableness, proportionality and non-discrimination.[52] By its decision, the Court, in essence, endorsed the submission of the Commission that although the Union citizenship concept is fundamental to the EU, the same applies to the Union's commitment to respect the national identities of its Member States.

On the other hand, in *Eman and Sevinger*, the ECJ held that since according to ex Article 17(1) TEC [now Article 20(1) TFEU] 'every person holding the national-

[46] *Zhu and Chen* (above n 43).

[47] Case C-145/04 *Spain v UK* [2006] ECR I-7917.

[48] Case C-300/04, *Eman and Sevinger v College van Burgemeester en Wethouders van Den Haag* [2006] ECR I-8055.

[49] For an in depth analysis of those two cases, see generally J Shaw, 'The Political Representation of Europe's Citizens: Developments' (2008) 4 *European Constitutional Law Review* 162.

[50] *Matthews v United Kingdom (Merits)* (Application No 24833/94) (judgment 18 February 1999) ECHR Reports 1999-I.

[51] *Spain v UK*, (above n 47) para 74.

[52] *Ibid*; *Eman and Sevinger* (Opinion of AG Tizzano), (above n 48) para 103.

ity of a Member State shall be a citizen of the Union', it is irrelevant whether that Member State national resides or lives in an OCT[53] and thus s/he may rely on the rights conferred on Union citizens in Part Two of the Treaty.[54] Moreover, the Court of Justice reiterated that, in the current state of Union law, the definition of the persons entitled to vote and to stand for election falls within the competence of each Member State in compliance with Community law.[55] More specifically in that particular case, given the special association arrangements set out in Part Four of the EC Treaty [now Part Four TFEU], the then Articles 189 TEC[56] and 190 TEC[57] did not apply to those countries and territories and thus the Member States are not required to hold elections for the European Parliament there.[58] The Court of Justice further noted that even the criterion linked to residence does not appear, in principle, to be inappropriate to determine who has the right to vote and to stand as a candidate in the European Parliament elections. The reason for that is the case law of the Strasbourg Court on Article 3 of Protocol No 1 ECHR as pointed out by the Advocate General in paragraphs 157 and 158 of his Opinion.[59] However, the principle of equal treatment or non-discrimination linked with the status of EU citizen precludes a Member State from granting the right to vote and to stand as a candidate in European Parliament elections to its nationals residing in Overseas Countries and Territories when, at the same time, it grants such right to its nationals residing in a non-member country.[60]

It is obvious from the analysis above that the *Micheletti* judgment is far from overruled. In fact the Court of Justice, reiterated recently that 'according to established case law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality'.[61] So, the Member States are omnipotent as far as the determination of nationality is concerned, although this competence has to be exercised 'having due regard to Community law'. This competence of the Member States is wide enough not to preclude them from granting electoral rights attached to the Union citizenship to non-EU citizens since the Union's commitment to respect the national identities of its Member States is fundamental to the EU, as has been clearly stated in the *Gibraltar* case. It seems, however, that the Court, both in the judgment in the *Aruba* case and in the Opinion of the Advocate General for both cases, tries to emphasise and explain the 'having due regard to Community law' condition, with particular emphasis on the non-discrimination/equal treatment principle. A similar approach was adopted by Advocate General Maduro in his Opinion in *Rottman.*[62]

[53] *Eman and Sevinger* (above n 48) para 27.
[54] *Ibid*, para 29.
[55] *Ibid*, para 45.
[56] Replaced, in substance, by Art 14(1) and (2) TEU.
[57] Replaced, in substance, by Art 14(1) to (3) TEU.
[58] *Eman and Sevinger*, (n 48) paras 46 and 47.
[59] *Ibid*, paras 54 and 55.
[60] *Ibid*, para 58.
[61] *Rottman* (above n 44) para 39.
[62] Case C-135/08, *Janko Rottman v Freistaat Bayern* (Opinion of AG Maduro delivered on 30 September 2009) [not yet reported].

Thus, it could be argued that, in those two recent cases where the issue was not only the delimitation of the status of citizen of the Union but also the way in which the rights associated with that status are provided for, it was clearly stated that the exercise of such power by the Member States should take place in compliance with the general principles of the Community legal order, such as the principles of reasonableness, proportionality and mainly non-discrimination.[63] If those principles are applied in our case, it could be argued that the Government of the Republic of Cyprus enjoys wide discretion with regard to the determination of the citizenship of its State and thus the access to Union citizenship, as long as it exercises such competence with due regard to Community law and especially to the principle of equal treatment. The suspension of the *acquis* in northern Cyprus does not prevent the Republic from considering the Turkish Cypriots as citizens of the bi-communal State. The principle of equal treatment, however, should be taken into account in any regulation/legislation concerning the exercise of the rights associated with such status.

Thus, the main questions that have to be answered in the following parts of the chapter are: first, if according to Article 20(1) TFEU '[e]very person holding the nationality of a Member State shall be a citizen of the Union' who, among the inhabitants of the 'Areas', are entitled to the nationality of this Member State; and second, how the rights attached to Union citizenship and the fundamental rights are exercised in the areas not under the effective control of the Government, where the application of the *acquis* is suspended.

2.2 Access to Union Citizenship[64]

Article 198[65] of the Constitution of the Republic of Cyprus provides that 'any matter relating to citizenship shall be governed by the provisions of Annex D to the Treaty of Establishment' until a law of citizenship is made incorporating such provisions. In 1967, the Republic of Cyprus issued the relevant citizenship law[66] which provides for the acquisition, renunciation and deprivation of Cypriot citizenship. According to section 3 of the aforementioned law

[63] *Eman and Sevinger* (n 48) paras 39 and 59; *Eman and Sevinger* (Opinion of AG Tizzano), (above n 48) para 103; See also *Rottman* (Opinion of AG Maduro) (above n 62).

[64] For a more detailed account of the relevant requirements see N Skoutaris, 'Differentiation in European Union Citizenship Law: The Cyprus Problem' in A Ott and K Inglis (eds), *The Constitution for Europe and Enlarging Union: Unity in Diversity?* (Groningen, Europa Law Publishing, 2005) 160.

[65] Art 198(1) reads as follows: 'The following provisions shall have effect until a law of citizenship is made incorporating such provisions—(a) any matter relating to citizenship shall be governed by the provisions of Annex D to the Treaty of Establishment; (b) any person born in Cyprus, on or after the date of the coming into operation of this Constitution, shall become on the date of his birth a citizen of the Republic if his father on that date of his birth is a citizen of the Republic or would but for his death have become such a citizen under the provisions of Annex D to the Treaty of Establishment'.

[66] The Republic of Cyprus Citizenship Law 1967 as amended by Laws Nos. 43 of 1967, 1 of 1972, 74 of 1983, 19(1) of 1996, 58(1) of 1996, 70(1) of 1996, 50(1) of 1997, 102(1) of 1998, 105(1) of 1998, 105(1) of 1998, 65(1) of 1999, 128(1) of 1999.

> [c]itizens of the Republic shall be the persons who, on the date of entry into force of the Law, have either acquired or are entitled to acquire citizenship of the Republic under the provisions of Annex D or who acquire thereafter such citizenship under the provisions of this Law.

Section 2 of Annex D[67] of the Treaty of Establishment provides the main rule for acquiring the citizenship of the Cyprus Republic. According to this Section of Annex D any person who, between 1914 and 1943, became a British subject under the provisions of the Cyprus (Annexation) orders in Council, or descended in the male line from such a person, or was born in the Island of Cyprus on or after 5 November 1914 and was ordinarily resident on the island of Cyprus at any time in the period of five years immediately before 1960 became a citizen of the Republic of Cyprus on 15 August 1960. Annex D also provided for the right of different categories of people, such as spouses of those entitled to the citizenship of the Republic, or those that have been naturalised as citizens of the UK and Colonies by the Governor of Cyprus, to apply to the appropriate authority in order to be granted Cypriot citizenship.[68] More importantly for the purposes of this research, it is noted that, by virtue of section 4 of the Citizenship law of 1967, a person acquires citizenship of the Republic of Cyprus by birth if one of her/his parents was a citizen at the time of her/his birth but also if s/he is married to a citizen of the Republic and the two have lived together for at least two years in accordance with section 5(2). On the other hand, a citizen may renounce her/his citizenship[69] by making a formal declaration.

It is clear from the provisions of Annex D of the Treaty of Establishment and The Republic of Cyprus Citizenship Law of 1967 that Cypriots of Greek or Turkish origin could claim the nationality of that Member State and thus have access to EU citizenship. As far as the situation of the residents of the 'Areas' are concerned, the Republic of Cyprus continues to recognise, in accordance with the aforementioned legal status quo, the citizenship and the right to citizenship of all residents being Cypriots of Turkish origin, residing in the North, who can prove that they come under the scope of *ratione personae* of Annex D or the subsequent legislation.[70]

Hence, one could argue that the Turkish Cypriots possess EU citizenship in 'hibernation' which can be activated if they provide proper documentation to the relevant authority of the only recognised Government on the island. In practice, the Republic of Cyprus regularly issues passports to Turkish Cypriots upon application. This situation is analogous to the one faced by the citizens of the Democratic Republic of Germany, who, before the fall of the Berlin wall, were considered to fall under the *ratione personae* of the EEC Treaty.[71]

[67] Annex D of the Treaty of Establishment; www.kypros.org/Constitution/English/annex_d.html.

[68] *Ibid*, ss 5 and 6.

[69] Section 7 of The Republic of Cyprus Citizenship Law of 1967.

[70] The Republic of Cyprus has so far had to supply 50,974 of the quarter million inhabitants of the North with EU passports. Some 81,805 have applied for and received ID cards. Figures as of 18 April 2008 from Republic of Cyprus Press and Information Office, Nicosia.

[71] In 1957, Germany declared that Germans within the meaning of the German Nationality Act (*Reichs-und Staatsangehörigkeitsgesetz* 1913, with amendments- which included all nationals of the Democratic Republic of Germany) must be regarded as Germans for European Community purposes.

It has to be stressed, however, that it is only through the aforementioned procedure that any inhabitants of the 'Areas' can successfully claim EU citizenship since the breakaway State in the North, that proclaimed its independence on 15 November 1983, has not been recognised by any other State except Turkey. As a result, several *fora* have refused to recognise the TRNC 'nationality'. In *Caglar v Billingham*,[72] the representative of the internationally unrecognised TRNC in London claimed, for revenue purposes, to be a TRNC citizen in accordance with Article 67 of the TRNC 'Constitution' and the 'Turkish Republic of Northern Cyprus Citizenship Law'[73] and thus not a Commonwealth citizen. The court held that his possession of the nationality of the Republic, under the aforementioned Citizenship law of 1967, would be asserted against him for the purposes of determining which regime of income tax assessment should be applied. Likewise, the Australian Refugee Review Tribunal treated an asylum seeker from northern Cyprus as a citizen of the Republic, albeit discounting the possibility of an internal flight alternative. It was further noted that

> Australia along with the rest of the world—with the single exception of Turkey—does not recognise the existence of the TRNC and I, concurring with this international view, do not accept that the TRNC can be regarded as his 'country of nationality'. My view is that he is and remains a citizen of Cyprus.[74]

Apart from the Turkish Cypriot citizens of the bi-communal Cyprus Republic, there are many residents in the 'Areas' who fall within the definition of nationals established by Article 67 of the 'Constitution' of the secessionist entity in the North and the 'Turkish Republic of Northern Cyprus Citizenship Law' but are excluded from the nationality of the Republic because they come under the category of 'settlers'. In the northern part of the island, Turkey's Government has, since 1974, implemented a policy of systematic colonisation in order to change the demographic character of those areas, and accordingly of the island.[75] According to reports confirmed in both the Turkish and Turkish Cypriot press, those 'settlers' come from the Turkish mainland and are of Turkish citizenship. The regime in the North, while accepting that they have come from Anatolia, refer to the Cypriot origin of those 'settlers'. Today, according to the Republic's authorities,[76] there are about 115,000 'settlers' in the part of Cyprus that is North of the Green Line. On the other hand, Turkish Cypriot sources refer to a number less than 90,000. There is also, of course, the presence of 35,000 Turkish occupation troops.[77]

It is important to note, for the purposes of the present chapter, that international law is clear on the issue of the implantation of settlers[78] in occupied territories.

[72] *Caglar v Billingham (Inspector of Taxes)* [1996] STC (SCD) 150. For a more detailed account of this case and a discussion of the issue of nationality and unrecognised states see generally A Grossman, 'Nationality and the Unrecognised State' (2001) 50 *International and Comparative Law Quarterly* 849.

[73] 'Law' of 21 May 1993, Resmi Gazette KKTC No 52, 27 May 1993.

[74] Case N95/07552, 12 June 1996 *Kadiroglu v Minister of Immigration* [1998] 1656 F.C.A. (1998).

[75] See generally the Cyprus question in www.mfa.gov.cy.

[76] *Ibid.*

[77] *Ibid.*

[78] For a more detailed analysis A De Zayas, 'The Annan Plan and the Implantation of Turkish Settlers in the Occupied Territory of Cyprus' (2006) *The Cyprus Yearbook of International Relations* 163.

It states that such persons are deemed to be illegal settlers and should be repatriated, taking into account humanitarian considerations. The receiving State in the present case, the Republic of Cyprus, has no obligation under international law to grant residence or nationality to such settlers. Article 49(6) of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in time of War of 1949 provides that '[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies'. According to Article 85 of the first Additional Protocol to the Geneva Conventions,[79] such practices are considered to be grave breaches of the Conventions and, as such, war crimes.

No distinction should be made between those 'settlers' who were directly transferred or implanted by decision of the Turkish Government, or those who moved there voluntarily after 1974. Both settlements are prohibited. The aforementioned Article 49(6) appears, by its terms, to apply to any transfer of parts of its civilian population, whatever the objective and whether involuntary or voluntary, by an occupying power. According to Pictet, this clause 'is intended to prevent a practice adopted during the Second World War by certain Powers which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed to colonise those territories'.[80]

In numerous Resolutions, the UN General Assembly has repeatedly deplored 'all unilateral actions that change the demographic structure of Cyprus'.[81] Moreover, in its Resolution 1987/50 of 11 March 1987, the UN Commission on Human Rights expressed concern over 'the fact that changes in the demographic structure of Cyprus are continuing with the influx of great numbers of settlers'. The Sub-Commission on Promotion and Protection of Human Rights in its Resolution No 1987/19 of 2 September 1987 expressed 'its concern also at the policy and practice of the implantation of settlers in the occupied territories of Cyprus which constitute a form of colonialism and attempt to change illegally the demographic structure of Cyprus'.[82]

Turkey's policy of colonisation is also contrary to the 1960 Treaty of Establishment[83] of the Republic of Cyprus. Annex D to the Treaty governs Cyprus' citizenship and makes it impossible and unlawful for either community to upset the demographic balance by bringing in large numbers of ethnic Turks or Greeks and contending that they were of Greek Cypriot or Turkish Cypriot descent and therefore entitled to come to Cyprus. Section 4(7) imposes quotas regarding the granting of citizenship to persons who had emigrated to Greece, Turkey or the British Commonwealth having been resident in Cyprus before 1955 or who descended from Ottoman subjects resident in Cyprus in 1914.

[79] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

[80] J Pictet (ed), *Commentary to the Fourth Geneva Convention*, (Geneva, International Committee of the Red Cross, 1958) 283.

[81] UN General Assembly Resolution 33/15 (9 November 1978); UN General Assembly Resolution 24/30 (20 November 1979); UN General Assembly Resolution 37/253 (13 May 1983) etc.

[82] UN General Assembly Resolution 1987/19 (2 September 1987) para 3.

[83] Appendix A of the Cyprus Agreements; www.kypros.org/Constitution/English/appendix_a.html.

The Republic of Cyprus does not consider those alien persons, who have settled illegally and without permission in the areas under control of the Turkish forces, as legitimate claimants to Cypriot citizenship[84] and thus they do not have access to EU citizenship via the citizenship laws of the Republic of Cyprus. According to the legislation of the Republic, they are considered to be illegal immigrants.[85] *Prima facie*, the policy of the Republic towards the 'settlers' bears similarities with the decision of certain Baltic States not to grant citizenship rights to huge portions of their Russian-speaking population, which remained stateless after the dissolution of the USSR.[86] However, we have to point out that by not recognising those persons as lawful claimants of the citizenship of the bi-communal Republic, the Cypriot Government acts in conformity with its own Constitution, which was part of an international agreement, and within the wide limits of autonomy that the Member States enjoy in matters of nationality in accordance with the *Micheletti* principle developed by the ECJ.

The aforementioned legal framework providing the rules for acquiring Cypriot citizenship and thus Union citizenship would have been significantly altered if the establishment of the United Cyprus Republic—as envisaged in the UN-sponsored plan for the Comprehensive settlement of the Cyprus problem, commonly known as the Annan Plan[87]—was approved by both communities in the two referendums that had taken place on 24 April 2004. It is important to examine the provisions of the Annan Plan referring to Cypriot citizenship, not only because the provisions of the Constitution attached to that unification plan differ from the policy adopted by the Republic of Cyprus towards the 'settlers' but, because it is more than probable that, in any future settlement plan, there will be similar provisions on citizenship. To that effect, the current President of the Republic, Mr Christofias, has said that he is prepared to accept 50,000 'settlers'.[88]

According to Article 3 of the Foundation Agreement and Article 12 of the Constitution of the United Cyprus Republic (hereafter UCR), there would have been a single Cypriot citizenship. Moreover, all persons holding Cypriot citizenship would have also enjoyed internal constituent state citizenship status as provided for by constitutional law. Such status, attributed on the basis of the residence at the date the settlement would have come into force, would have been complementary to, and would not have replaced, Cypriot citizenship.[89] It is important to note that no-one would have held the internal constituent citizenship status of both constituent

[84] See generally US Office of Personnel Management Investigation Service, *Citizenship Laws of the World*, March 2001, 62; www.opm.gov/extra/investigate/IS-01.pdf.

[85] See generally *Ο Περί Αλλοδαπών και Μεταναστεύσεως (Τροποποιητικός) Νόμος του 2004* [*Aliens and Immigration (Amending) Act 2004*].

[86] G Guliyeva, 'Lost in Translation: Russian Speaking Non-citizens in Latvia and the Protection of Minority Rights in the European Union' (2008) 33 *European Law Journal* 843; D Kochenov, 'A Summary of Contradictions: An Outline of the EU's Main Internal and External Approaches to Ethnic Minority Protection' (2007) 31(1) *Boston College International and Comparative Law Review* 1, 32.

[87] www.unficyp.org/nqcontent.cfm?a_id=1637.

[88] Christofias interviewed by CNN Turk, referenced in the Greek Cypriot newspaper *Politis*, 25 March 2008; also in press statement, London, 5 June 2008.

[89] Arts 3(2) of the Foundation Agreement and 12(2) of the UCR Constitution.

States. Provisions, which stated that the internal constituent state citizenship status was regulated by the Constitutional Law on Internal Constituent State Citizenship Status and Constituent State Residency Rights,[90] were included in the Constitutions of both the constituent Cypriot States.[91] The constituent State citizenship status, similar to the regime in the Åland islands[92] and to the EU citizenship, was designed to be connected with the exercise of political rights by the UCR citizens as analysed in the previous chapter.

However, it was the Federal Law to Provide for the Citizenship of the United Cyprus Republic and For Matters Connected Therewith or Incidental Thereto[93] that would have regulated the Cypriot citizenship and thus access to EU citizenship status for the nationals of this State. According to section 3(1), the descendants and spouses of any person who held Cypriot citizenship on 31 December 1963,[94] would have been considered citizens of the United Cyprus Republic upon the relevant date. It is worth noting that, according to the estimations of the Republic of Cyprus, 18,000 'settlers' have become spouses of Cypriot citizens.

In addition to the above, persons, whose names[95] were on a list handed over to the UN Secretary-General by each side, would have been considered citizens of the Republic. Each side's list could include no more than 45,000 persons, including their spouses and children. Applicants would have been included on the list according to the following criteria and in the following order of priority: (i) persons who enjoyed permanent residence on Cyprus for at least seven years before reaching the age of 18 and for at least one year during the five years immediately preceding the relevant date and (ii) other persons who have enjoyed permanent residence on Cyprus for more than seven consecutive years based on the length of their stay. The previously mentioned provision clearly offered the possibility for 45,000 'settlers' to become EU citizens.

Moreover, Article 7 of the Federal Law gave the possibility to acquire the citizenship of the United Cyprus Republic by naturalisation to persons who were of full age and capacity, had enjoyed permanent residence in Cyprus for at least nine consecutive years immediately before submitting an application, including at least four years after the relevant date, had some knowledge of either Greek or Turkish, were not the objects of a security measure and had not been sentenced for a criminal act for longer than one year. According to the estimates of the Republic, another 17,000 'settlers' would have been eligible to apply for citizenship under this provision.

[90] Constitutional Law on Internal Constituent State Citizenship Status and Constituent State Residency Rights.

[91] Art 8 of the Constitution of the Greek Cypriot State and 73 of the Constitution of the Turkish Cypriot State.

[92] See generally The Åland Agreement in the Council of the League of Nations, 1921, *League of Nations Official Journal, 701*, September 1921.

[93] Federal Law to Provide for the Citizenship of the United Cyprus Republic and For Matters Connected Therewith or Incidental Thereto.

[94] This date is connected with the incidents that led to the establishment of the 'Green Line' during December 1963.

[95] Constitutional Law on Internal Constituent State Citizenship Status (above n 90), s 3(2).

Overall, if this new state of affairs had been realised, around 80,000 'settlers' (45,000 in the list, 18,000 spouses, and 17,000 naturalised) could have become citizens of the United Cyprus Republic and thus of the EU. Although in a possible future unification of the island the number of citizens may be altered, it is also inevitable that similar provisions will give a significant number of 'settlers' the opportunity to obtain access to EU citizenship, which has been, until now, impossible under the formerly mentioned legal status quo of the Republic of Cyprus.

2.3 The Exercise of Union Citizenship Rights

Since the legal framework concerning the access of the Cypriots residing North of the Green Line to Union citizenship has been extensively analysed, it is crucial now to examine how the rights attached to the 'fundamental status' of the Cypriot nationals could be exercised in an area where the application of the *acquis* is suspended. Obviously, the suspension of the *acquis* means that the Union citizens, whether residing in northern Cyprus or not, cannot invoke any rights derived from primary or secondary Union law against the regime in the North. Despite this, as already mentioned, such a suspension is territorial and thus the Union citizens residing in the 'Areas' should be able to enjoy, as far as possible, the relevant rights that are not linked to the territory as such.[96]

Firstly, pursuant to Article 14 TEU, the people of each Member State elect their own representatives in the European Parliament. Given that the vast majority of Turkish Cypriots do not participate in the constitutional life of the Cyprus Republic since 1963 and that the relevant Cypriot Law 72/79 does not provide for any separate electoral list for the Turkish Cypriot community in view of the post-1974 *status quo*, the impediments for the exercise of such electoral rights become evident.

Interestingly enough, the political rights of the Turkish Cypriot ethno-religious segment attached to the concept of citizenship of the Republic and to Union citizenship are effectively protected in the aftermath of the judgment of the European Court of Human Rights in *Aziz v Cyprus*.[97] In that case, the Strasbourg Court found that the refusal of the Cypriot Ministry of Interior to enrol the applicant, a Turkish Cypriot, on the electoral roll in order to exercise his voting rights in the parliamentary elections of 2001, consisted of a breach of the obligations of the Republic as a Contracting Party to the Convention under Article 3 of Protocol No 1. According to that provision, the States should 'hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the

[96] M Uebe, 'Cyprus in the European Union' (2004) 46 *German Yearbook of International Law* 375; F Hoffmeister, *Legal Aspects of the Cyprus Problem, Annan Plan and EU Accession* (Leiden, Martinus Nijhoff Publishers, 2006) 207–215; A De Mestral, 'The Current Status of the Citizens of the Turkish Republic of Northern Cyprus in the Light of the Non-Application of the *Acquis Communautaire*' in S Breitenmoser, B Ehrenzeller, M Sassoli, W Stoffel, and BW Pfeifer (eds), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (Baden-Baden, Nomos, 2007) 1423.

[97] *Aziz v Cyprus* (Application No 69949/01) (judgment 22 June 2004), ECHR Reports 2004-V.

people in the choice of the legislature'. Moreover, such a practice was in breach of Article 14 of the Convention that provides that

> [t]he enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. [98]

In the aftermath of this decision, the Turkish Cypriots residing in the South can be included in the Greek Cypriot electoral system while Turkish Cypriots residing in northern Cyprus can cross the Green Line to vote in the South provided that they have registered there. With this judgment, the Strasbourg Court not only acted as a guard of the bi-communal structure of the Republic but also indirectly enhanced the exercise of EU citizenship rights concerning the election of representatives to the European Parliament. Obviously, the situation is far from ideal.[99] If the Annan Plan was approved, the whole Turkish Cypriot community would have been participating in the electoral process and represented by two European Parliamentarians. Nevertheless, it should still be noted that—theoretically speaking at least—all the Turkish-speaking Cypriots could participate in the political life of the Union, although the Republic of Cyprus does not have a legal obligation to hold European Parliament elections in an area where the *acquis* is suspended as it was held in the *Eman and Sevinger* case,[100] and cannot de facto hold elections in the northern part of the island given the post-1974 status quo.

Recently, it has been suggested that the Union should create 'forms of political representation for Turkish Cypriots which can be implemented without violating the suspension' of the *acquis* 'and the EU's non-recognition policy towards the TRNC, while at the same time providing an effective voice to the Turkish Cypriots in EU public policy making'.[101] More precisely, the introduction of some form of observer status for Turkish Cypriot representatives in the European Parliament has been recommended.[102] In a way, such a development would be following the paradigm of the Parliamentary Assembly of the Council of Europe (PACE), which has developed a mechanism to meet the demands of the Turkish Cypriots for access to the political debates. In the aftermath of the referendums in April 2004, the level of participation of the Turkish Cypriots in the debates and operations of PACE underwent formal upgrading. Until 2004, a Turkish Cypriot parliamentarian was only invited to attend committee meetings in PACE whenever the situation of Cyprus

[98] *Ibid*, para 38.

[99] At the elections for the European Parliament on 13 June 2004, approximately 500 Turkish Cypriots were registered, out of which 97 actually voted. With respect to the 2009 EP elections held on 6 June 2009 in Cyprus, 1305 Turkish Cypriots were registered on the electoral lists, out of which 757 are residents in the Areas (117 actually voted); S Laulhé Shaelou, *The EU and Cyprus: Principles and Strategies of Full Integration* (Leiden, Brill / Martinus Nijhoff, 2010) 202.

[100] *Eman and Sevinger* (above n 48) paras 46–48.

[101] M Brus, M Akgün, S Blockmans, S Tiryaki, T van den Hoogen, and W Douma, *A Promise to Keep: Time to End the International Isolation of the Turkish Cypriots* (Istanbul, Tesev Publications, 2008) 36.

[102] *Ibid.*

was to be discussed,[103] however, with the adoption of Resolution 1376 (2004), PACE decided 'to associate more closely elected representatives of the Turkish Cypriot Community in the work of the Parliamentary Assembly and its committees, beyond the framework of resolution 1113'.[104] Thus, the Turkish Cypriot representatives are now allowed to give their views on all issues under discussion but they still may not vote. In July 2007, however, the Conference of Presidents of the European Parliament rejected such a proposal. As, 'from a legal point of view, it is not possible for the European Parliament to invite observers from the Turkish Cypriot community'.[105] Politically speaking, however, if the two communities agree that a number of Turkish Cypriot representatives should enjoy observer status in the European Parliament, it would be difficult for the Union institutions to reject such a proposal. For the time being, this prospect seems rather improbable.

On the other hand, Turkish Cypriots can participate in Community programs[106] and work in the institutions of the Union. With regard to the latter, in the first recruitment competition after Cyprus' Union accession, the European Commission required that examinations should be passed in the Greek language.[107] Two Turkish Cypriots brought an action before the Court of First Instance, arguing that this requirement constituted unlawful discrimination against Cypriot citizens whose mother tongue is not Greek. By its Order of 5 May 2007, the CFI held that the action was inadmissible.[108] On 19 October, the Court of Justice upheld the order of the CFI.[109] Undoubtedly, if it was not for the procedural issues, the judgment of the Court would have been particularly interesting. It would have been difficult for the Commission to justify what seems to be a breach of the equal treatment principle. Given the body of case law concerning Union citizenship analysed above, there is a possibility that the Court would have found in favour of the applicants. To that effect, it is not meaningless that, in the meantime, new recruitment competitions for Cypriots may be passed in any official Community language.

2.4 Remarks

As it has become obvious from the previous analysis, the Turkish Cypriots residing in the North have access to the nationality of the Republic of Cyprus in accordance with the 1960 Constitution and thus to Union citizenship. However, the limits for the exercise of the rights that are associated with the Union citizenship concept are

[103] Resolution 1113 (1997) of the Parliamentary Assembly of the Council of Europe.

[104] Resolution 1376 (2004) of the Parliamentary Assembly of the Council of Europe.

[105] See M Brus and others, *A Promise to* Keep, (above n 101) 42 citing PE392.496/cpg: Summary of Decisions of the Conference of Presidents Meeting on 12 July 2007.

[106] See Commission Decision C(2006)6533 of 15 December 2006; and The European Union Scholarship Programme for the Turkish Cypriot Community; http://www.benavrupadaokumakistiyorum.eu/index.php?option=com_content&view=article&id=52&Itemid=62.

[107] EPSO/A/1/03.

[108] Case T-455/04 *Beyatli and Candan* v *Commission*, Order of 5 March 2007, [2007] OJ C95/40.

[109] Case C-238/07 P *Beyatli and Candan* v *Commission*, Order of 19 October 2007 [2008] OJ C51/30.

extremely narrow in an area where the application of EU law is suspended. What should be further examined is how the fundamental rights of Union citizens are protected in those areas, given that the Union is founded *inter alia* on the principle of the protection of human rights, and how the exercise of the rights connected with Article 21 TFEU [ex Article 18 TEC] concerning the free movement of persons have been facilitated by the Union through the Green Line Regulation, in an area that has been isolated from the Rest of the World for 30 years.

3. FUNDAMENTAL RIGHTS

3.1 Introduction

Article 2 TEU provides that the Union is founded 'on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'.[110] On the other hand, as mentioned in the previous section of this chapter 'Union citizenship is destined to be the fundamental status of nationals of the Member States'.[111] Thus, it is critical to analyse the level of protection of fundamental rights in this part of EU territory where the *acquis* is suspended pursuant to Article 1 of Protocol No 10 of the Act of Accession 2003. Interestingly enough, the protection of fundamental rights of Union citizens in northern Cyprus is not mainly a responsibility of the relevant Member State but of a candidate Member State, according to the case law of the European Court of Human Rights. This legal paradox is a result of the overall control exercised by Turkey over the territory of northern Cyprus.

Thus, starting from the analysis of the fundamental rights protection in the Union legal order, this part of the chapter thoroughly examines the judgments of several courts in Europe on cases arising from this political and legal anomaly, with particular emphasis on the case law of the European Court of Human Rights. Its most recent judgments may suggest an 'upgrade' of the regime in the North. It further discusses the human rights conditionality of Turkey since the Union has declared that the full execution of the Strasbourg Court judgments on Turkey's violations in the 'Areas' is part of its accession conditionality. It is argued, finally, that it is only in the framework of a comprehensive settlement that the fundamental rights protection issue could be effectively addressed. For this reason, the assessment of the relevant provisions of the Annan Plan is again critical.

[110] Article 2 TEU replaced Article 6 TEU.
[111] *Grzelczyk*, (n 2) para 31.

3.2 Fundamental Rights Protection in the Union Legal Order[112]

The original EEC Treaty contained no system of fundamental rights protection. In the light of that, the Court resisted implying that it and the other EEC institutions were responsible for the protection of these fundamental rights. Awareness of the dangers, however, of the absence of human rights safeguards in EEC law led to a softening of the ECJ case law towards the end of the 1960s. In *Van Eick*,[113] the ECJ held that the disciplinary procedures for the staff of the Community institutions were 'bound in the exercise of [their] powers to observe the fundamental principles of the law of procedure'. In *Stauder*,[114] on the other hand, the Court went a step further to declare that in cases where there were two legitimate interpretations of a Community law provision, it would adopt the one that did not violate fundamental rights.

Although the abovementioned cases stressed the consonance between Union law and established notions of fundamental rights, they did not grant these rights an organic status that would allow them to be used as a basis for steering the actions of the Union authorities and as a ground for judicial review. National courts were left to judicially review whether EU law was compatible with fundamental rights enshrined in their constitutions and in the European Convention of Human Rights. Also, it was precisely this challenge, posed by Member State jurisdictions to the supremacy of Union law where EU legislation was encroaching upon important rights protected under national law, which led the Court of Justice to declare that the respect of fundamental rights is an integral part of the general principles of Community law.

In the *Internationale Handelsgesellschaft* case,[115] the Administrative Court in Frankfurt had found that an EC Regulation violated the provisions of the German Constitution which protected freedom of trade and required all public action to be proportionate. The said Regulation had awarded a German trading company a licence to export maize on the condition that it set down a deposit which would be forfeited if it failed to export the maize within the time stipulated in the licence. The company failed to export the maize and, since the deposit was forfeited, it challenged the Regulation. In its judgment, firstly, the Court reaffirmed that the validity of such measures can only be judged in the light of Community law. As an independent source of law and because of its very nature, Community law cannot be overridden by rules of national law without being deprived of its character and the

[112] P Alston, M Bustelo, and J Heenan (eds), *The EU and Human Rights* (Oxford, Oxford University Press, 1999); A Williams, *EU Human Rights Policies: A Study in Irony* (Oxford, Oxford University Press, 2004); V Straznicka, 'Human Rights Protection in the European Union' in S Breitenmoser, B Ehrenzeller, M Sassoli, W Stoffel, and BW Pfeifer (eds), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (Baden-Baden, Nomos, 2007) 805; A Von Bogdany, 'The EU as a Human Rights Organisation' (2000) 37 *Common Market Law Review* 1307.

[113] Case C-35/67 *Van Eick v Commission* [1968] ECR 329.

[114] Case C-29/69 *Stauder v City of Ulm* [1969] ECR 419.

[115] Case C-11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125.

legal basis of the Community being called in question. More importantly, however, in paragraph four, it held that 'respect for fundamental rights forms an integral part of the general principles of law protected' by the ECJ. Furthermore, although the protection of those liberties is inspired by the various constitutional traditions of the Member States, it should nevertheless be ensured within the Union framework.

In *Nold*,[116] the Court reaffirmed that the source of these general principles was not entirely independent of the legal cultures and traditions of the Member States. At the same time, it stressed that 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law'. Most importantly, in *Rutili*,[117] the Court referred to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Since *Rutili*, the Court has indicated that this treaty has a particular status as a source of law.[118]

The particular status of that treaty within the Union legal order has been recognised *expressis verbis* in Article 6(3) TEU which provides that the 'fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'. Moreover, Article 6(2) TEU goes a step further by providing for the accession of the Union to the European Convention of Human Rights. Finally, the first paragraph of the same Article provides that the Charter of Fundamental Rights, approved in December 2000 in Nice,[119] 'shall have the same legal value as the Treaties'. The explicit reference to the system of the Convention of Human Rights in the Treaty on European Union is of critical importance for the purposes of the present research since the decisions of the Strasbourg Court in cases concerning the Cyprus issue have altered the legal and political background of the conflict.

3.3 The Right to Property and Beyond . . .

More significantly, for the purposes of the present research, the Luxembourg Court has recognised a number of categories of different rights, including civil rights, such as the right to respect for family and private life,[120] freedom of religion,[121] freedom of expression,[122] the right to an effective remedy[123] etc., economic rights such as

[116] Case C-4/73 *Nold v Commission* [1974] ECR 491.
[117] Case C-36/75 *Rutili v Ministre de l' Interieur* [1975] ECR 1219.
[118] Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629.
[119] [2000] OJ C364/1.
[120] Case C-136/79 *National Panasonic v Commission* [1980] ECR 2033.
[121] Case C-130/75 *Prais v Council* [1976] ECR 1589.
[122] Case C-260/89 *ERT v DEP* [1991] ECR I-2925.
[123] Case C-222/84 *Johnston v RUC* [1986] ECR 1651.

the right to trade,[124] the right to carry out the economic activity,[125] and the right to own property. For the purposes of this research the focus will be on the latter, given the significant amount of case law concerning affected property rights of Cypriot citizens.

The right to own property has been recognised by the ECJ in *Hauer v Land Rheinland—Pfulz.*[126] In that case, the Court had to provide a preliminary ruling on whether, among other things, the prohibition on granting authorisations for new plantings, according to Article 2(1) of the Council Regulation 1162/76,[127] infringed the right to property. The Court, in its judgment, first explicitly referred to the *Internationale Handelsgesellschaft* case by reiterating that the question of a possible infringement of fundamental rights by an EC measure could only be judged in the light of EC law itself. Furthermore, it reaffirmed that fundamental rights form an integral part of the general principles of the EC law and that, in safeguarding those rights, the ECJ is bound to draw inspiration from constitutional traditions common to the Member States. Moreover, the Court stressed that international treaties for the protection of human rights can supply guidelines which should be followed within the framework of EC law. Accordingly, in paragraph 14 of the judgment, it found that

> the right to property is guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States, which are also reflected in the First Protocol to the European Convention for the Protection of Human Rights.

In other words, in that judgment, the Court of Justice recognised the right to property enshrined in the first Article of the first Protocol of the Convention as a fundamental right within the Union legal order. However, it is not only the case law of the Court of Justice that recognises the right to property as a fundamental right. The wording of Article 17 of the Charter of Fundamental Rights is based on Article 1 of Protocol No 1 of the ECHR. Thus, the analysis of the case law of the European Court of Human Rights, and of several national courts on that Article, becomes crucial in cases concerning the Cyprus conflict and for the purposes of the present research.

3.3.1 The European Court of Human Rights

The judgment of the Strasbourg Court in *Loizidou v Turkey*[128] was the first important decision which significantly altered the *status quo ante* of the conflict. It was the first time that an international court recognised that Turkey has overall effective control of northern Cyprus. In addition to that, given that the European Court of Human Rights accepted the extraterritorial application of the human rights obliga-

[124] Case C-240/83 *Procureur de la République v. Association de Défense des Bruleurs d' huiles Usagées* [1985] ECR 531.

[125] Case C- 230/78 *Eridania v Minister of Agriculture and Forestry* [1979] ECR 2749.

[126] Case C-44/79 *Hauer v Land Rheinland—Pfulz* [1979] ECR 3727.

[127] [1976] OJ L131/16.

[128] *Titina Loizidou v Turkey (Merits and Just Satisfaction)* (Application No 15318/89) (judgment 18 December 1996), ECHR Reports 1996-VI.

tions, it gave the opportunity to thousands of Cypriots to claim damages from the Turkish Government for their properties that have been affected by the post-1974 situation.

In that case, the applicant, a Greek Cypriot, had owned a property in the 'Areas' North of the Green Line and alleged that the Turkish forces had prevented her from fully enjoying it. She alleged that Turkey was responsible for continuing violations of Article 1 of Protocol No 1 and of Article 8 of the ECHR. Hence, pursuant to the decision of the Grand Chamber of the European Court of Human Rights (hereafter referred to as the 'Court' or 'Court of Human Rights') in *Loizidou v Turkey (Preliminary Objections)*[129] which dismissed the preliminary objections of the respondent State concerning an alleged abuse of process, the *ratione loci* of the application and the territorial restrictions attached to Turkey's Article 25 and 26 declarations, the Strasbourg Court delivered its judgment on the merits of the case on 18 December 1996.[130]

The Court held, by eleven votes to six, that the Turkish army exercises 'effective overall control over that part of the island' and that such control entails Turkey's responsibility for the policies and actions of the internationally unrecognised TRNC.[131] Hence, the denial of access to and the subsequent loss of control of the property was imputable to Turkey,[132] and thus there had been a breach of Article 1 of Protocol No 1.[133]

Among other submissions, Turkey relied on Article 159 of the TRNC constitution which provides inter alia that 'all immovable properties, buildings and installations' abandoned upon the proclamation of the Turkish Federated State of Cyprus on 13 February 1975 or 'which were considered by law as abandoned or ownerless' or found within the area of military installations within the boundaries of the TRNC on 15 November 1983 should be the property of the purported State.[134] The Court, however, held that it could not attribute legal validity, for the purposes of the Convention, to an Article of the so-called TRNC 'constitution' since 'the international community does not regard the internationally unrecognised TRNC as a State under international law'.[135]

It should be noted, however, that

> international law recognises the legitimacy of certain legal arrangements and transactions in such a situation, for instance as regards the registration of births, deaths and marriages, 'the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory'.[136]

[129] *Titina Loizidou v Turkey (Preliminary Objections)* (Application No 15318/89) (judgment 23 March 1995), Series A-310.
[130] *Titina Loizidou v Turkey (Merits and Just Satisfaction)*, (above n 128).
[131] *Ibid*, para 56.
[132] *Ibid*, para 57.
[133] *Ibid*, para 64.
[134] *Ibid*, para 35.
[135] *Ibid*, para 44.
[136] *Ibid*, para 45.

This paragraph whose importance can only be understood in the light of subsequent case law, relates to what is sometimes called the *Namibia* exception. That is the exception to the principle that the acts—including the laws—of a State which lack international recognition, are of no effect. This exception may give effect to acts such as the registration of births, deaths and marriages, and perhaps other transactions between persons in the territory controlled by the unrecognised State. In its Advisory Opinion on the *Legal consequences for states of the continued presence of South Africa in Namibia, notwithstanding Security Council Resolution 276 (1970),* the International Court of Justice stated:

> In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.[137]

Obviously, the actions of the Turkish government in this case could not come under the *Namibia* exception. In other words, Ms Loizidou could not be deemed to have lost her property as a result of Article 159 of the TRNC 'constitution'. She must still be regarded to be the legal owner of the land.[138] According to the Court, neither the need to rehouse displaced Turkish Cypriot refugees in the years following the Turkish intervention in 1974, nor the fact that property rights were the subject of inter-communal talks involving both communities, 'could justify the complete negation of the applicant's property rights in the form of a total and continuous denial of access and a purported expropriation without compensation'.[139] On the other hand, the Court unanimously held that there had been no breach of Article 8 because the applicant had not established that the property had been her home.[140]

With a later judgment,[141] the Court determined the amount of the pecuniary compensation that had to be awarded to the applicant in accordance with Article (ex) 50 of the ECHR. Initially, Turkey explicitly declared that it had no intention to and could see no legal obligation to execute the judgment. It was only in 2003, and after the Committee of Ministers of the Council of Europe had set another

[137] Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, [1971] International Court of Justice Reports 16, 56, para 125. A good illustration of the application of the *Namibia* exception to a case relating to the Cyprus issue is the judgment of the UK High Court in *Emin v Yeldag* [2002] 1 FLR 956. At issue before the High Court was the impact of the Crown's non-recognition of the TRNC on the validity of a divorce decree granted by the TRNC 'authorities'. Both the Attorney General and the Foreign Office drew the Court's attention to the Crown's diplomatic stance *vis-à-vis* the TRNC, inviting it, nevertheless, to respect divorce decrees, to the extent that these affected private rights only. Indeed, the High Court did recognise the divorce decree in question.

[138] *Titina Loizidou v Turkey (Merits and Just Satisfaction)*, (n 128) paras 46 and 47.

[139] *Ibid*, para 64.

[140] *Ibid*, para 66.

[141] *Titina Loizidou v Turkey (Article 50)* (Application No 15318/89) (judgment 28 July 1998), ECHR Reports 1998-IV.

deadline, that Turkey paid the just satisfaction ordered.[142] In any case, the decision in *Loizidou*, apart from its immense importance for the jurisprudence of the Strasbourg Court, consisted of a 'green light' for thousands of Cypriots[143] to claim damages for their properties, which either have been illegally expropriated by the *de facto* regime in the North or access to which has been denied.[144]

At the same time, the Republic of Cyprus filed its fourth inter-State application since 1974 against Turkey.[145] That fourth application concerned four broad categories of complaints: alleged violations of the rights of Greek Cypriot missing persons and their relatives; alleged violations of the home and property rights of displaced persons; alleged violations of the rights of enclaved Greek Cypriots in northern Cyprus; alleged violations of the rights of Turkish Cypriots and the Gypsy community in northern Cyprus. Finally, the legitimate Government of the Republic of Cyprus complained, under former Article 32(4) of the ECHR, that the respondent State had failed to put an end to the human rights violations found in the Commission's 1976 Report.[146]

The Grand Chamber, in its judgment of 10 May 2001, followed the *Loizidou* decision to unanimously hold that it had jurisdiction to examine the preliminary issues raised in the proceedings before the Commission.[147] Moreover, by sixteen votes to one, it held that Cyprus had *locus standi* to bring the application[148] and that the facts fell within the 'jurisdiction' of Turkey according to the meaning of Article 1 ECHR and thus entailed the responsibility of the respondent State under the Convention.[149] By ten votes to seven, finally, it decided that, for the purposes of the then Article 26 (now 35(1)) ECHR, the available remedies in the TRNC could be regarded as domestic remedies of Turkey.[150] This finding has been recently

[142] For a detailed account of the saga concerning the implementation of the *Loizidou* judgment see M Marmo, 'The Execution of Judgments of the European Court of Human Rights—A Political Battle' (2008) 15 *Maastricht Journal of European and Comparative Law* 235.

[143] At the time of the case, *Xenides-Arestis v Turkey (Merits and Just Satisfaction)* (Application No 46347/99) (judgment 22 December 2005) [unreported], 1,400 property cases were pending before the Court.

[144] In para 1 of the dissenting opinion of Judge Bernhardt, joined by Judge Lopes Rocha, in the *Loizidou (Merits)* case, it is mentioned that '[t]he Court's judgment concerns in reality not only Mrs Loizidou, but thousands or hundreds of thousands of Greek Cypriots who have (or had) property in northern Cyprus'.

[145] *Cyprus v Turkey* (Application No 25781/94) (judgment 10 May 2001) ECHR Reports 2001-IV.

[146] The first (No 6780/74) and second (No 6950/75) applications were joined by the Commission and led to the adoption of a report under former Art 31 of the Convention, on 10 July 1976, in which the Commission expressed the opinion that the respondent State had violated Arts 2, 3, 5, 8, 13 and 14 of the ECHR and Art 1 of Protocol No 1. On 20 January 1979, the Committee of Ministers of the Council of Europe adopted Resolution DH (79) 1 in which it expressed, inter alia, the conviction that 'the enduring protection of human rights in Cyprus can only be brought about through the re-establishment of peace and confidence between the two communities; and that inter-communal talks constitute the appropriate framework for reaching a solution of the dispute'. In this resolution, the Committee of Ministers urged the parties to resume the talks under the auspices of the Secretary-General of the UN in order to agree upon solutions to all aspects of the dispute. The Committee of Ministers viewed this decision as completing its consideration of the case.

[147] *Cyprus v Turkey* (above n 145) paras 56–58.

[148] *Ibid*, para 62.

[149] *Ibid*, para 80.

[150] *Ibid*, para 102.

reaffirmed in the groundbreaking decision of the Court in *Demopoulos*,[151] where the ECtHR held—much to the disappointment of the Greek Cypriot community—that the TRNC Immovable Property Commission provides an 'accessible and effective framework of redress in respect of complaints about interference with the property owned by Greek Cypriots',[152] as we shall later see in detail.

With regard to the alleged violations of the rights of Greek Cypriot missing persons and their relatives, the Court decided that the failure of the Turkish authorities to conduct an effective investigation into the whereabouts and fate of Greek Cypriot missing persons who disappeared in life threatening circumstances,[153] considering that there is an arguable claim that they were in Turkish custody at the time of disappearance,[154] has consisted of a continuing violation of Articles 2 and 5. In addition, the Court found that there has been an Article 3 violation in respect of the relatives of the Greek Cypriot missing persons.[155]

Those findings have been upheld by the Third Section of the Strasbourg Court in *Varnava and Others v Turkey*[156] and have been reaffirmed by a Grand Chamber judgment a year later.[157] In *Varnava*, the ECtHR concluded that there had been a continuing violation of the right to life (Article 2 ECHR) given that Turkey had failed to provide an effective investigation aimed at clarifying the fate of the nine Greek Cypriots in question who went missing during the 1974 'Peace Operation'.[158] It also followed the rationale of its earlier decision in *Cyprus v Turkey* finding that 'the length of time over which the ordeal of the relatives has been dragged out and the attitude of official indifference in face of their acute anxiety to know the fate of their close family members' equates to an Article 3 violation in respect of the relatives of the missing persons.[159] With regard to Article 5, the Court did not alter its stance from the earlier inter-State decision.[160] However, the Court seemed reluctant to impose—as the applicants suggested—fines on the Turkish Government until they finally comply with the Court's judgments.[161] Instead, it reiterated that it falls to the Committee of Ministers acting under Article 46 of the Convention to address the issues as to what may be required in practical terms by way of compliance.[162] It

[151] Joined Cases of *Takis Demopoulos and Others, Evoula Chrysostomi, Demetrios Lordos and Ariana Lordou Anastasiadou, Eleni Kanari-Eliadou and Others, Sofia (Pitsa) Thoma Kilara Sotiriou and Nina Thoma Kilara Moushoutta, Yiannis Stylas, Evdokia Charalambou Onoufriou and Others and Irini (Rena) Chrisostomou v Turkey* (Application Nos 46113/99,3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04) (Grand Chamber decision as to the admissibility 1 March 2010).

[152] *Ibid*, para 127.

[153] *Cyprus v Turkey*, (n 145) para 136.

[154] *Ibid*, para 150.

[155] *Ibid*, para 158.

[156] *Varnava and Others v Turkey* (Applications Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) (judgment 10 January 2008) [not yet reported].

[157] *Varnava and Others v Turkey* (Applications Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) (Grand Chamber judgment 18 September 2009) [not yet reported].

[158] *Ibid*, para 194.

[159] *Ibid*, para 202.

[160] *Ibid*, para 208.

[161] *Ibid*, para 223.

[162] *Ibid*, para 222.

did, though, exceptionally award a sum of 12,000 euros—a sum that is significantly smaller than the one sought by the applicants—for non-pecuniary damage to the relatives of the missing persons, although it held that there are no 'specific scales of damages that should be awarded in disappearance cases'.[163]

In any case, the significance of the findings of the Court in *Cyprus v Turkey* as reaffirmed in *Varnava* could be better understood if we examine the European Parliament Resolution of 15 March 2007 on missing persons in Cyprus,[164] where there is a direct reference to the fourth inter-State decision. In that Resolution, the Parliament calls on all the parties concerned to cooperate sincerely for the speedy completion of the appropriate investigations into the fate of missing persons in Cyprus after the 1974 invasion. It also calls all those who have information regarding the missing persons to pass it on to the UN-sponsored Committee on Missing Persons in Cyprus without any further delay. More importantly, it asks the Council and the Commission to concern themselves actively with this problem and to take all necessary steps, in cooperation with the UN Secretary-General, to bring about the implementation of the aforementioned judgment and the relevant UN and EP Resolutions.

The Parliamentary Assembly of the Council of Europe has also commended the progress of the work of the Committee on Missing Persons. By June 2008, of the 2,000 people that went missing in inter-communal violence after 1963 and mostly during the Turkish invasion in 1974, they have discovered 400 bodies and returned 91 to their families. Further, the Parliamentary Assembly has called for all the parties concerned to grant full support to its activities. In this context, the Assembly has welcomed the 'financial contributions to the Committee made by several Council of Europe member states, as well as by the European Union and the United States'.[165] More importantly, it has called upon Turkey to

> co-operate effectively in the efforts to ascertain the fate of the missing persons in Cyprus and to fully implement the judgment of the European Court of Human Rights in the case of *Cyprus v Turkey* (2001) pertaining to the tragic problem of the missing persons and their families and abide by and fulfil, without any further delay, its obligations and duties stemming from the aforementioned judgment.[166]

Turning back to the groundbreaking decision of the Strasbourg Court in *Cyprus v Turkey*, we note that with regard to the alleged violations of the home and property rights of displaced persons, the Court followed, in essence, the *Loizidou* judgment. It found that there has been a continuing violation of Article 8 by reason of the refusal to allow the return of any Greek Cypriot displaced persons to their homes in northern Cyprus.[167] In accordance with the judgment, there is also a violation of Article 1 of Protocol No 1 by virtue of the fact that Greek Cypriot owners of property in northern Cyprus are being denied access to and the control, use and

[163] *Ibid*, para 225.
[164] [2007] OJ C301E/243.
[165] Resolution 1628 (2008) of the Parliamentary Assembly of the Council of Europe, para 8.
[166] *Ibid*, para 14.3.
[167] *Cyprus v Turkey* (above n 145) para 175.

enjoyment of their property as well as any compensation for the interference with their property rights.[168]

As far as the alleged violations of the rights of enclaved Greek Cypriots in northern Cyprus are concerned, the Court noted, in paragraph 245 of the judgment, that the restrictions placed on the freedom of movement of the respective population curtailed their ability to observe their religious beliefs, in particular 'their access to places of worship outside their villages and their participation in other aspects of religious life,' and thus consist of a violation of Article 9.[169] The Court also found a violation of the Article 10 freedom of expression in so far as the school books, destined for use in the primary schools of the Greek Cypriot community living in the North, were subject to excessive measures of censorship.[170] In addition, the Court found a violation of the right of education under Article 2 of Protocol No 1 since no appropriate secondary facilities were available to them.[171] In a recent judgment, the Court of Human Rights held that the confiscation of educational material that a teacher was transferring to a Greek Cypriot enclave in the Karpas peninsula was a violation of Article 10 of the Convention.[172]

Unsurprisingly, the Court also affirmed that there are violations with regard to the property rights of the enclaved Greek Cypriots under Article 1 of Protocol No 1 given that their right to the peaceful enjoyment of their possessions was not secured in case of their permanent departure from that territory while in case of death, the inheritance rights of relatives living in the South were not recognised. In addition, a multitude of adverse circumstances, such as restrictions to the freedom of movement, the absence of normal means of communication, etc.[173] violated the right of that population to respect for their private and family life. Such circumstances were the direct result of the official policy conducted by Turkey and its subordinate administration.[174] Last but not least, the Grand Chamber held that the Greek Cypriots living in the Karpas peninsula have been subjected to discrimination amounting to degrading treatment.[175] Such treatment is in breach of Article 3 of the Convention.

Finally, with regard to the alleged violations in respect of the rights of Turkish Cypriots living in the 'Areas', including members of the gypsy community, the Court followed the decision of the Commission and thus it declined jurisdiction to examine those aspects of the applicant Government's complaints under Articles 6, 8, 10 and 11 of the ECHR, in respect of political opponents to the regime in the North. It also declined jurisdiction to examine the complaints under Articles 1 and 2 of Protocol No 1, in respect of the Turkish Cypriot gypsy community, which were held by the Commission to be outside the scope of the aspects of the case which were

[168] *Ibid*, para 189.
[169] *Ibid*, para 246.
[170] *Ibid*, para 254.
[171] *Ibid*, para 280.
[172] *Foka v Turkey* (Application No 28940/95) (judgment 24 June 2008) [not yet reported].
[173] *Ibid*, para 300.
[174] *Ibid*, paras 296 and 301.
[175] *Ibid*, para 311.

declared admissible.[176] However, it found that there had been a violation of Article 6 on grounds that the trial of civilians by court was authorised.

Very recently, following its decision in *Cyprus v Turkey,* the Court delivered some judgments that discuss human rights issues in northern Cyprus which are not related to the property aspect of the conflict. Apart from the *Varnava* judgment that deals with the very sensitive issue of the missing persons and the *Foka* judgment that discusses issues arising from the living conditions of the enclaved Greek Cypriots in the Karpas peninsula, both of which have been referred to above, the Court of Human Rights delivered two judgments on 24 September 2008 and one on 27 October 2010 that deal with incidents during the turbulent summer of 1996. Although the facts of those cases are different, the Court adopted a similar approach in all three of them.

In *Panayi v Turkey*[177] an unarmed National Guard soldier, Stelios Kalli Panayi was shot and killed inside the UN buffer zone in central Nicosia. 'The investigation has revealed that the lethal round was fired by a Turkish Cypriot soldier whom UNFICYP had observed entering the buffer zone with his rifle strung across his back'.[178] More importantly, 'UNFICYP soldiers were prevented from reaching the National Guard soldier by Turkish-Cypriot soldiers who fired shots in the direction of the UNFICYP soldiers each time the latter tried to move forward'.[179] Two months later, Tassos Isaak participated in a demonstration organised by the Cyprus Motorcycle Federation that took place at several points of the Green Line on 11 August 1996.[180] Isaak was part of a group that arrived at the Dherynia roadblock where they left their motorcycles and proceeded to enter the UN buffer zone.

> The members of UNFICYP who testified about the events of 11 August 1996 unanimously declared that Anastasios Isaak had been attacked and beaten to death by a group of counter-demonstrators and that some members of the TRNC police had either watched the scene passively or had participated in the beating.[181]

On 14 August 1996, after attending the funeral of Isaak, Solomos Solomou along with some other people, entered the UN buffer zone near the spot of the killing. He then crossed the barbed wire at the Turkish ceasefire line and entered the territory of the breakaway State. He was pursued by an UNFICYP officer, who attempted to pull him back. After breaking free from the soldier, Solomos attempted to climb a pole where a Turkish flag was flying. Several UNFICYP officers

> clearly stated that, from different positions, two soldiers in Turkish uniform and a man in civilian clothes standing on the balcony of the Turkish observation post had aimed their weapons at Solomos Solomou and had fired in his direction while he was climbing the flagpole.[182]

[176] *Ibid,* para 335.

[177] *Kallis and Androulla Panayi v Turkey* (Application No 45388/99) (judgment 27 October 2009) [not yet reported].

[178] *Ibid,* para 11 citing a Report of the UN Secretary-General dated 7 June 1996.

[179] *Ibid.*

[180] *Isaak v Turkey* (Application No 44587/98) (judgment 24 September 2008) [not yet reported].

[181] *Ibid,* para 111.

[182] *Solomou and Others v Turkey* (Application No 36832/97) (judgment 24 September 2008) [not yet reported] para 71.

In all three cases the Court found that the killings of the victims were violations of the right to life that could not be justified by any of the exceptions laid down in paragraph 2 of the Article 2.[183] In addition, a violation of Article 2 was found in all cases in respect of the fact that Turkey had failed to produce any evidence showing that an investigation had been carried out into the circumstances of the deaths of Panayi, Isaak and Solomou.[184]

This is significant as these cases which focus on violations of Article 2 ECHR still represent a rather small category in the 'Cyprus problem' jurisprudence of the Strasbourg Court. The vast majority of cases pending before the Court of Human Rights are related with the property issue that lies at the very core of the Cypriot Gordian knot.

Going back, then, to the case law concerning the thorny property aspect of this international problem, one could not overstate the significance of the *Loizidou* judgment and the decision of the Court on the fourth inter-State application of the Cyprus Republic and the euphoria brought to the Greek Cypriot side. The Court, through the aforementioned decisions, subsequently upheld in *Evgenia Michaelidou Developments Ltd. and Michael Tymvios v Turkey*[185] and *Demades v Turkey,*[186] rejected Turkey's arguments. According to the Turkish arguments, the regime in the North is an independent and separate State representing the right of self-determination and sovereignty of Turkish Cypriots in northern Cyprus and the property issue is a political problem that could only be resolved through UN-sponsored inter-communal talks. Instead, it was reaffirmed that Turkey has effective control of the areas to the North of the Green Line and had been found liable for a number of human rights violations arising from the post-1974 *status quo*, including expropriation of private properties for which thousands of Greek Cypriots could claim damages.

The legal and political impact of those judgments for the conflict is obvious. According even to some analysts, the legal dimension of the political problem of Cyprus was very close to being solved in the aftermath of the aforementioned judicial decisions.[187] The European Court of Human Rights, as an actor in this saga, however, does not act in a vacuum. On the contrary, it is influenced by the dynamics of the conflict. Thus, the 1,400 property cases pending before the European Court of Human Rights, brought primarily by Greek Cypriots against Turkey[188] as a result of the *Loizidou* case law, threaten the Court with paralysis. The prospects of political stagnation, in the aftermath of the rejection of the Annan Plan, led the

[183] See *Isaak v Turkey* (above n 180) paras 117, 118 and 120; *Solomou and Others v Turkey* (above n 182) paras 71, 78 and 79; *Panayi v Turkey* (above n 177) para 63.

[184] See *Isaak v Turkey* (n 180) para 124; *Solomou and Others v Turkey* (n 182) para 83; *Panayi v Turkey* (n 177) para 73.

[185] *Evgenia Michaelidou Developments Ltd. and Michael Tymvios v Turkey (Merits and Just Satisfaction)* (Application No 16163/90) (judgment 31 July 2003) (2004) 39 EHRR 36.

[186] *Demades v Turkey (Merits and Just Satisfaction)* (Application No 16219/90) (judgment 31 July 2003) [unreported].

[187] See M Droushiotis, *Ευρωζαλάδες για τον Ντενκτάς* [Euro-headaches for Denktash], Article in Eleftherotypia newspaper 13 April 2003.

[188] *Xenides-Arestis v Turkey (Merits and Just Satisfaction)* (above n 143) para 38.

Court to alter, somewhat, its previously analysed stance as we can observe in the *Xenides-Arestis* judgments[189] and in *Demopoulos*.[190]

More analytically, on 30 June 2003, the TRNC 'Parliament' enacted the 'Law on Compensation for Immovable Properties Located within the Boundaries of the Turkish Republic of Northern Cyprus' which entered into force on the same day.[191] On 30 July 2003, under Article 11 of this 'Law', an 'Immovable Property Determination Evaluation and Compensation Commission' was established in the TRNC. On 14 March 2005, however, in its decision as to the admissibility of the application of Mrs Xenides-Arestis,[192] the European Court of Human Rights held that the aforementioned commission did not provide for an adequate or effective remedy under Article 35(1) of the ECHR.

The Court had to reach that decision because the compensation offered by 'Law no 49/2003' in respect of the purported deprivation of the applicant's property was limited to damages concerning pecuniary loss for immovable property and no provision was made for movable property or non-pecuniary damages. More importantly, however, the terms of compensation did not allow for the possibility of restitution of the property withheld. Furthermore, the Court noted that the 'Law' was vague as to its temporal application, that is, as to whether it had retrospective effect concerning applications filed before its enactment and entry into force, since it merely referred to the retrospective assessment of the compensation. In addition to that, the composition of the compensation commission raised concerns since, in the light of the evidence submitted by the Cypriot Government, the majority of its members were living in houses owned or built on property owned by Greek Cypriots. Finally, the Court also pointed out that the 'Law' did not address the applicant's complaints with regard to Articles 8 and 14 of the ECHR.

On 22 December 2005, the Third Section of the Court also delivered its judgment in *Xenides-Arestis v Turkey*. The Court unsurprisingly followed its decisions in *Loizidou,*[193] *Cyprus v Turkey*,[194] *Evgenia Michaelidou Developments Ltd. and Tynvios*[195] and *Demades*[196] and held that there were breaches of Article 8 and of Article 1 of Protocol No 1.[197] However, the Strasbourg Court continued by referring to the widespread nature of the problem of Greek Cypriot property in northern Cyprus and to the fact that the Court had approximately 1,400 property cases pending, brought primarily by Greek Cypriots against Turkey. So, it held that Turkey should introduce a remedy that genuinely secures

[189] *Xenides-Arestis v Turkey* (Application No 46347/99) (Decision as to the admissibility 14 March 2005) [unreported]; *Xenides-Arestis v Turkey (Merits and Just Satisfaction)* (n 143); *Xenides-Arestis v Turkey (Just Satisfaction)* (Application No 46347/99) (judgment 7 December 2006) [2007] 44 EHRR SE13.

[190] *Demopoulos and Others v Turkey*, (above n 151).

[191] 'Law no 49/2003'.

[192] *Xenides-Arestis v Turkey* (Decision as to the admissibility), (above n 189).

[193] *Loizidou v Turkey (Merits and Just Satisfaction)*, (above n 128).

[194] *Cyprus v Turkey*, (above n 145).

[195] *Evgenia Michaelidou Developments Ltd. and Michael Tymvios v Turkey*, (above n 185).

[196] *Demades v Turkey*, (above n 186).

[197] *Xenides-Arestis v Turkey (Merits and Just Satisfaction)*, (n 143), paras 22 and 32.

> effective redress for the Convention violations identified in the instant judgment in relation to the present applicant as well as in respect of all similar applications pending before the Court, in accordance with the principles for the protection of the rights laid down in Articles 8 of the Convention and 1 of Protocol No 1 and in line with its admissibility decision of 14 March 2005.[198]

The reason for the need to provide such a remedy is that a

> judgment in which the Court finds a breach imposes on the respondent State a legal obligation [. . .] to select, [. . .] the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects.[199]

Such a remedy should be available within three months from the date that the judgment would be delivered and the redress should occur three months thereafter.[200]

It is obvious from both the decision of the Court as to the admissibility of Mrs Xenides-Arestis' application, and its judgment in that case, that Turkey could and should introduce an adequate and effective means for redressing the Greek Cypriot applicants' complaints in accordance with the indirect guidelines spelled out in the admissibility decision. Indeed, Turkey and the internationally unrecognised TRNC amended the 'Law' concerning the 'Immoveable Property Commission' ('IPC' hereafter) and consequently the Court of Human Rights, in its judgment in *Xenides-Arestis v Turkey (Just satisfaction),* welcomed the steps taken by Turkey 'in an effort to provide redress for the violations of the applicant's Convention rights as well in respect of all similar applications pending before it'.[201]

The new 'IPC', which was established under 'Law no 67/2005', is composed of five to seven members, two of whom are foreign members, Mr Hans-Christian Krüger[202] and Mr Daniel Tarschys,[203] and has the competence to decide on the restitution, exchange of properties or payment of compensation. There is even a right of appeal against the decision of the Commission, which lies with the TRNC 'High Administrative Court'.[204] The Court noted that 'the new compensation and restitution mechanism, in principle, has taken care of the requirements of the decision of the Court on admissibility of 14 March 2005 and the judgment on the merits of 22 December 2005'.[205] Furthermore, in two judgments issued the same day, the Court of Human Rights reaffirmed its aforementioned finding about the 'IPC'[206]

[198] *Ibid,* para 39.
[199] *Ibid.*
[200] *Ibid,* para 40.
[201] *Xenides-Arestis v Turkey (Just Satisfaction)*, (above n 189), para 37.
[202] Former Secretary to the European Commission of Human Rights and former Deputy Secretary-General of the Council of Europe.
[203] Former Secretary-General of the Council of Europe.
[204] *Xenides-Arestis v Turkey (Just Satisfaction)*, (n 189) para 11.
[205] *Ibid,* para 37.
[206] *Demades v Turkey (Just Satisfaction)* (Application No 16219/90) (judgment 22 April 2008) [not yet reported] para 22.

and approved, for the first time, a friendly settlement between Turkey and an applicant entailing the payment of damages and exchange of property.[207]

After holding that the law establishing the 'IPC' has, in principle, taken care of the requirements set by the ECtHR, the next step for the Court was to examine the effectiveness of the relevant compensation and restitution mechanism. In order to achieve this, it has selected eight 'test cases'. The much-awaited decision of the Grand Chamber on the admissibility of *Demopoulos and Others v Turkey* was delivered on 1 March 2010.[208]

The Court in this landmark decision manifested in the clearest possible terms, that all the cases related to the Cyprus issue, pending before it, are burdened with 'a political, historical and factual complexity flowing from a problem that should have been resolved by all parties assuming full responsibility for finding a solution on a political level'.[209] In the light of such consideration, it then examined on the one hand whether the Greek Cypriot owners of property under the control of the breakaway State should first exhaust the remedies provided in the TRNC before they apply to Strasbourg; and on the other, whether the new 'IPC' framework is capable of providing effective redress.

With regard to the first question the Court recalled the *Namimbia* exception[210] and its own decision in *Cyprus v Turkey*[211] to remind that 'the mere fact that there is an illegal occupation does not deprive all administrative or putative legal or judicial acts therein of any relevance under the Convention'.[212] Until there is a comprehensive settlement of the age-old dispute it is of critical importance 'that individuals continue to receive protection of their rights on the ground on a daily basis'.[213] In any case, allowing Turkey 'to correct wrongs imputable to it does not amount to an indirect legitimisation' of an unlawful regime under international law.[214] Thus, given that borders, 'factual or legal, are not an obstacle *per se* to the exhaustion of domestic remedies'[215] and that according to the settled case law of the Court 'applicants have not infrequently been required to exhaust domestic remedies even where they did not choose voluntarily to place themselves under the jurisdiction of the respondent State',[216] remedies available in the secessionist

[207] *Eugenia Michaelidou Developments Ltd. and Michael Tymvios v Turkey (Just Satisfaction and Friendly Settlement)* (Application No 16163/90) (judgment 22 April 2008) [not yet reported]. The same conclusion was reached in respect of a settlement reached in *Alexandrou v Turkey (Just Satisfaction and Friendly Settlement)* (Application No 16162/90) (judgment 28 July 2009).

[208] *Demopoulos and Others v Turkey* (Grand Chamber decision as to the admissibility), (above n 151); For an analysis of this landmark decision see generally N Skoutaris, 'Building Transitional Justice Mechanisms without a Peace Settlement: A Critical Appraisal of the Recent Jurisprudence of the Strasbourg Court on the Cyprus Issue' (2010) 35 *European Law Review* 718.

[209] *Ibid*, para 85.

[210] Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, (above n 137).

[211] *Cyprus v Turkey* (above n 145) para 96.

[212] *Demopoulos and Others v Turkey*, (n 151), para 94.

[213] *Ibid*, para 96.

[214] *Ibid.*

[215] *Ibid*, para 98.

[216] *Ibid*, para 101.

entity in the North, and in particular the 'IPC' may be regarded as 'domestic remedies' of Turkey.[217]

Turning to the effectiveness of the 'IPC' the Court noted the following. First of all, the Grand Chamber pointed out that the Turkish Government has accepted its responsibility under the Convention for violations of human rights that take place in the TRNC and that they have, in substance, acknowledged the rights of Greek Cypriot owners to remedies for breaches of their right to property.[218] Having said that, the Court also indicated that although the applicants in these cases have not lost their ownership in any formal sense, it is unrealistic to expect that it could or should order Turkey 'to ensure that these applicants obtain access to, and full possession of, their properties, irrespective of who is now living there or whether the property is allegedly in a militarily sensitive zone or used for vital public purposes'.[219] In any case, the jurisprudence of the Court shows that where it has not been possible to restore the position of the dispossessed owners, the ECtHR has imposed the alternative requirement on the violating State to pay compensation for the value of the property,[220] since 'property is a material commodity which can be valued and compensated for in monetary terms'.[221]

Most importantly, the Court remarked that 35 years after the applicants or their predecessors had to flee from northern Cyprus and leave their property, 'it would risk being arbitrary and injudicious for it to attempt to impose an obligation on the respondent State to effect restitution in all cases'.[222]

> It cannot be within this Court's task in interpreting and applying the provisions of the Convention to impose an unconditional obligation on a Government to embark on the forcible eviction and rehousing of potentially large numbers of men, women and children even with the aim of vindicating the rights of victims of violations of the Convention.[223]
>
> It is evident from the Court's case-law that while restitution laws implemented to mitigate the consequences of mass infringements of property rights caused, . . . it is still necessary to ensure that the redress applied to those old injuries does not create disproportionate new wrongs.[224]

Following this, and given that the Court was not convinced about the claims of the applicants concerning the lack of subjective impartiality of the 'IPC',[225] the inadequacy of the compensations awarded,[226] and the problematic accessibility and inefficiency of the framework,[227] it held that the law 67/2005 creating the 'Property Commission' 'makes realistic provision for redress in the current situation of occu-

[217] *Ibid*, para 103.
[218] *Ibid*, para 108.
[219] *Ibid*, para 112.
[220] *Ibid*, para 114.
[221] *Ibid*, para 115.
[222] *Ibid*, para 116.
[223] *Ibid*.
[224] *Ibid*, para 117.
[225] *Ibid*, para 120.
[226] *Ibid*, para 123.
[227] *Ibid*, para 126.

pation that is beyond this Court's competence to resolve'.[228] However, it also clarified that the decision should not be interpreted as requiring that applicants make use of the 'IPC'. They may 'await a political solution'.[229]

From a political point of view, it is rather difficult not to notice a difference in the stance of the Court if one compares its decisions in *Loizidou* and in *Cyprus v Turkey* with its more recent judgments in *Xenides-Arestis* and *Demopoulos*. The Court still holds that Turkey exercises effective control over northern Cyprus. However, it has gradually allowed the respondent State to create a scheme that could lead to the settlement of the property issue without a peace agreement. Arguably, the recent case-law of the Court lifts some of the pressure that the international community has directed towards Turkey in the past in order to facilitate a comprehensive settlement of the conflict.

However, legally speaking, in all those recent judgments that have undoubtedly influenced the leverage of the two communities in the current negotiations and the international arena,[230] the Court did not deconstruct its own precedent by approving the illegal expropriation of the Greek Cypriot properties in northern Cyprus. Such a decision would have undermined the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings and its own mission, as set out in Article 19, 'to ensure the observance of the engagements undertaken by the High Contracting Parties'.[231] It would have also seriously questioned the effective protection of the fundamental rights of Union citizens in a territory that is part of the EU.

It has made use, however, of an 'escape window' it has created for itself in the fourth inter-State case. There, it declared that for the purposes of the then Article 26 (now 35(1)) ECHR, the available remedies in the TRNC could be regarded as domestic remedies of Turkey.[232] In any case,

> the obligation to disregard acts of de facto entities is far from absolute. Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the de facto authorities, including their courts; and in the very interest of the inhabitants, the acts of these authorities related thereto cannot simply be ignored by third States or by international institutions, especially courts, including this one.[233]

The Court elaborated on this finding in *Xenides-Arestis* and in *Demopoulos* to the effect that it became possible for Turkey to establish a legal framework that provides for the resolution of the property issue—which lies at the core of the Cyprus problem—outside the framework of a comprehensive political settlement. In other words, those decisions provide for a *quasi*-transitional legal mechanism for the

[228] *Ibid*, para 127.
[229] *Ibid*, para 128.
[230] See generally R Bryant and M Hatay, *Suing for Sovereignty: Property Territory, and the EU's Cyprus Problem* (Istanbul, Global Political Trends Centre, 2009); International Crisis Group, *Cyprus: Reunification or Partition* ((2009) Europe Report No 201).
[231] *Loizidou v Turkey (Preliminary Objections)* (above n 129) paras 75 and 93.
[232] *Cyprus v Turkey*, (n 145) para 102.
[233] *Ibid*, para 96.

resolution of the property aspect of the Cyprus conflict, even in the case that a comprehensive solution is never achieved and the status quo on the island remains in *limbo*.[234] On the other hand, those decisions create also facts on the ground that cannot be ignored by the two communities in their current negotiations for the reunification of the island. The explicit reference to the detailed and complex treatment of property claims provided by the Annan Plan, also points to this direction.[235]

Having said that, one cannot underestimate that, although the Court has built on its own precedent to reach its latest decision, the acceptance of such a restitution mechanism alters the legal status quo concerning Greek Cypriot properties in the North. In all of the aforementioned cases concerning the property aspect of the Cyprus issue up until *Xenides-Arestis*, Turkey was found internationally responsible for denial of access to and the subsequent loss of control of the relevant property. However, following *Demopoulos*, it seems that Turkey can only be found responsible if the Court in a future judgment decides that the 'IPC' does not provide for an effective and adequate redress to the expropriation of the properties.[236] This is not a trivial change of context.

Thus, the Court still holds that Turkey exercises effective control over northern Cyprus but, since *Demopoulos*, this assertion leads to a different legal conclusion other than the one the Court reached in *Loizidou* and the fourth inter-State application. It might be far-fetched to argue that the Court has suggested in its decision that 'the longer the duration of an act of aggression, the more likely for its consequences to be accepted as a *fait accompli* by international courts'.[237] Still, it seems that, from now on, the Court will restrict itself to judging on a case by case basis whether a given decision of the 'IPC' respects the relevant principles set out in its case law on Article 1 of Protocol 1 ECHR rather than deciding on the just satisfaction of a certain breach of property rights arising from the post-1974 status quo, as it has been doing.[238] In other words, the Court would limit itself to an ex-post scrutiny of the proper functioning of the 'IPC' on a case by case basis. In order to reach this decision, it seems that the Court, for the first time, took into serious consideration the fact that it cannot 'impose an unconditional obligation on a Government to embark on the forcible eviction and rehousing of potentially large numbers of men, women and children even with the aim of vindicating the rights of victims of violations of the Convention'.[239]

[234] For an in depth analysis of the jurisprudence of the Strasbourg Court concerning transitional justice see generally T Allen, 'Restitution and Transitional Justice in the European Court of Human Rights' (2006) 13 *Columbia Journal of European Law* 1.

[235] *Demopoulos and Others v Turkey*, (n 151), paras 9–16.

[236] I owe this comment to VP Tzevelekos.

[237] P Koutrakos, 'Property in Cyprus: What is a judge to do?' (2010) 35 *European Law Review*, 305.

[238] See also the recent judgments of the Strasbourg Court, *Economou v Turkey* (Application No 18405/91); *Evagorou Christou v Turkey* (Application No 18403/91); *Gavriel v Turkey* (Application No 41355/98); *Ioannou v Turkey* (Application No 18364/91); *Kyriacou v Turkey* (no. 18407/91); *Michael v Turkey* (Application No 18361/91); *Nicolaides v Turkey* (Application No 18406/91); *Orphanides v Turkey* (Application No 36705/97); *Sophia Andreou v Turkey* (Application No 18360/91) (judgments 22 June 2010).

[239] *Demopoulos and Others v Turkey*, (n 151), para 116.

One might argue that even this substantial differentiation to the legal approach of the Court follows from its subsidiary nature. In other words, if the Court continued handling the innumerable actions of Greek Cypriots, this 'would also transform the nature of its function under the Convention, and render it, effectively, a first instance court'.[240] But apart from the volume of applications that threaten the Court with paralysis, it seems that the Court has realised its limits concerning its role in the quest for a solution to the Cypriot Gordian knot. Not only does it refer extensively to the Annan Plan,[241] it also points out that the Cyprus issue 'should have been resolved by all parties assuming full responsibility for finding a solution on a political level'.[242] Indeed, if we read *Demopoulos* in conjunction with the ECJ judgment in *Apostolides v Orams*,[243] we realise that the Courts can only offer incremental solutions in such intractable conflict—and that they are fully cognisant of this.

Finally, apart from the obvious paradox entailed in a situation where a candidate Member State is responsible for the protection of the fundamental rights in an area that belongs to a Member State, one has to note the political connotations of such a restitution mechanism. Such a mechanism, together with a legal framework that would provide for direct trade relations, may lead to the 'normalisation' of EU relations with the authorities in northern Cyprus or the '*Taiwan-isation*' of the regime in the North. As will be explained in the following chapter, there is a danger that such a framework may upgrade the status of the Turkish Cypriot entity to such an extent that the quest for a comprehensive settlement of the Cyprus issue will become a chimera.

On the other hand, the existence of dangers arising from the upgrading of the authorities in the North does not mean that the Turkish Cypriot population should remain 'hostage' because of the failure of all the parties in the conflict to reach a solution. Indeed, it is interesting how the Court of Human Rights has allowed for the creation of such a restitution mechanism that resembles analogous transitional justice arrangements, in order to get around the political stagnation and provide for the effective protection of human rights. What should become clear from the analysis of the case law is that there is an imperative need for a more democratic procedure that would lead to a comprehensive settlement before judgments like the most recent ones of the Strasbourg Court lead to a *stasis*.

3.3.2 National Courts

It is not only the international courts that have been faced with cases arising from the Cyprus issue. There is important case law coming from national courts as well. In the judgments of the Cypriot and UK courts, it will be observed, on the one hand, that they have been influenced by the jurisprudence of the European Court of

[240] Koutrakos, 'Property in Cyprus', (above n 237).
[241] *Demopoulos and Others v Turkey*, (n 151), paras 9-16.
[242] *Ibid*, para 85.
[243] Grand Chamber judgment in *Apostolides v Orams* (above n 4).

Human Rights and, on the other hand, that the legal process can only provide incremental solutions to issues of grave political importance, such as the Cyprus conflict.

In the aftermath of the 1974 Turkish intervention, the urgent need to rehouse displaced Greek Cypriot refugees has led the Government of the Republic to use the properties of the Turkish Cypriots that have gone to the North.[244] Despite this established practice of the Cypriot State, in its groundbreaking decision *Arif Moustafa v The Ministry of Interior,*[245] the Supreme Court of Cyprus held that the applicant, a Turkish Cypriot citizen of the Republic, has the right to have his property returned to him since he has proved that his permanent residence is in the Government Controlled Areas. In other words, by that judgment, the Cypriot court overruled a well-established policy of the Republic of Cyprus. In order to hold that decision, it based its judgment on the previously analysed judgment of the Strasbourg Court in *Aziz v Cyprus.*[246] The Attorney General initially appealed against this decision on the ground that guardianship of the property could not end upon the mere return of the Turkish Cypriot owner to the Government controlled areas. However, the 'appeal was settled by the issue of a Legal Opinion by the Legal Services of the Republic confirming the right of Turkish Cypriots to get their property back upon their return to live on the said property'.[247]

A year later, though, the Court refused to extend the rationale of this decision to protect the rights of Turkish Cypriot dispossessed owners residing in the areas not under the effective control of the Republic.[248] Most importantly, it reaffirmed that the law administering the Turkish Cypriot properties was within the ambit of the Constitution and 'that it was not rendered obsolete by the partial ease on restrictions

[244] Law No 139/1991, namely Turkish Cypriot Properties (Administration and Other Matters) Law 1991 as further amended by Laws Nos 99(I)/1992, 35(I)/1994, 7(I)/1996, 33(I)/1998, 59(I)/2003. The law was enacted according to its preamble to regulate by law the administration of Turkish Cypriot properties in the Republic of Cyprus, which became essential for its protection in light of the following:

> 'Whereas, because of the massive removal of the Turkish-Cypriot population as a result of the Turkish invasion to the areas occupied by the Turkish invasion forces and the prohibition by such forces of the movement of such population within the areas of the Republic of Cyprus, properties which consist of movable and immovable property were abandoned,
>
> And whereas it became essential for the protection of those properties to take immediate measures,
>
> And whereas the measures taken included the administration of such properties by a special committee which was constituted through administrative arrangements;
>
> And whereas the regulation by law of the question of the Turkish-Cypriot properties in the Republic became necessary'.

The relevant sections of this Law provided, inter alia, for a Custodian (Minister of Interior) to be appointed with the duty of administering all Turkish Cypriot properties, with powers to enter into contracts and leases with regard to the properties, to collect rent or other sums to be held on behalf of the owner, to carry out repairs and, if necessary, to sell.

[245] Supreme Court of Cyprus, *Arif Moustafa v The Ministry of Interior* (Case No 125/2004) (judgment 24 September 2004).

[246] *Aziz v Cyprus* (above n 97).

[247] Laulhé Shaelou, *The EU and Cyprus* (above n 99) 209.

[248] Supreme Court of Cyprus, *Kiamil Ali Riza v Ministry of Interior*, (Case No 133/2005) (judgment 24 March 2005).

of movement in 2003'.[249] Lately, however, following the friendly settlement between the Republic of Cyprus and a dispossessed Turkish Cypriot owner residing in the UK, the 'Attorney-General has undertaken initiatives to effect certain changes' to the 'Custodian' Law.[250] The extent of the amendments to the law remains to be seen.

In all the aforementioned cases, the respondent was a State that is party to that conflict, namely either Turkey or Cyprus. In all those decisions, the Courts have reaffirmed their role as guardians of human rights, the 'European public order' and even the bi-communal character of the Cypriot Constitution against State practices that are in breach of those norms. The situation is quite different when the courts are faced with cases where a Union citizen complains about a breach of his property rights, not by a State but by another Union citizen. This is the factual background of the *Orams v Apostolides*[251] case, which raises very interesting and important questions for 'European public order'[252] and the Union legal order. This case sheds light on the implications of the Cyprus conflict for the everyday life of a significant number of European citizens.

In the *Orams* case, the facts are as follows. Mr Apostolides, a Greek Cypriot, used to live in northern Cyprus, where his family owned land. As a result of the invasion he had to flee. In 2002, Mr and Mrs Orams, British citizens, purchased part of the land which had come into the ownership of Mr Apostolides from a Turkish Cypriot, who was the registered owner under the relevant 'TRNC law'. The Orams purchased the land for £50,000 and they spent a further £160,000 improving the property. On Tuesday, 26 October 2004, Mr Apostolides issued a specially endorsed writ in the District Court of Nicosia naming Mr and Mrs Orams as defendants. On 9 November 2004, in the Nicosia District Court in Cyprus, Mr Apostolides obtained a judgment in default of appearance according to which the Orams had to demolish the villa, the pool and the fencing, had to give Mr Apostolides possession of the land and had to pay damages. On 15 November 2004, an application was issued on behalf of the Orams that the judgment should be set aside. Following a hearing, the Nicosia District Court held that Mr Apostolides had not lost his right to the land, citing *Loizidou*, and that the conduct of Mr and Mrs Orams towards the property amounted to trespass and thus that the application for setting aside the judgment should be dismissed. Mr and Mrs Orams appealed against the judgment of 19 April 2005 to the Supreme Court of Cyprus which, by its decision on 21 December 2006,[253] rejected the appeal. In accordance with the procedure laid down in Regulation 44/2001,[254] on 21 October 2005, it was ordered that the judgments be

[249] Laulhé Shaelou, (n 99) 209.

[250] *Sofi v Cyprus* (Application No 18163/04) (decision 14 January 2010) [not yet reported].

[251] *Orams v Apostolides* [2006] EWHC 2226 (QB).

[252] For a more detailed analysis of the term 'European public order' see generally F Sudre, 'Existe-t-il un ordre public européen?' in P Tavernier (ed), *Quelle Europe pour les droits de l'homme*? (Brussels, Bruylant, 1996) 39.

[253] Supreme Court of Cyprus, *Orams v Apostolides* (Case No 121/2005) (judgment 21 December 2006).

[254] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters [2001] OJ 2001, L12/1.

registered and be declared enforceable in the UK. The Orams appealed against that order.

In its decision, the Queen's Bench division of the High Court of Justice, after referring to the case law of the European Court of Human Rights in *Loizidou*, *Cyprus v Turkey* and *Xenides-Arestis*, turned to whether under the aforementioned Union Regulation the decision of the Cypriot court could be declared enforceable in the UK. The Court, first, affirmed that the order was in full accordance with the procedure of the Regulation and especially with Article 22(1) which provides that in proceedings which have as their object rights *in rem* in immoveable property, the courts of the Member State where the property is situated shall have exclusive jurisdiction. However, it still held that the *acquis,* and therefore Regulation 44/2001, are of no effect in relation to matters which relate to northern Cyprus. The reason for that is the suspension of the *acquis* in accordance with Article 1(1) of Protocol No 10 on Cyprus of the Act of Accession 2003.

Thus, according to the court, the Regulation was not enforceable pursuant to Article 1. As a result of that, Mr Apostolides could not rely on it to enforce the judgments, which he had obtained. According to the judgment, as Mr Apostolides 'could not rely on the *acquis* against his own Government in connection with his human rights arising from matters relating to the area controlled by the TRNC, he cannot rely on the *acquis* against'[255] the Orams to enforce his judgments against them. The judge also affirmed that, according to the case law of the Strasbourg Court, the laws of the internationally unrecognised TRNC cannot be relied on by the appellants to deprive the respondent of his title. He pointed out that, in any event, relying on those 'laws' would have involved a review of the judgment of the Nicosia District Court contrary to Article 36 of the aforementioned Regulation. According to the said Article, 'under no circumstances may a foreign judgment be reviewed as to its substance'.

The judge pointed out that, by its answer to the given situation, the conflict, which would otherwise arise in cases between the de facto situation in northern Cyprus and the enforcement of judgments against the new 'owners' of Greek Cypriot property, who have assets elsewhere in the EU, is avoided. However, he also suggested that compensation could be obtained at a higher level of litigation according to the case law of the European Court of Human Rights. Despite those arguments, the reasoning of this judgment is highly problematic. It is important to discuss the 'grey zones' of that decision, in order to better understand the subsequent judgment of the ECJ on that case.

Firstly, it should be noted that, by its decision, the High Court failed to apply Regulation 44/2001 correctly. According to recital (10) of the Regulation, 'for the purposes of the free movement of judgments, judgments given in a Member State bound by this Regulation should be recognised and enforced in another Member State bound by this Regulation'. This is the reason why Article 33(1) provides that 'a judgment given in a Member State shall be recognised in the other Member State

[255] *Orams v Apostolides* (above n 251) para 30.

without any special procedure being required'. In addition, Articles 34 and 35 of the Regulation provide the reasons for which a national court of a Member State may not recognise and enforce the judgment of the court of another Member State. Despite the fact that, as already mentioned, the judge admitted that the order was in full accordance with the procedure laid down by the Regulation, he refused to recognise the judgment on grounds not included in the Regulation.

The High Court refused to apply the Regulation because, pursuant to Article 1 of Protocol No 10, the *acquis* is suspended in northern Cyprus. Although it is undeniable that the Act of Accession provides for the suspension of the *acquis* North of the Green Line, it has to be stressed that the judgment was delivered by a court in the Government Controlled Areas, bound by that Regulation, which has exclusive jurisdiction over the issue in accordance with Article 22 of the Regulation. In essence, by not recognising the judgment of the Cypriot court on the ground that the *acquis* is suspended in the North, the UK court reviewed the judgment of a national court of another Member State in contradiction to Article 36 of the respective Regulation. It implied by its judgment that the Cypriot national court did not have jurisdiction to decide on proceedings which have as their object rights *in rem* in immoveable property in the North because of the de facto situation that has led to the suspension of the *acquis*.

Moreover, it should be pointed out that the result of the ruling of the English court was that the violation of Mr Apostolides' property rights was not remedied on the ground that the *acquis* is suspended. Given that the EU is founded on, inter alia, the principle of the protection of human rights and that, pursuant to Article 6(3) TEU, 'fundamental rights, as guaranteed by the' ECHR 'constitute general principles of the Union's law', it would seem rather absurd to argue that, by Article 1(1) of Protocol No 10 on Cyprus of the Act of Accession 2003, a legal obligation not to respect the fundamental rights of the EU citizens in those 'Areas' has been created for the EU Member States. It is rather the case that the purpose of Protocol 10 was to prevent the Republic of Cyprus from being found in breach of Community law by reason of matters occurring in northern Cyprus and beyond its control. Such an interpretation is also supported by the principle of effectiveness of public international law, which is used in order to give effect to provisions in accordance with the intentions of the parties[256] and rules of international law. If the latter interpretation of the suspension of the *acquis* had prevailed, the Regulation would have applied and thus the violation of the applicants' property rights would have been remedied.

Arguendo, though, that the intention of the parties was to provide, for practical purposes, that the 'Areas' should not be the subject of EU law for any purpose, and, as such, the application of the Regulation could rightly be denied on the ground of the suspension of the *acquis*. Still, this would allow the European Court of Human Rights to review EU primary law and find it incompatible with the Convention as

[256] See generally the *Fisheries Jurisdiction (Spain v Canada) Case*, International Court of Justice Reports 1999, 432; *The Ambatielos (Greece v United Kingdom) Case*, International Court of Justice Reports 1952, 28; *The Corfu Channel Case (United Kingdom v Albania)*, International Court of Justice Reports 1949, 4.

was the case in *Matthews v UK*.[257] According to the Court's decision, 'the Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be "secured"' and thus, Member States' responsibility . . . continues even after such a transfer'.[258] It also noted that it was the respondent State 'together with all the other parties to the Maastricht Treaty that is responsible *ratione materiae* under Article 1 of the Convention and, in particular, under Article 3 of Protocol No 1, for the consequences of that Treaty'.[259] This would mean, in this case, that the Republic of Cyprus together with all the other Contracting Parties to the Act of Accession could be held responsible for those human rights violations that have taken place because of the application of Protocol No 10 which provides for the suspension of the *acquis* in the 'Areas'.

However, given that, by its decision, the High Court in essence reviewed the judgment of the Nicosia court, it should also be noted that it has failed to comply with well established rules of the legal order, founded by the European Convention of Human Rights. Thus, it has erred in its judgment as a matter of legal doctrine as well. More precisely, according to paragraph 3 of Resolution 1226 of the Parliamentary Assembly of the Council of Europe,

> [t]he principle of solidarity implies that the case-law of the Court forms part of the Convention, thus extending the legally binding force of the Convention *erga omnes* (to all the other parties). This means that the state parties not only have to execute the judgments of the Court pronounced in cases to which they are party, but also have to take into consideration the possible implications which judgments pronounced in other cases may have for their own legal system and legal practice.[260]

Applying this view to the facts of the given case, it would mean that the UK High Court of Justice should have taken the case law of the Strasbourg Court into serious consideration, according to which the property title of Mr Apostolides is not invalidated by the 'TRNC laws' and thus the appellants could not present themselves as lawful owners of the relevant property.

In other words, by its decision, the UK Court did not respect the 'European public order'. The purpose of the High Contracting Parties in drafting the Convention was 'to establish a common public order of the free democracies of Europe'.[261] That is why the obligations undertaken by the Parties in the Convention 'are essentially of an objective character'—a character which also appears in the machinery provided in the Convention for its collective enforcement—'being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves'.[262] This notion of 'European public order' was reaffirmed both in the decision as to the admissibility of the applications

[257] *Matthews v United Kingdom (Merits)* (above n 50).
[258] *Ibid*, para 32.
[259] *Ibid*, para 33.
[260] Resolution 1226 (2000) of the Parliamentary Assembly of the Council of Europe.
[261] *Austria v Italy* (Application No 788/60) (judgment 11 January 1961), Yearbook, vol 4, 166–168.
[262] *Ibid.*

of *Loizidou* and *Papachrysostomou*[263] but also in the judgment of the Court as to the merits of the *Loizidou* case.[264] In those instances, the Court pointed out 'the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings' and its own mission, as set out in Article 19, 'to ensure the observance of the engagements undertaken by the High Contracting Parties'. Hence, ruling in contrast with the well established principles of the Strasbourg Court case law, as laid down in *Loizidou* and the subsequent case law, the UK court contravenes the principles of the European public order.

Be that as it may, one has to admit that if consensus emerges—at any stage—on the lack of enforceability of judgments that protect the property rights of Greek Cypriots in the North, there is an imminent danger that the property aspect of the Cyprus problem will remain largely unresolved since the rights of the 'new owners' will be upheld. Although, in the aftermath of the subsequent decision of the Court of Justice, such development is rather unlikely, still the *Orams* saga makes the achievement of a comprehensive settlement of the Cyprus issue as soon as possible even more imperative.

3.3.3 The European Court of Justice

The problematic decision of the UK High Court was challenged by Mr Apostolides before the Court of Appeal. Given the important legal questions that the case was posing for the Union legal order the fact that the Court of Appeal referred the matter to the Court of Justice for a preliminary ruling does not raise any eyebrows. On 18 December 2008, Advocate General Kokott delivered her Opinion.[265] Four months later the Court delivered its judgment.[266] As shall be explained, both the Opinion and the judgment share a significant part of our earlier criticism towards the judgment of the High Court.

The first question referred to the Court was whether the suspension of the application of the *acquis communautaire* in the areas not under the effective control of the Republic 'precludes the recognition and enforcement under Regulation No 44/2001 of a judgment relating to claims to the ownership of land situated in that area'.[267] The Advocate General started by distinguishing the territorial scope of the Regulation from the '*reference area* of proceedings or judgments in respect of which

[263] *Chrysostomos, Papachrysostomou, Loizidou v Turkey* (Application Nos. 15299/89, 15300/89, 15318/89) (decision as to the admissibility 4 March 1991) D.R. 68, 216.

[264] *Loizidou v Turkey (Preliminary Objections)* (n 129) paras 75 and 93.

[265] Case C-420/07 *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams* (Opinion of AG Kokott delivered on 18 December 2008) [2009] ECR I-3571 (hereafter AG Opinion in *Apostolides v Orams*).

[266] Grand Chamber judgment in *Apostolides v Orams* (n 4). For an analysis of this landmark decision see generally G De Baere, 'Case C-420/07, *Meletis Apostolides v David Charles Orams, Linda Elizabeth Orams,* Judgment of the Grand Chamber of 28 April 2009, [2009] ECR I-3571', (2010) 47 *Common Market Law* Review 1123; P Koutrakos, 'Who wants to be Pandora? The Court of Justice and the Cyprus Problem', (2009) 34 *European Law Review* 345; Laulhé Shaelou, (n 99) 211–223; H Meidanis, 'The Brussels I Regulation and the Cyprus Problem before the Court of Justice: Comment on Apostolides v Orams' (2009) 34 *European Law Review* 963.

[267] AG Opinion in *Apostolides v Orams* (above n 265) para 24.

the regulation lays down provisions'.[268] Under the then Article 299 TEC,[269] the territorial scope of the Regulation 'corresponds to the territory of the Member States with the exception of certain regions specified in that provision'.[270] Therefore, it applies in the UK and, subject to Protocol No 10, in the Republic of Cyprus.[271] On the other hand, the reference area of the Regulation is broader in the sense that it 'also applies to proceedings which include a non-member-country element'.[272]

The dispute before the Court of Appeal does not involve the recognition and enforcement of a judgment of a court of a Member State in northern Cyprus nor does it entail the recognition and enforcement of a judgment of a court situated in northern Cyprus.[273] In fact, as the Grand Chamber noted the relevant 'judgments concern land situated in the northern area'[274] but 'were given by a court sitting in the Government-controlled area'.[275] Therefore, the restriction of the territorial scope of the Regulation does not affect the case.[276] In any case, as we have already mentioned in the previous chapter, the *acquis* 'is to be suspended *in* that area and not *in relation* to that area'.[277]

To that effect the Court of Justice pointed out that 'Protocol No 10 constitutes a transitional derogation based on the exceptional situation in Cyprus'.[278] It also stressed the need to interpret the suspension provided by Protocol No 10 as restrictively as possible and to limit any exceptions / derogations to what is absolutely necessary.[279] Given that the recognition and enforcement of such a judgment does not give rise to 'any unrealisable obligations for the Republic of Cyprus in relation to Northern Cyprus which bring it into conflict with Community law,' then the objective of Protocol No 10 does not require the suspension of Regulation 44/2001.[280] So, in the light of the foregoing, the Court agreed with the Opinion of the Advocate General[281] that the suspension of the application of the *acquis* in northern Cyprus 'does not preclude the application of Regulation No 44/2001 to a judgment which is given by a Cypriot court sitting in the Government-controlled area, but concerns land situated in the northern area'.[282]

The Commission, however, had expressed doubts as to whether the case is a civil and commercial matter within the meaning of Article 1(1) of the Regulation.[283]

[268] *Ibid*, para 25.
[269] Replaced, in substance by Art 52 TEU. The territorial scope of the Treaties is specified in Art 355 TFEU.
[270] AG Opinion in *Apostolides v Orams* (n 265) para 26.
[271] *Ibid.*
[272] *Ibid*, para 27.
[273] *Ibid*, para 31.
[274] Grand Chamber judgment in *Apostolides v Orams* (n 4) para 38.
[275] *Ibid.* para 37.
[276] AG Opinion in *Apostolides v Orams* (n 265) para 32.
[277] *Ibid*, para 34.
[278] Grand Chamber judgment in *Apostolides v Orams* (n 4) para 34.
[279] *Ibid*, para 35.
[280] AG Opinion in *Apostolides v Orams* (n 265) para 42.
[281] *Ibid*, para 53
[282] Grand Chamber judgment in *Apostolides v Orams* (n 4) para 39.
[283] *Ibid*, para 40; AG Opinion in *Apostolides v Orams* (n 265) para 54.

Although it is a dispute between private parties, the Commission sustained that it should be placed in the wider context of the Cyprus conflict.[284] Therefore, the claim should be brought in front of the TRNC 'Immovable Property Commission'.[285] Accordingly, the Commission submitted that

> when applying Regulation No 44/2001, it should be borne in mind that an alternative legal remedy which would be in accord with the ECHR is available. Article 71(1) of the Regulation provides that it is not to affect any conventions which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments. The compensation regime, introduced under the supervision of the European Court of Human Rights, can be construed as such a convention.[286]

The Court of Justice adopted a purely legal—if not legalistic—approach in order to reply to this interesting argument, which, in retrospect, relates to the *Demopoulos* decision as well. It 'pointed out that it was self-evident that the Orams-Apostolides dispute was a civil one, since the lawsuit was not against a state but against individuals, and no *jure imperii* action was involved'.[287]

The response of the Advocate General, however, was more elaborate. First of all, Kokott pointed out that Mr Apostolides did not make any claim against a Government authority but a civil claim for restitution of land and further claims connected with loss of enjoyment of land against the Orams.[288] 'Those claims do not alter in nature as a result of the possibility that Mr Apostolides may have alternative or additional claims under public law outstanding against the TRNC authorities'.[289] Secondly, although it would be possible to exclude such civil claims by means of a provision of national or international law and to confine the parties concerned solely to a claim for restitution or compensation against the State, the Republic of Cyprus has clearly not availed itself of that possibility.[290] Thirdly, the *Xenides-Arestis v Turkey (Just Satisfaction)* judgment,[291] in which the European Court of Human Rights took a positive view of the compatibility of the compensation regime with the ECHR, gives no indication that the legislation in question validly excludes the prosecution of civil claims under the law of the Republic of Cyprus.[292] Finally, the TRNC's compensation scheme and the judgments of the Strasbourg Court do not fall within the definition of Article 71(1) of the Regulation.[293]

It is almost impossible to criticise the reasoning of the Advocate General and the approach of the Grand Chamber on legal grounds. Still, one can only wonder whether the decision in *Demopoulos* renders at least part of the Opinion obsolete

[284] AG Opinion in *Apostolides v Orams* (n 265) para 55.
[285] *Ibid*, para 56.
[286] *Ibid*, para 57.
[287] Meidanis, 'The Brussels I Regulation and the Cyprus problem before the Court of Justice' (above n 266) 973 citing Grand Chamber judgment in *Apostolides v Orams* (n 4), paras 40–46.
[288] AG Opinion in *Apostolides v Orams* (n 265) para 60.
[289] *Ibid*, para 61.
[290] *Ibid*, paras 64–65.
[291] *Xenides-Arestis v Turkey (Just Satisfaction)*, (above n 189).
[292] AG Opinion in *Apostolides v Orams* (n 265), para 68.
[293] *Ibid*, para 72.

and questions the approach of the Court. The fact is that if the ECJ had risked speculating on the outcome of *Demopoulos* a year before the Court of Human Rights had decided it, there would have been a clear danger of being arbitrary and injudicious. Indeed, it is impossible to second-guess what would have been the outcome of *Apostolides v Orams*, if the decision in *Demopoulos* was delivered before the ECJ judgment. Still, we can definitely argue that if there is a case in the future with similar facts, the Luxembourg Court will have to seriously consider the fact that the ECtHR has held that the TRNC 'IPC' provides opportunities for redress under the current status quo. Until that moment, the two judgments will sit together uncomfortably somehow.

The second question that the Court of Appeal referred to the ECJ was whether the fact that the judgment was given by a Court situated in the Government-controlled areas concerning land situated in northern Cyprus could be regarded as an infringement of the rule of jurisdiction laid down in Article 22(1).[294] Unsurprisingly, the Orams argued that Article 22(1) must be interpreted restrictively to the effect that courts of the Republic should not have jurisdiction for actions in connection with rights over land in northern Cyprus.[295] Interestingly enough, the Court noted that

> it is common ground that the land is situated in the territory of the Republic of Cyprus and that, therefore, the rule of jurisdiction laid down in Article 22(1) of Regulation No 44/2001 has been observed. The fact that the land is situated in the northern area may possibly have an effect on the domestic jurisdiction of the Cypriot courts, but cannot have any effect for the purposes of that regulation.[296]

So, with regard to the second question as well, the Court followed the Opinion of the Advocate General,[297] holding that Article 35(1) does not entitle a court of a Member State to refuse the recognition and enforcement of a judgment given by the courts of another Member State concerning land situated in an area of the latter State, over which its Government does not exercise effective control.[298]

The third question that the Court of Appeal referred to the ECJ concerns the public policy proviso in Article 34(1) of the Regulation. It asked whether the recognition and enforcement of a judgment must be refused on the basis of the proviso that a judgment cannot be enforced, as a practical matter, in the State where the judgment was given as that Government does not exercise effective control over the

[294] Grand Chamber judgment in *Apostolides v Orams* (n 4) para 47.
Art 22(1) of Regulation 44/2001 provides:

> 'The following courts shall have exclusive jurisdiction, regardless of domicile:
>
> 1. in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State'.

[295] AG Opinion in *Apostolides v Orams* (n 265) para 83.
[296] Grand Chamber judgment in *Apostolides v Orams* (n 4) para 51.
[297] AG Opinion in *Apostolides v Orams* (n 265) para 89.
[298] Grand Chamber judgment in *Apostolides v Orams* (n 4) para 52.

area to which the judgment relates.[299] Firstly, the Court noted that according to its settled case law, the public policy proviso should be interpreted as restrictively as possible in order to allow for the free movement of judgments within the Union.[300] In fact the Court clarified that

> recourse to the public-policy clause . . . can be envisaged only where recognition or enforcement of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it would infringe a fundamental principle.[301]

On this point, Kokott referred to *Krombach* where the ECJ concluded that a court of a Member State is entitled to refuse recognition of a foreign judgment which was arrived at in manifest breach of fundamental rights since fundamental rights, as enunciated in the ECHR, form an integral part of the general principles of law.[302]

However, the Court of Appeal did not refer to any fundamental principle within the UK legal order which the recognition or enforcement of the judgments in question would be liable to infringe.[303] Indeed, as Meidanis points out, it is hard 'to envisage how public policy within the United Kingdom would be violated by the fact that the judgment, whose enforcement is sought in England, has no practical value in Cyprus in terms of actual execution'.[304]

Nevertheless, the Advocate General states that the Commission did not contend that the judgment, whose enforcement was sought, infringes fundamental rights. Instead, in the Commission's view, the 'public policy' issue relates to the requirements of international policy regarding the Cyprus problem.

> Those requirements have to a certain extent acquired legally binding status in so far as they have become established in UN Security Council resolutions. That applies, for example, to the obligation on States to refrain from any action which might exacerbate the Cyprus conflict.[305]

However, as Advocate General Kokott rightly argued, it is doubtful that the preservation of peace and the restoration of the territorial integrity of Cyprus, albeit noble causes, could be regarded 'as a "rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order" within the meaning of the *Krombach* case-law'.[306] On the other hand, she mentioned that it 'it is also by no means clear whether recognition of the judgment in the present context would be beneficial or detrimental to solving the Cyprus problem',[307] a view which the UK Court of

[299] *Ibid*, para 53.
[300] *Ibid*, para 55; See also Meidanis (n 266) 970.
[301] *Ibid*, para 59.
[302] AG Opinion in *Apostolides v Orams* (n 265) para 60 citing Case C-7/98 *Krombach* [2000] ECR I-1935, paras 25–27 and 38–40.
[303] Grand Chamber judgment in *Apostolides v Orams* (n 4) para 61.
[304] Meidanis (n 266) p 970.
[305] AG Opinion in *Apostolides v Orams* (n 265), para 109.
[306] *Ibid*, para 110.
[307] *Ibid*, para 111.

Appeal referred to in the subsequent judgment of this saga.[308] In the light of the aforementioned considerations both the Advocate General and the Court held that a court of a Member State should not refuse recognition or enforcement of a judgment on the basis of the public policy proviso just because the judgment, although formally enforceable in the State where it was given, cannot be enforced there for factual reasons.[309]

Although the legal arguments put forward by the Court and the Advocate General seem persuasive, the judgment has already been criticised on the ground that it favoured a literal interpretation of the applicable legal instruments avoiding a more creative approach that would have taken into account and discussed the political aspects of the case.[310] In fact, Koutrakos has argued that 'it is interesting that an institution which has often been reproached for engaging in a creative construction of EC law should be so keen to be as faithful as possible to the wording of the rules which it has been asked to interpret'.[311] But is it really the case that the non-political approach adopted by the Court is unprecedented?

It is true that the Court did not discuss extensively the political environment of the case. In fact if we compare the judgment with the Opinion of the Advocate General, the absence of any discussion on the TRNC 'IPC' framework in the reasoning of the Grand Chamber is striking. However, it is my view that the judgment of the Court in *Apostolides v Orams* epitomises the pragmatic approach that the Union as a whole including its judiciary has adopted when dealing with issues arising from the conflict. As we have already mentioned in the previous chapter and as we shall see and in the next one when we focus on the *Anastasiou* case law,[312] the Union as a political organisation and the Court as its judicial branch—albeit conscious of the political consequences of their actions and decisions on the Cyprus issue—always favour a seemingly depoliticised, overly technical approach when dealing with aspects of this international political problem.

So, in the present case, the Court has delivered a decision that is political 'in disguise', in the sense that it vindicated the rights of the Greek Cypriots without engaging itself in the debate about the political aspects of the conflict. In fact, the Grand Chamber seems aware of the political and legal consequences of an adverse judgment, as the one of the UK High Court, that would not have protected the property rights of Greek Cypriots in the North effectively. Such a judgment would have questioned the viability of the special *post*-2004 legal *status* that northern Cyprus enjoys within the Union legal order. Suddenly, the suspension of the *acquis* would pose

[308] UK Court of Appeal (Civil Division), *Apostolides v Orams & Ors* [2010] EWCA Civ 9 (19 January 2010), para 64.

[309] Grand Chamber judgment in *Apostolides v Orams* (n 4) para 71; AG Opinion in *Apostolides v Orams* (n 265) para 112.

[310] Koutrakos, 'Who wants to be Pandora?', (above n 266).

[311] *Ibid.*

[312] Case C-432/92 *Regina v Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and Others* [1994] ECR I-3116; Case C-219/98 *Regina v Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and Others* [2000] ECR I-5241; Case C-140/02 *Regina v Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and Others* [2003] ECR I-10635.

impediments to the effective protection of the fundamental rights of Union citizens instead of limiting 'any unrealisable obligations for the Republic of Cyprus in relation to northern Cyprus which bring it into conflict with Community law'.[313] So, from such legal point of view, it would be difficult to imagine that the Court could reach a conclusion similar to the one reached by the UK High Court.

The Court, however, seems also aware of the political ramifications of a judgment that would put doubt on the property rights of dispossessed Greek Cypriot owners at a crucial moment when bi-communal negotiations for the reunification of the island take place. To that effect, we note that a decision that would have upheld the property rights of the Orams would have made the quest for the creation of a restitution mechanism in the future reunified State almost unattainable. The reason for that is that apart from the rights of the dispossessed Cypriot owners and the current users of their properties that have to be balanced in such a future mechanism, such a judgment would have created a third category of lawful claimants: the *bona fide* purchasers of Greek Cypriot property in the North. The Court of Justice decision puts an end to that prospect.

Having said that, one cannot also ignore the fact that such a judgment opened the way to prosecutions[314] within the Union 'not just of European buyers of holiday homes built on Greek Cypriot owned land but also of Turkish Cypriots, Turkish nationals or anybody else using such properties without their original owners' permission'.[315] Even in the event that the Greek Cypriots act in a politically prudent manner and do not flood the ECJ with *Orams*-type cases as they have done in the aftermath of the *Loizidou* judgment with regard to the Strasbourg Court, still, it is certain that the judgment of the Court of Justice has seriously undermined 'the construction sector and real estate business that were among the last Turkish Cypriot economic windows on the outside world'.[316] In addition and in relation to the further economic isolation of the Turkish Cypriot segment that the judgment might lead to, it is worth pointing out that the decision has also been cited by a British Court that ruled that Turkish Cyprus Airlines could not fly directly between northern Cyprus and the UK.[317]

It is far from surprising that this decision created euphoria on the Greek Cypriot side. However, this has been counter-balanced by the decision of the Court of Human Rights in *Demopoulos*, a year later. We have noted earlier that those two judgments, important as they may be for all parties in the conflict, do not sit together very comfortably. Nevertheless, a close examination of the discrepancies between

[313] AG Opinion in *Apostolides v Orams* (n 265) para 42.

[314] In fact 'in October 2006, the Parliament of the Republic of Cyprus adopted an amendment to the Penal Code which penalises any illegal use (including rent) of property with a sentence of seven years of imprisonment'; Communication from the Commission Report on the implementation of Council Regulation (EC) 866/2004 of 29 April 2004 and the situation resulting from its application; Brussels, 20.9.2007, COM(2007)553 (hereafter 2007 Commission's Report) 3.

[315] International Crisis Group, *Cyprus: Reunification or Partition* (above n 230) 13.

[316] *Ibid.*

[317] *Kibris Turk Hava Yollari and Anor v The Secretary of State for Transport* [2009] EWHC 1918 (Admin).

the two judgments proves, beyond reasonable doubt, that only a comprehensive settlement plan can provide the appropriate framework for the effective protection of the fundamental rights and freedoms of all EU citizens in northern Cyprus. In other words, those judgments have shown both parties in the conflict that time is not on their side and a rapid political settlement is by far the best solution to resolve property disputes. In this context, it should be understood that the current status quo that has caused the suspension of the *acquis* has to be considered as a rather temporary solution.

3.4 Human Rights Conditionality in Turkey's Accession Negotiations

As mentioned before, the European Court of Human Rights has found Turkey responsible for the acts and omissions of its 'subordinate local administration' that violate human rights in the North. This has led to a paradox, according to which a candidate Member State (Turkey) is responsible for the human rights situation in a territory that belongs to a Member State (the Republic of Cyprus). Unsurprisingly, this political anomaly is also reflected in the human rights' conditionality element of Turkey's accession negotiations.

Human rights conditionality is a crucial element in Turkey's accession negotiations. Article 49 TEU provides that '[a]ny European State which respects the principles set out in Article 2', one of which is the respect of human rights, may apply to become an EU Member State. This is verified by paragraph 4 of the Negotiating Framework for Turkey[318] which sets out the method and the guiding principles of the negotiations in line with the December 2004 European Council conclusions.[319] This paragraph provides that '[t]he Union expects Turkey to sustain the process of reform and to work towards further improvement in the respect of the principle[s] of . . . respect of human rights and fundamental freedoms, including relevant European case law'. The fact that '[t]he negotiations will be based on Turkey's own merits and the pace will depend on Turkey's progress in meeting the requirements for membership,'[320] one of which is the respect of human rights as also echoed in the 2008 Accession Partnership[321] (AP). There, the Turkish Republic is asked to '[c]omply with the ECHR, and ensure full execution of the judgments of the ECtHR'. Although, such a phrase does not refer only to the cases arising from the factual background in Cyprus, it is beyond any reasonable doubt that it includes them.

According to the sophisticated mechanism of the accession negotiations,[322] the Association Council is the responsible institution to control how Turkey is responding to those human rights priorities which are linked to the Cyprus issue

[318] ec.europa.eu/enlargement/pdf/st20002_05_tr_framedoc_en.pdf.

[319] http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/ec/83201.pdf.

[320] Paragraph 1 of the Negotiating Framework.

[321] Council Decision 2008/157/EC of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with Turkey [2008] OJ L51/4.

[322] See below s 2.5 of chapter five.

and have been characterised as short-term priorities.[323] The full execution of the relevant judgments of the Strasbourg Court, not only in accordance with the 2008 AP but also with Article 46 of the ECHR on the binding force and execution of judgments, is the most obvious obligation of Turkey with regard to the respect of human rights in the 'Areas'.[324] This is particularly important when taking into account the most recent judgments of the Court of Human Rights allowing Turkey to establish a 'Property Commission' in the North. One may argue that it is the first time that a Candidate Member State has an obligation to establish such an institution for the effective protection of human rights in a territory that is part of the EU. Finally, it has to be mentioned that, in case of a failure to resolve any matter raised, the Association Council could even refer the issue to the ECJ in accordance with Article 25(2) of the Ankara Agreement.

3.5 The Protection of Human Rights in the United Cyprus Republic (UCR)[325]

3.5.1 General Provisions

In the previous section we extensively analysed the status quo concerning the protection of EU citizens' fundamental rights in Cyprus at present. We mentioned in numerous occasions that the existing situation—even after the establishment of the 'IPC'—is far from satisfactory and that effective protection of human rights can only be achieved in the aftermath of a comprehensive settlement that is even partially based on the principles of EU and international law, as was the case for the Annan Plan. Although the Annan Plan was overwhelmingly rejected by the Greek Cypriots six years ago, the recent explicit reference of the Court of Human Rights to its elaborate system for the protection of human rights[326] and the minimal progress that the two parties in the current bi-communal negotiations have achieved with regard to the complex property issue,[327] makes the analysis of the relevant provisions of the UN plan necessary.

Recital v of the Annan Plan's Foundation Agreement underlined the commitment of the reunified Cypriot State to international law, an integral part of which is human rights and the principles and purposes of the UN.[328] Recital vi went a step further by declaring that the UCR would have been committed to 'respecting democratic principles, individual human rights and fundamental freedoms, as well as each other's cultural, religious, political, social and linguistic identity'. This was

[323] Expected to be accomplished within one to two years; Part 3.1 of the Annex of 2008 AP.

[324] JA Frowein, 'The Binding Force of ECHR Judgments and its Limits' in S Breitenmoser, B Ehrenzeller, M Sassoli, W Stoffel, and BW Pfeifer (eds), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (Baden-Baden, Nomos, 2007) 261.

[325] D Pfirter, 'Cyprus—A UN Peace Effort under Conditions of ECHR Applicability' in *Human Rights, Democracy and the Rule of Law, ibid, 595*; see also *contra* L Loucaides 'The Legal Support of an Illegal UN Plan by a UN Lawyer' (2007) *The Cyprus Yearbook of International Relations* 19.

[326] *Demopoulos and Others v Turkey*, (n 151) paras 9–16.

[327] International Crisis Group, *Cyprus: Reunification or Partition* (above n 230) 16–17.

[328] Preamble of the UN Charter.

echoed in Article 4 of the Foundation Agreement, as well, where it was provided that 'respect for human rights and fundamental freedoms shall be enshrined in the Constitution'. Indeed, in accordance with Article 11(1) of the UCR Constitution, the human rights and fundamental freedoms enshrined in the ECHR and the UN Covenant on Civil and Political Rights would have been an integral part of the Constitution.

Apart from the quite detailed Catalogue of Human Rights attached to the Foundation Agreement and the bills of rights that were included in the constitutions of the two constituent States,[329] Article 4 of the Foundation Agreement and Article 11 of the Constitution provided some special protection of certain populations and rights. Such provisions have been mainly dictated by the experiences of the past. More specifically, it was mentioned that, in the new unified State, there would have been no discrimination against any person on the basis of his/her gender, ethnic or religious identity, or internal constituent State citizenship status.[330] Moreover, the freedom of movement and of residence across the island may have been only limited where expressly provided by the Agreement, the Constitution or a constitutional law.[331] Furthermore, the rights of the religious minorities, the Maronites, Latins and the Armenians, would have been safeguarded in accordance with the standards foreseen under the European Framework Convention for the Protection of National Minorities. Such protection would have included the right to administer their own cultural, religious and educational affairs and to be represented in the legislature.[332] A similar provision concerning the protection of the cultural, religious, educational and political rights of Greek Cypriots and Turkish Cypriots, living in specified villages[333] in the other constituent State was also provided.[334] In the light of the foregoing, it is obvious that the Annan Plan did provide a legal framework for the satisfactory protection of human rights and fundamental liberties.

3.5.2 Provisions on Property

Since 1963, 200,000 Greek Cypriots and 65,000 Turkish Cypriots abandoned their properties and became refugees within their own country. Thus, the solution of the

[329] Part II of the Constitution of the Greek Cypriot State, Arts 10–41; Part II of the Constitution of the Turkish Cypriot State, Arts 10–73.

[330] Arts 4(1) of the Foundation Agreement and 11(2) of the UCR Constitution.

[331] Arts 4(1) of the Foundation Agreement and 11(3) of the UCR Constitution.

[332] Arts 4(3) of the Foundation Agreement and 11(4) of the UCR Constitution.

[333] Art 11(5) of the UCR constitution provided: 'Greek Cypriots residing in the Karpas villages of Rizokarpaso/Dipkarpaz, Agialousa/Yeni Erenköy, Agia Trias/Sipahi, Melanarga/Adacay, and Turkish Cypriots residing in the Tillyria villages of Amadhies/Günebakan, Limnitis/Ye ilyirmak, Selemani/Suleymaniye, Xerovounos/Kurutepe, Karovostasi/Gemikonagi, Agios Georgios/Madenliköy and Kokkina/Erenköy, as well as the Mesaoria villages of Pyla/Pile, Skylloura/Yilmazköy and Agios Vasilios/Türkeli'. Moreover, '[r]esidents of the village of Kormakiti shall enjoy equal treatment to long-term residents of the Turkish Cypriot State with regard to sale and purchase of properties located within the Turkish Cypriot State and the 1960 boundaries of the village of Kormakiti'.

[334] Arts 4(2) of the Foundation Agreement and 11(5) of the UCR Constitution.

property issue, unavoidably, lies at the core of any attempt for the comprehensive settlement of the Cyprus problem. The UN Plan for a Comprehensive Settlement of the Cyprus Problem, in Article 10 of the Foundation Agreement, provided that the property claims would have been resolved in a comprehensive manner in accordance with international law, the respect for the individual rights of dispossessed owners and current users and the principle of bi-zonality. A specific institution, the Cyprus Property Board, would have been responsible for implementing the relevant provisions.[335] The Board would have comprised of seven members, two hailing from each constituent State and three non-Cypriot members.[336]

According to the Annan Plan,[337] the only dispossessed owners that would have enjoyed an absolute right to reinstatement[338] were the Greek Orthodox Church of Cyprus and the Evkaf.[339] Any affected property[340] owned by them, which was used as a religious site in 1963 or 1974, would have been reinstated to them in the aftermath of the solution. The right to reinstatement of the affected property of the rest of the dispossessed owners, however, was subject to limitations. Those limitations were largely dependant on whether the affected property in question was in an area subject to territorial adjustment or not.

With regard to properties located in areas subject to territorial adjustment,[341] the general rule was that they would be reinstated to dispossessed owners.[342] An exception to that rule would arise when the current user[343] of the affected property had

[335] Art 10(4) of the Foundation Agreement and Art 2 of Annex VII to the Agreement on Treatment of Property affected by Events since 1963.

[336] Art 2(2) of Attachment 2 on The Cyprus Property Board and Compensation Arrangements of Annex VII of the Foundation Agreement.

[337] Art 4 of Part I of Annex VII of the Foundation Agreement.

[338] Reinstatement: restitution through the award of legal and physical possession to the dispossessed owner, so as to enable him/her to exercise effective control over such property, including use for his/her own purposes (Art 1 of Attachment 1 of Annex VII of the Foundation Agreement).

[339] Since 1571, the Islamic religious organisation has accumulated properties known as *Evkaf*. They are properties appropriated for, or donated to, charitable uses and to the service of God by a document called *vakfieh*. Nobody has the right to sell property designated as *vakf*. *Evkaf* properties can be rented for ten years, but a longer period requires the approval of the parliament. The Constitution of the Republic of Cyprus recognised and re-confirmed the legal rights of *Evkaf*, accepting the importance of the institution of *Evkaf* to the Turkish Community, its sanctity, and the need for the preservation and the protection of its properties under the laws and regulations of the Turkish Cypriot Communal Chamber; www.cypnet.co.uk/ncyprus/history/ottoman/evkaf.html.

[340] Affected property: immovable property in Cyprus which the owner, being a natural or legal person, left or of which s/he lost use and control as a consequence of inter-communal strife, military action or the unresolved division of the island between December 1963 and the entry into force of the Foundation Agreement, and which had not since been reinstated to the owner (or his/her heir, personal representative or successor in title), and over which s/he had not regained use and control (Art 1 of Attachment 1 of Annex VII of the Foundation Agreement).

[341] According to Art 9 of the Foundation Agreement the administration of 7.5 per cent of the territory of Cyprus would have been transferred under the supervision of the UN to the Greek Cypriot State in six phases over a 42 month period, beginning 104 days after the entry into force of the Foundation Agreement.

[342] Dispossessed owner: a natural/legal person who, at the time of dispossession, held a legal interest in the affected property as owner or part owner, his/her legal heir, personal representative or successor in title, including by gift. (Art 1 of Attachment 1 of Annex VII of the Foundation Agreement).

[343] Current user: a person who had been granted a form of right to use or occupy property by an authority under a legal or administrative process established to deal with property belonging to

made a significant improvement to the property,[344] whose market value[345] exceeded the value of the actual property. In that case, the Property Board would have facilitated an amicable solution between the dispossessed owner and the current user. If such a solution could not be reached, the Board would have decided whether to grant reinstatement to the dispossessed owner immediately or to first grant a lease of one to twenty years to the owner of the significant improvement.[346]

According to the UN estimations,[347] 60 per cent of displaced Greek Cypriots could obtain full restitution of their properties in accordance with the aforementioned provisions. The remaining 40 per cent of displaced Greek Cypriots and the dispossessed Turkish Cypriot owners were entitled to restitution of their former home and one third of their land or at least the equivalent of one *donum*.[348]

More analytically, with regard to properties located in areas not subject to territorial adjustment, the Annan Plan did not provide, in principle, for an absolute right to reinstatement. Dispossessed owners, being natural or legal persons, could opt for compensation.[349] In that case, they would have received full and effective compensation for their property on the basis of the value at the time of dispossession adjusted to reflect appreciation of property values in comparable locations.[350] All the remaining dispossessed owners would have had the right to reinstatement of one third of the area of their total property ownership, and to receive full and effective compensation for the remaining two thirds. However, they would have had the right to reinstatement of a dwelling they had built, or in which they lived for at least ten years, and up to one *donum* of adjacent land.[351] On the other hand, a dispossessed owner whose property could not be reinstated, because, for instance, it had been exchanged by a current user or bought by a significant improver or the dispossessed owner had voluntarily deferred to a current user, would have had the right to another property of equal size and value in the same municipality or village. S/he would have also had the right to sell his/her entitlement to another

dispossessed owners, or any member of his/her family who had a derivative right to use or occupy such property, or his/her heir or successor in title (Art 1 of Attachment 1 of Annex VII of the Foundation Agreement).

[344] Significant improvement: an improvement (including any new construction on vacant land) to an affected property, which was made between the time of dispossession and 31 December 2002 or any later improvement which had been deemed admissible for this purpose pursuant to regulations of the Property Board and of which the market value is greater than the value of the affected property in its original state (Art 1 of Attachment 1 of Annex VII of the Foundation Agreement).

[345] Market value: the amount for which a property could be sold on the open market, based on an assessment of purchase prices or amounts paid for comparable properties in comparable locations at the time of assessment (Art 1 of Attachment 1 of Annex VII of the Foundation Agreement).

[346] Art 3(4) of Attachment 4 to Annex VII of the Foundation Agreement.

[347] Pfirter, 'Cyprus—A UN Peace Effort' (above n 325) 614.

[348] Art 10(3)(b) of the Foundation Agreement. *Donum* is a unit of area used in the Ottoman Empire and still used, in various standardised versions, in many countries which were formerly part of the Ottoman Empire. It was defined as 'forty standard paces in length and breadth', but varied considerably from place to place. It is considered to be the equivalent of about a quarter of an acre; *Demopoulos and Others v Turkey* (n 151) para 12.

[349] Art 9 of Part I of ANNEX VII.

[350] Arts 10(3)(a) of the Foundation Agreement and 8 of Part I of ANNEX VII.

[351] Arts 10(3)(b) of the Foundation Agreement and 16 of Part I of ANNEX VII.

dispossessed owner, from the same place, who could aggregate it with his/her own entitlement.[352]

Current users, according to this sophisticated scheme, could even apply for, and receive title to the property they were using if they would agree, in exchange, to renounce their title to a property of similar value, in the other constituent State, of which they were dispossessed.[353] With regard to persons who owned significant improvements to properties, the Annan Plan provided that they could apply for, and could receive, title to such properties provided they would pay for the value of the property in its original state.[354] Finally, current users being Cypriot citizens who were required to vacate property which would be reinstated would not be required to do so until adequate alternative accommodation was made available.[355]

According to Article 22 of Annex VII, it would have been a Property Court, composed of an equal number of Greek Cypriot and Turkish Cypriot judges and three neutral judges, that would have conducted the final judicial review of decisions of the Property Board. More importantly, since the Foundation Agreement would have provided a domestic remedy for the settlement of the property issue, the UCR, in accordance with Article 37 of the ECHR, would have informed the Strasbourg Court that it would be the sole responsible State Party and request the Court to strike out any proceedings currently before it.[356]

According to the aforementioned Article 37 ECHR, the Court of Human Rights may decide, at any stage of the proceedings, to strike an application out of its list of cases. In order to do that, it should be proved that the circumstances lead to the conclusion that either the applicant does not intend to pursue his application or the matter has been resolved or, for any other reason established by the Court, it is no longer justified to continue the examination of the application. On the other hand, the same provision allows the Court to 'continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires'. Thus, one could convincingly argue that the Court could strike out all the applications of Greek Cypriots on the ground that the Foundation Agreement provided for a restitution scheme and, thus, it is no longer justified to continue the examination of the applications.

The question that should be addressed, however, is whether asking the Court to strike out the Greek Cypriot applications against Turkey could be seen as a hindrance to their right to apply to the Court under Article 34 ECHR claiming to be the victims of human rights violations.[357] With regard to the right enshrined in

[352] Arts 10(3)(c) of the Foundation Agreement and 16 of Part I of ANNEX VII.
[353] Arts 10(3)(d) of the Foundation Agreement and 12 of Part I of ANNEX VII.
[354] Arts 10(3)(e) of the Foundation Agreement and 18 of Part I of ANNEX VII.
[355] Arts 10(3)(f) of the Foundation Agreement and Attachment 3 to ANNEX VII.
[356] Art 5 of Part I of ANNEX VII.
[357] See generally V Koutroulis and VP Tzevelekos, '*Το Κυπριακό πρόβλημα: πρόσφατες και τρέχουσες εξελίξεις στο πλαίσιο του συστήματος προστασίας της Ευρωπαϊκής Σύμβασης Δικαιωμάτων του Ανθρώπου. Εμπέδωση ή αποδόμηση του νομικού «κεκτημένου»*;' ['The Cyprus Issue: Recent and Current Developments in the Frame of the System of Protection of the European Convention on Human Rights. Entrenchment or Deconstruction of the Judicial "Acquis?"'] (2005) 36 *Δίκη* 1148 and 1273.

Article 34, it has been stated by the Court that, after the amendments made to the Convention system by Protocol No 11, 'the right of individual application is no longer dependent on a declaration by the Contracting States'.[358] 'Thus, individuals now enjoy at the supranational level a real right of action to assert the rights and freedoms to which they are directly entitled under the Convention'.[359]

Obviously, in the aftermath of a comprehensive settlement that would solve the property aspect of the conflict inter alia, an application made by the new State to strike out the Greek Cypriot applications probably does not come *stricto sensu* within the meaning of a governmental action that would hinder the right of individuals to apply to the Court. The reason for this is that the settlement plan itself would offer more effective protection of human rights, including the right to property, through a restitution mechanism although, as shall be seen in chapter five, not all dispossessed owners would have an absolute right to reinstatement if the future settlement is based on the principle of bi-zonality. On the other hand, is must be stressed that 'the Convention right to individual application . . . has over the years become of high importance and is now a key component of the machinery for protecting the rights and freedoms set forth in the Convention'.[360] In addition, the Court has emphasised 'the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings' and has described its own mission, as set out in Article 19, 'to ensure the observance of the engagements undertaken by the High Contracting Parties'.[361] Thus, the Strasbourg Court could judicially review the compatibility of any settlement and the relevant restitution mechanism in accordance with the European public order and its well established principles. Any dispossessed owners that are not satisfied with the restitution mechanism could, in the aftermath of a settlement, apply to the Strasbourg Court and it is the responsibility of the Court to rule on the legality of the scheme. Although this would mean that the new unified United Cyprus Republic would have been held liable for human rights violations caused by Turkey, it still would have been an available means for the effective protection of the rights of individuals.

3.6 Remarks

To sum up this part of the chapter, it should be noted that, due to this international political problem, the protection of the fundamental rights of Union citizens in northern Cyprus is far from satisfactory. Neither the present political status quo, nor the European courts offer much more than an incremental solution to the human rights issues arising from this historical, political and legal saga. On the

[358] *Mamatkulov and Abdurasulovic v Turkey (Merits and Just Satisfaction)* (Applications No 46827/99 and 46951/99) (judgment 6 February 2003), [2003] ECHR 68 para 106; *Mamatkulov and Askarov v Turkey* (Applications No 46827/99 and 46951/99) (Grand Chamber judgment 4 February 2005), ECHR Reports 2005-I, para 122.

[359] *Ibid.*

[360] *Ibid.*

[361] *Loizidou v Turkey (Preliminary Objections)* (above n 129) para 93.

contrary, if the political actors do not engage in successful negotiations, there is an imminent danger that the present unsatisfactory situation will be crystallised, despite the evolution of the case law and especially the case law of the Strasbourg Court. Even a comprehensive settlement plan, however, cannot restore the *status quo ante* 1963. Any solution based on the agreed principles will entail painful sacrifices by all the actors.

What remains to be analysed, however, is how the Union, through the legislative device of the Green Line Regulation, has tried to facilitate the free movement rights of the Union citizens in an area where the *acquis* is suspended and how the Annan Plan would have altered such an exercise. The latter part of the analysis is important given that any possible future solution will include similar arrangements.

4. CROSSING THE 'LINE'

4.1 Introduction

In the aftermath of the 1974 Turkish military invasion, the Cypriot Government declared the closure of all the ports of entry into the island situated in those 'Areas'.[362] Until April 2003, when the restrictions to movement across the 'Line' posed by the regime in the North were partially lifted, the Greek Cypriots did not have access to the northern part of their country and the Turkish Cypriots[363] were isolated from the rest of the world, with the exception of Turkey. Since the Turkish Cypriot community expressed their clear desire for a future within the EU at the referendum on 24 April 2004, the Union had to build on the existing policy of the Republic. This policy allowed the Green Line to be crossed by all EU citizens and third country nationals who legally reside either in the South or in the North and people who have

[362] In the Letter dated 19 August 2005, from the Chargé d' affaires a.i. of the Permanent Mission of Cyprus to the UN addressed to the Secretary-General, it was stated:

> 'On the specific matter of airports and ports in the occupied area of Cyprus, it should be stressed that, following the Turkish military invasion and occupation of the northern part of the island, the Government of the Republic of Cyprus declared all ports of entry into the Republic of Cyprus which are situated in those areas as closed. In particular with regard to airports, it should be noted that the Government of the Republic of Cyprus acted in accordance with the Chicago Convention on International Civil Aviation, which provides that "the contracting States recognise that every State has complete and exclusive sovereignty over the airspace above its territory", including designation of official ports of entry. Moreover, according to International Civil Aviation Organisation decisions of 1974, 1975 and 1977, a country not exercising, temporarily, effective control over its territory by reasons of military occupation, does not lose its sovereign rights over its territory and the airspace above it. In that context, the two airports operating in the occupied area of the island—over which the Republic of Cyprus has temporarily no access or effective control and consequently is not in a position to impose the terms of operation and international safety standards—are illegal and pose potential safety concerns to civil aviation'. Furthermore, with regard to ports, the relevant ports were declared closed as from 3 October 1974 by an order of the Council of Ministers which was communicated to the International Maritime Organisation on 12 December 1974 for distribution to its Member States.

[363] For the situation before April 2003, see inter alia *Djavit An v Turkey* (Application No 20652/92) (judgment 20 February 2003) ECHR Reports 2003-III.

entered the island through the Government Controlled Areas in order to facilitate the exercise of the free movement rights of all the Union citizens and lift the isolation of the Turkish-speaking Cypriots.[364] It is important to note that such isolation

> does not affect just the businessman trying to trade, but also the Turkish Cypriot teenager in the folk dance group, the young graduate or politician trying to make a career in the EU, the university student, the artist and even the Turkish Cypriot footballer (who could not participate in international contests).[365]

Indeed, the Green Line Regulation[366] states the rules that apply to EU citizens and to third country nationals, including the special case of the 'settlers', in order for them to cross the line and have access to the southern Government-controlled part of the island and, from there, to other EU Member States and to the North of the UN Buffer zone. The abovementioned scope of the Green Line Regulation was required in order to address the *lacuna* in the EU legal order created by the suspension of the *acquis* and to put an end to the isolation of the Turkish Cypriot community.[367] As shall be seen, the framework provided by that Regulation has managed to effectively lift the isolation without recognising any other authority on the island apart from the legitimate Government of the Republic. It provides a prime example of the 'pragmatic approach' that the Union has adopted when dealing with the issues arising from this conundrum.

This section of the chapter provides a legal analysis of the Green Line Regulation with regard to the crossing of persons. In order to draw a more accurate picture of the present *status quo* on the island, concerning the free movement of persons, it also refers to the provisions of Protocol No 3 of the Act of Accession, which describes the application of the *acquis* to UK Sovereign Base Areas. However, given that this entire framework would have been completely altered if the new state of affairs was approved a week before Cyprus joined the Union, the final part of the chapter analyses the relevant provisions of the Annan Plan. Apart from being intellectually stimulating, such an exercise is deemed necessary since it is probable that similar provisions will be included in any future settlement plan.

4.2 Green Line Regulation's Provisions on Crossing of Persons

Given the suspension of the *acquis* in northern Cyprus provided by Article 1 of Protocol No 10, Article 21 TFEU according to which every EU citizen has the 'right

[364] Recital (6) of the Green Line Regulation.

[365] Turkish Cypriot Human Rights Foundation, *The Turkish Cypriots: The Excluded EU Citizens* (Nicosia, Turkish Cypriot Human Rights Foundation, 2006).

[366] For an analysis of the free movement provisions of this legislative device see generally N Skoutaris, 'The application of the acquis communautaire in the areas not under the effective control of the Republic of Cyprus: The Green Line Regulation', (2008) 45 *Common Market Law Review* 727.

[367] The EU's General Affairs Council on 26 April 2004 said in its Conclusions (8566/04 (Presse 115)) that: 'The Council is determined to put an end to the isolation of the Turkish Cypriot community and to facilitate the reunification of Cyprus by encouraging the economic development of the Turkish Cypriot community'.

to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down' in the Treaties and by the measures adopted to give them effect[368] does not apply. Instead, the Council of the EU has unanimously defined the terms under which the provisions of EU law apply to the line in the Green Line Regulation with regard to the free movement of persons. Since the Government of Cyprus has declared the closure of those ports of entry into the island situated North of the Green Line, the Regulation not only provides the rules for access to the 'Areas' for EU citizens and third country nationals but also for those lawfully residing in the North. The Regulation provides the terms under which those persons can move lawfully from Cyprus via the line to other destinations, and thus provides for the partial but effective lifting of their isolation.

Therefore, although in principle the line does not constitute an external border of the EU,[369] special rules are established by the Regulation concerning the crossing of persons, the prime responsibility for which belongs to the Republic of Cyprus. While taking into account the legitimate concerns of the Republic's Government concerning the recognition of any authority in the 'Areas', it was deemed necessary that those special rules should enable EU citizens to exercise their free movement rights within the EU. This was achieved by setting minimum rules for carrying out checks on persons at the line and at the same time by ensuring the effective surveillance of the line in order to combat illegal immigration of third country nationals, as well as any threat to public security and public policy.[370] Hence, it was also deemed necessary to define the conditions under which third country nationals are allowed to cross the line.[371]

More analytically, for the purpose of checks on persons, the term 'line' means the line between the Government Controlled Areas and those areas in which the Government of the Republic of Cyprus does not exercise effective control.[372] According to Article 2(1) of the Green Line Regulation, the Republic has the responsibility to carry out checks on all persons crossing the line with the aim of combating illegal immigration by third country nationals and to detect and prevent any threat to public security and public policy. Such checks also should be carried out on vehicles and objects in the possession of persons crossing the line. All persons crossing the line should undergo at least one such check in order to establish their identity.[373]

The line, however, can be crossed only at crossing points authorised by the competent authorities of the Republic of Cyprus.[374] Initially, in Annex I of the

[368] Eg Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L229/35.

[369] Recital (4) of the Green Line Regulation.

[370] Recitals (4) and (7) of the Green Line Regulation.

[371] Recital (7) of the Green Line Regulation.

[372] Art 1(1)(a) of the Green Line Regulation.

[373] Art 2(2) of the Green Line Regulation.

[374] Art 2(4) of the Green Line Regulation.

Regulation, only the crossing points of Ledra Palace and Agios Dhometios were mentioned. However, Article 9 of the Regulation provides that the Commission, in agreement with the Government of the Republic, may amend the Annexes of the Regulation. After subsequent amendments to the Regulation, the list at Annex I contains seven crossing points at the moment.[375]

Of all the seven crossing points, the opening of the one in Ledra Street has been considered the most crucial. The reason for this is that it would provide for a crossing point of the line inside the historical centre of Nicosia, which has been divided since 1963. During their meeting on 21 March 2008, the President of the Republic, Mr Christofias, and the then Turkish Cypriot leader, Mr Talat, agreed to open the Ledra Street crossing point as soon as possible. Indeed, two weeks later, on 3 April 2008, after 45 years of division, the two sides of the historical centre of the 'Mediterranean Berlin' were connected to each other.

With regard to third country nationals, Article 2(3) of the Green Line Regulation provides that they should only be allowed to cross the line provided they possess either a residence permit issued by the Republic or a valid travel document, and, if required, a valid visa for the Republic as long as they do not represent a threat to public policy or public security.[376] According to Article 1(2), the term 'third country national' is defined as any person who is not a citizen of the Union within the meaning of Article 17(1) of the EC Treaty. Given the special historical and political circumstances that have arisen in the post-1974 *status quo*, the seemingly technical and neutral definition of 'third country nationals' has some important political connotations. The Union tries to get around the thorny issue of 'settlers' through those technical rules concerning the crossing of 'third country nationals'. In other words, the Council of the EU deals effectively with one of the most important aspects of the conflict which also has implications for the partial application of the *acquis* in northern Cyprus, without referring *expressis verbis* to it in a rather depoliticised manner.

As previously mentioned in the present chapter,[377] the Republic of Cyprus does not consider those alien persons who have settled in the 'Areas' illegally and without permission as legitimate claimants of the Cypriot citizenship and, thus, they do not have access to EU citizenship via the citizenship laws of the Republic of Cyprus. Therefore, for the purposes of the Green Line Regulation, the 'settlers' are deemed to be third country nationals that may cross the line if they comply with the aforementioned criteria provided in Article 2(3).

[375] Agios Dhometios, Astromeritis—Zodhia, Kato Pyrgos—Karavostasi, Kokkina—Kato Pyrgos, Pachyammos—Kokkina, Ledra Palace and Ledra Street.

[376] For a more detailed account of how those terms are defined for EU law purposes see the case law of the Court of Justice in the following cases: Case C-41/74, *Van Duyn v Home Office* [1974] ECR 1337; Cases C-115 & 116/81 *Adoui and Cornuaille v Belgian State* [1982] ECR 1665; Case C-36/75 *Rutili v Minister of the Interior* [1975] ECR 1219; Case C-67/74 *Bonsignore v Oberstadtdirektor der Stadt Koln* [1975] ECR 297; Case C-30/77 *R. v Bouchereau* [1977] ECR 1999.

[377] See above s 2.2.

With regard to the 'threat to public policy' criterion, one has to note the criminal dimension of 'settling', which is recognised in the legislation of the Republic.[378] As far as the 'valid travel document' criterion is concerned, one should point out that the vast majority of 'settlers' also hold the citizenship of the Turkish Republic. For Turkish nationals, a valid visa is required to visit the Republic. Given the well-known policy of Turkey not to recognise the Cyprus Republic, the practical impediments for Turkish citizens to access the Cypriot visa has become obvious.[379] Thus, it could be argued that 'settlers' holding Turkish nationality can enjoy the relevant rights with regard to *inter alia* access to the EU labour market and freedom of establishment, provided by the Ankara Agreement and the case law of the ECJ,[380] in any EU Member State but, in reality, not in the Government Controlled Areas of the Cyprus Republic.

One has to note, however, that the situation on the ground with respect to 'settlers' married to Turkish Cypriots is slightly different than the Union legislation suggests. Although such individuals cannot claim the citizenship of the Republic, they may still lawfully cross the line. The customs authorities of the Republic of Cyprus have created another list including the names of those who can prove their marriage to a Turkish Cypriot on the basis of a marriage certificate. This practice started in 2003 and continued even after the EU accession. This is also the case for the children of 'settlers' married to Turkish Cypriots.[381]

Overall, one has to emphasise that the Union has managed to 'square the circle' in a seemingly technical and depoliticised way. It has facilitated the free movement rights of third country nationals, legally residing in the North or entering the island through the Government Controlled Areas, while at the same time it took into account the legitimate concerns of the Government of the Republic concerning the 'settlers' without explicitly referring to them.

[378] See generally *Ο Περί Αλλοδαπών και Μεταναστεύσεως (Τροποποιητικός) Νόμος του 2004* [*Aliens and Immigration (Amending) Act 2004)*].

[379] See generally N Trimikliniotis, 'Nationality and Citizenship in Cyprus since 1945: Communal Citizenship, Gendered Nationality and the Adventures of a Post-colonial Subject in a Divided Country' in R. Bauböck et al (eds), *Citizenship Policies in the New Europe* (Amsterdam, Amsterdam University Press, 2007).

[380] See inter alia Case C-12/86 *Demirel v Stadt Schwabisch Gmund* [1987] ECR 3719; Case C-434/93 *Bozkurt v Staatsecretaris van Justitie* [1995] ECR I-1475; Case C-171/95 *Tetik v Land Berlin* [1997] ECR I-329; Case C-36/96 *Gunaydin v Freistaat Bayern* [1997] ECR I-5143; Case C-98/96 *Ertanir v Land Hessen* [1997] ECR I-5179. For a more detailed account of the rights deriving from the Ankara Agreement see generally M Cremona, 'Citizens of Third Countries: Movement and Employment of Migrant Workers Within the EU' (1995) 2 *Legal Issues of Economic Integration* 87; M Hedemann-Robinson, 'An Overview of Recent Legal Developments at Community Level in Relation to Third-country Nationals Resident within the European Union, with particular reference to the Case Law of the European Court of Justice' (2001) 38 *Common Market Law Review* 525; S Peers, 'Towards Equality: Actual and Potential Rights of Third Country Nationals in the EU' (1996) 33 *Common Market Law Review* 7; H. Staples, *The Legal Status of Third Country Nationals Resident in the European Union* (The Hague, Kluwer Law International, 1999).

[381] Interviews with TRNC officials.

4.3 Protocol No 3's Provisions on Crossing of Persons

For the purpose of checks on persons, as mentioned above, the Green Line means the line between the areas under the effective control of the Government of the Republic and those areas in which the Government does not exercise effective control. However, it does not include the line between the Government Controlled Areas and the UK Sovereign Base Areas. This is reaffirmed by Article 5(1) of Protocol No 3 to the Act of Accession 2003, which provides that the Republic is not required 'to carry out checks on persons crossing their land and sea boundaries with the Sovereign Base Areas and any Community restrictions on the crossing of external borders shall not apply in relation to such persons'.

Checks on persons at the boundary between the Eastern Sovereign Base Area and the areas not under effective control of the Government of the Republic of Cyprus are carried out in accordance with Article 5(2) of the Protocol No 3.[382] This Article provides that it is the UK, and not the Republic, which should exercise controls on persons crossing the external borders of the Bases, in accordance with the undertakings set out in Part Four of the Annex of the Protocol. Such controls shall include the verification of travel documents. As is the case in the Green Line Regulation, all persons shall undergo at least one check in order to establish their identity.[383]

Article 2 of the Annex provides that the UK allows the external borders of the Bases to be crossed only at crossing points. The term 'external borders of the Sovereign Base Areas' means, however, the sea boundaries, the airports and seaports, but not the land or sea boundaries with the Republic of Cyprus. On the other hand, the term 'crossing points' refers to any crossing point authorised by the competent authorities of the UK for the crossing of the external borders.[384]

With regard to nationals of third countries, they shall only be permitted to cross the external border of the Sovereign Base Areas if (i) they possess a valid travel document, (ii) they are in a possession of a valid visa for the Cyprus Republic, if so required, (iii) they are engaged in defence-related activity or are a family member of a person who is engaged in such activity and, (iv) they are not threat to national security.[385] The UK can only derogate from these conditions on humanitarian grounds, on grounds of national interest or in order to comply with the international obligations[386] arising from the bilateral and multilateral agreements to which UK is a contracting party. Since 1 May 2004, only on one single occasion the Administration of the Bases derogated from the conditions for nationals of third countries to cross the external borders on humanitarian grounds. 'On this occasion, a small number of non-EU nationals (less than 50) was airlifted from Lebanon to RAF Akrotiri in the first few days of the evacuation procedure'.[387]

[382] Art 2(5) of the Green Line Regulation.
[383] Art 4 of Part Four of the Annex of Protocol No 3.
[384] Art 1 of Part Four of the Annex of Protocol No 3.
[385] Art 3(a) of Part Four of the Annex of Protocol No 3.
[386] Art 3(b) of Part Four of the Annex of Protocol No 3.
[387] Report from the Commission to the European Parliament and the Council—First Report on the implementation of the provisions of Protocol No 3 to the 2003 Act of Accession on the Sovereign Base

Similar to Article 3 of the Green Line Regulation, Article 5 of Part Four of the Annex of Protocol No 3 provides that the competent authorities of the UK should use mobile units to carry out external border surveillance, between border crossing points and at crossing points in order for people to be discouraged from circumventing the checks at crossing points. Indeed, according to the Commission 'the SBA Administration carries out regular maritime controls along the sea boundaries'.[388]

As we mentioned in the previous chapter, the competent authorities of the UK and of the Republic of Cyprus are expected to maintain constant close cooperation with a view to the effective implementation of checks and surveillance.[389] Moreover, bearing in mind humanitarian considerations, they should co-ordinate their actions with a view to devising practical ways and means of respecting the rights and satisfying the needs of asylum seekers[390] and illegal immigrants in the Sovereign Bases.[391] In fact with regard to asylum, the two Member States have signed a Memorandum of Understanding. According to it, the responsibility of examining the applications of asylum seekers who first entered the island of Cyprus through the Sovereign Bases is delegated to the Republic of Cyprus.[392]

4.4 Implementation of the Green Line Regulation

Recital (6) of the Green Line Regulation recognises that the policy of the Republic, even before the adoption of that piece of legislation, has been to allow the crossing of the line by all citizens of the Republic, EU citizens and third country nationals who are legally residing in the northern part of Cyprus and by all EU citizens and third country nationals who entered the island through the Government Controlled Areas. From the very first annual report on the implementation[393] of the Green Line Regulation, the Commission assured the Council that the crossing of persons was running smoothly and that thousands of Cypriots cross the line daily from either side.[394] In its more recent annual report, the Commission reported

Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus (hereafter Commission Report on the implementation of Protocol No 3); Brussels, 19.4.2010 COM(2010)155.

[388] *Ibid.*

[389] Art 6 of Part Four of the Annex of Protocol No 3 on the Sovereign Base Areas in Cyprus.

[390] Art 7(a) of Part Four of the Annex of Protocol No 3 on the Sovereign Base Areas in Cyprus provides that: '[a]n applicant for asylum who first entered the island of Cyprus from outside the European Community by one of the Sovereign Base Areas shall be taken or readmitted to the Sovereign Base Areas at the request of the Member State of the European Community in whose territory the applicant is present'.

[391] Art 7(b) of Part Four of the Annex of Protocol No 3 on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus.

[392] Commission Report on the Implementation of Protocol No 3; See also Laulhé Shaelou, *The EU and Cyprus* (n 99) 151–154.

[393] Art 11(1) of the Green Line Regulation reads as follows: 'Without prejudice to Article 4(12), the Commission shall report on an annual basis, starting not later than one year after the date of entry into force of this Regulation, on the implementation of the Regulation and the situation resulting from its application, attaching to this report suitable proposal for amendments if necessary'.

[394] Communication from the Commission Report on the implementation of Council Regulation (EC) 866/2004 of 29 April 2004 and the situation resulting from its application; Brussels, 14.07.2005 COM(2005) 320 final (hereafter 2005 Commission's Report).

that 'the Regulation provides a stable legal framework for the free movement of Cypriots, other EU citizens and third country nationals who cross the Line at the authorised crossing points'.[395]

The Republic of Cyprus, however, felt that it was necessary to stress that its laws stand to the effect that, as regards persons, all arrivals via non-legal points of entry are subject to criminal sanctions. Although the application of such sanctions stands suspended as regards EU citizens, the Government fully reserves its rights in this respect.[396] More importantly,

> in October 2006, the Parliament of the Republic of Cyprus adopted an amendment to the Penal Code which penalises any illegal use (including rent) of property with a sentence of seven years of imprisonment. Given that some 78% of the private property in the northern part of Cyprus is (originally) Greek Cypriot property, this amendment caused concern in the Turkish Cypriot community. The authorities of the Republic of Cyprus seem to follow a policy of not applying the amendment to ordinary Turkish Cypriot citizens resulting in a lack of legal certainty. The impact of this legislation on the crossings of Turkish Cypriots will have to be closely monitored.[397]

With regard to the surveillance of the line, in its first report, the Commission noted that, despite the checks carried out by the Republic on persons crossing the line, it has become obvious that a 'systematic illegal route through the northern part to the government-controlled areas exists'.[398] Hence, the Green Line cannot be regarded as being under effective surveillance. In fact, in the 2009 Commission Report, it was noted that 'the high number of third country nationals crossing the Line illegally remains an area of serious concern'.[399]

The Republic of Cyprus has tried to reply to those criticisms[400] by noting that such problems are inherent to that very special political anomaly, according to which an EU Member State cannot exercise effective control over the whole of its territory. It is not coincidental that 65 per cent of the illegal immigrants who have 'entered the government-controlled areas across the Line . . . had either a Turkish or a Turkish Cypriot entry or exit stamp . . ., a visa issued by Turkey . . . or a "visa" or a "residence permit" of the "TRNC" '.[401] On the other hand, the fact that the two

[395] Report from the Commission to the Council Annual Report on the implementation of Council Regulation (EC) 866/2004 of 29 April 2004 and the situation resulting from its application; Brussels, 14.09.2009 COM(2009)478 (hereafter 2009 Commission's Report) p 3. The Commission reported that during the period 1 May 2008—30 April 2009 '730,310 (previous year: 633,163) Greek Cypriots in 193,909 vehicles (previous year: 426,990) crossed from the government-controlled areas to the northern part of Cyprus and 1,287,126 (previous year: 1,162,739) Turkish Cypriots in 451,334 vehicles (previous year: 602,992) crossed from the northern part of Cyprus to the government-controlled areas'.

[396] Interviews with officials of the Cyprus Republic.

[397] Communication from the Commission Report on the implementation of Council Regulation (EC) 866/2004 of 29 April 2004 and the situation resulting from its application; Brussels, 20.9.2007, COM(2007)553 (hereafter 2007 Commission's Report) 3.

[398] 2005 Commission's Report, 3.

[399] 2009 Commission's Report, 4.

[400] Interviews with officials of the Cyprus Republic.

[401] 2009 Commission's Report, 4.

communities do not directly exchange information on those issues, creates another impediment to the effective surveillance of the Line.[402]

Despite the arguments of the Republic, the Commission in its 2007 Report suggested that the main cause of the reluctance of the Cypriot Government to fully meet its surveillance obligation is that any measure which could possibly lead to the Green Line taking on the appearance of an external border is politically unacceptable.[403] Such allegation is repeated in the latest Report of the Commission.[404]

It is unquestionable that the factual inability of the Republic to control its borders has caused concerns and has resulted in the suspension of the *Schengen acquis*. It remains clear, however, that the Green Line Regulation has partially but effectively lifted the isolation of a significant number of the inhabitants of an area where the ports of entry are all deemed closed under international law, without recognising any other authority on the island apart from the legitimate Government of the Republic of Cyprus.

4.5 The Exercise of Free Movement Rights in a Unified Cyprus

The implementation of the Green Line Regulation, as presented in the Commission Reports, stands as an indisputable proof that the suspension of the *acquis* significantly limits the exercise of free movement rights of EU citizens and third country nationals in northern Cyprus. It is only in the framework of a comprehensive settlement that a full exercise of such rights could take place. However, even in that case, the relevant provisions of the Annan Plan show that derogations from the *acquis* are almost unavoidable since any settlement plan has to address the legitimate concerns of the two communities.

Starting from the premise that permanent derogations to the *acquis* should be avoided as far as possible, the Commission had already made it known to the UN, during the preparatory phase of Burgenstock,[405] that the exceptions on property and residence rights should be clearly framed as transitional. Largely, this scope was attained. Nevertheless, as any solution based on the principles of bi-zonality, bi-communality and political equality of the two ethno-religious segments, the Annan Plan unsurprisingly entailed some derogations from the *acquis*. Such EU-related exemptions were laid down in the Draft Act of Adaptation on the terms of the accession of the United Cyprus Republic to the European Union (hereafter DAA). If the new state of affairs had been approved in the simultaneous referendums of 24 April 2004, this Regulation would have amended the Treaty of Accession on the basis of Article 4 of Protocol No 10 and it would arguably have consisted of primary law as shall be seen in chapter five. In any case, Hoffmeister contends that the adoption of that Regulation would have been the first step. As a second step, those 'adaptations

[402] *Ibid*, 5.
[403] 2007 Commission's Report, 11.
[404] 2009 Commission's Report, 4.
[405] Last phase of the UN negotiations that led to the fifth and last version of the Annan Plan.

would have been formally incorporated into primary law in order to bring about legal security within the Union's legal system'.[406]

Such a development would have been in conformity with Article 6 of Annex IX of the Foundation Agreement of the Annan Plan. That provision obliged the Co-Presidents to send a letter that was attached to the Annex to the President of the European Council in case the plan was approved. With that letter, they would have requested inter alia that the European Union endorse the Foundation Agreement and interpret its terms in line with the principles on which the European Union is founded and adopt special measures for the Turkish Cypriot State. They would have also requested that the final outcomes would result in the adaptation of primary law that would ensure legal certainty and security within the European Union legal system for all concerned.

First of all, the Annan Plan provided for restrictions on the right to property and, thus, for derogations from the free movement of capital *acquis*.[407] More specifically, it provided for restrictions on the right of natural persons, not permanently residing in the Turkish Cypriot constituent State for at least three years, and of legal persons to purchase immovable property in that State, without permission of the competent authority of that constituent State. Those restrictions on the acquisition of property in the Turkish Cypriot constituent State should have lasted for 15 years or, alternatively, until the gross domestic product per capita in that constituent State remained below 85 per cent of the gross domestic product per capita in the Greek Cypriot State. The proposed authorisation procedure was deemed necessary because of the economic disparities between the Turkish Cypriot constituent State and EU Member States but also between the two communities. According to Recital xii, the purpose of that provision was to avoid unacceptable sudden price increases and a large-scale buy-out of land. In other words, that legislative act would have served as a safeguard clause, according to which the authorities of the Turkish Cypriot constituent State could deny the right of non-resident natural persons and legal persons to acquire property for a specific period of time, based on published, objective, stable and transparent criteria that would have been applied in a non-discriminatory manner.[408]

Moreover, apart from restrictions on the right to acquire property in northern Cyprus, restrictions on residence rights were provided. According to recital vii of the DAA, the recognition of the particular national identity of Cyprus and the need for protection of the balance between Greek Cypriots and Turkish Cypriots in Cyprus, the bi-zonal character of the UCR and the distinct identity and integrity of the constituent States necessitated certain safeguards and temporary restrictions on the residence rights of Cypriot citizens, as well as citizens of Greece and Turkey. Articles 2 and 3 provided for the terms that would have applied to the right to residence of the Cypriot citizens, Greek and Turkish nationals, other EU citizens and third country nationals, in the constituent States of the UCR.

[406] Hoffmeister, *Legal Aspects of the Cyprus Problem,* (above n 96) 189.
[407] Art 1 DAA, Appendix D of the Annan Plan.
[408] Art 1(2) DAA, Appendix D of the Annan Plan.

More analytically, Article 2, on the right of a Cypriot citizen to reside in a constituent State of which s/he would not have held the internal constituent State citizenship status, provided that the application of restrictions on such a right should not have been precluded in the form of a moratorium during the first five years of the life of the reunified State, notwithstanding existing provisions of Community law. Later on, between the sixth and ninth years, the percentage of people not holding the relevant constituent State citizenship status could not exceed six per cent of the total population of the respective municipality or village. This percentage would have been doubled between the tenth and fourteenth years. For the following five years, or until Turkey's accession, the relevant percentage could have reached 18 per cent. Finally, after the nineteenth year, after the establishment of a new state of affairs, either constituent State could, with a view to protecting its identity, take safeguard measures to ensure that no less than two-thirds of its Cypriot permanent residents speak its official language as their mother tongue.

Equally, Article 3 of the aforementioned proposed Regulation provided for the application of restrictions for 19 years, or until Turkey would join the EU, on the right of Greek and Turkish nationals to reside in Cyprus on a non-discriminatory basis. The restrictions would apply if the number of Greek and Turkish nationals would have reached five per cent of the number of resident Cypriot citizens holding the internal constituent State citizenship status of the Greek Cypriot or Turkish Cypriot constituent State respectively. After that period, the UCR would have had the right, in consultation with the Commission, to pose safeguard measures in order to ensure that the demographic ratio between Cyprus' permanent residents, speaking either Greek or Turkish as mother tongue, would not have been altered.

Evidently, both provisions had the potential to be applied without any temporal limitation and could be read as permanent derogations from the free movement of persons *acquis*. It should be noted, however, that the Union has repeatedly expressed its willingness to accommodate the terms of a settlement within the Union legal order. Furthermore, it is almost unavoidable that any settlement, based on the principle of bi-zonality, would entail derogations from the *acquis*, as shall be seen later. In any case, it should be pointed out that such restrictions are justified because of the experiences of the past and the particular national identity of Cyprus as a bi-communal and bi-zonal federal State. Also, the Union has undertaken to 'respect [the Member States'] national identities inherent in their fundamental structures . . . [and] their essential State functions, including ensuring the territorial integrity of the State'.[409]

On the other hand, such restrictions on fundamental freedoms are not unprecedented. In the previous enlargement, the Union accepted permanent restrictions on the right to residence in the Åland islands in order to protect the Swedish identity of those Finnish islands,[410] while in the 'Big-Bang' enlargement of 2004 the EU agreed that permanent derogations from the freedom of capital *acquis* could apply

[409] Art 4(2) TEU.

[410] Protocol No 2 to the Act of Accession of Sweden, Austria and Finland, [1994] OJ C241/21.

in Malta.[411] Obviously, the historical and political necessities that led to those derogations, as well as the extent of the restrictions, are completely different to those relevant for this case. One should note, however, the willingness and the capability of the Union to accommodate such restrictions, within its legal order, in order to respond to relevant political concerns.

4.6 Remarks

Overall, the Green Line Regulation framework, based on the post 2003 political situation on the island, has proved that it is an adequate means in order for Union citizens and third country nationals to have access to the 'Areas' where the *acquis* is suspended and thus for the isolation of the Turkish Cypriot community to be lifted. It still cannot be argued, however, that it foresees the full exercise of the fundamental freedoms of the EU citizens in the 'Areas'. To that effect, there is no provision for services *per se* in the Regulation. Article 7 on 'Taxation' provides a layout for the supply of services to some extent but the Commission, in its 2005 Annual Report, reported of not having any knowledge of services supplied across the Line during the first year of the operation of the Green Line Regulation,[412] and the 2006 and 2007 Annual Reports do not even mention the movement of services.

On the contrary, one could assume that given inter alia the checks, the crossing points and the provisions on third country nationals, the Green Line is a de facto EU border. What is more problematic is the fact that the Annan plan, would have also failed to offer the possibility to all EU citizens of fully exercising the rights attached to the status of Union citizen. This, however, should be read as an endogenous problem of any settlement based on the principle of bi-zonality and as a necessary sacrifice for the reunification of the island.

5. CONCLUSION

It is evident that due to this unprecedented political anomaly for an EU Member State, the protection of fundamental rights and the exercise of fundamental freedoms, attached to the Union citizenship concept, is problematic. The European Court of Human Rights may have found Turkey responsible for the acts and omissions of its 'subordinate local administration' that violate human rights in the North, but this does not effectively address the *lacuna* within the 'European public order'. Even the latest judgments of the Court that allow the establishment of *quasi*-transitional institutions, dealing with the property aspect of the Cyprus issue, point to the incremental solutions available through the judicial process rather than offer a comprehensive solution.

[411] Protocol No 6 to the Act of Accession 2003 on the acquisition of secondary residences in Malta, [2003] OJ L236/947.

[412] 2005 Commission's Report 5.

On the other hand, the Union has managed to adopt a 'pragmatic approach' when dealing with the Cypriot Gordian knot in order to facilitate the exercise of the fundamental freedoms of the Union citizens in northern Cyprus, where EU law is suspended. Indeed, it has managed to effectively lift the isolation of the residents in an area where the ports of entry have been declared closed for 30 years. And it has done so, while taking into account the legitimate concerns of the Republic of Cyprus with regard to the 'settlers'. This is particularly important considering that the situation concerning the access to the citizenship of the bi-communal Cyprus Republic, and thus to the EU citizenship of the residents in the North, is understandably less clear than in any other Member State given the two claims of legitimate rule on the island.

It is obvious that this *lacuna* in the Union legal order, created by the suspension of the *acquis,* could only be effectively addressed in the framework of a comprehensive settlement of the Cyprus issue. The cleavages, however, between the two communities and the political concerns that have to be addressed in any settlement plan create serious doubts whether that *lacuna* will disappear whenever the Cyprus problem is resolved. It is more than probable that in any future settlement, based on the principles of bi-zonality, bi-communality and political equality of the two ethno-religious segments, similar derogations from the *acquis* will be provided. Despite that, the Union should remain willing to accommodate the solution even if there are restrictions to the fundamental freedoms. At the end of the day, the achievement of peace and stability in one of its Member States is a legitimate justification for such derogations.

IV

Free Movement of Goods

'A time for drunken horses'.
Bahman Ghobadi (2000)

1. INTRODUCTION

THE EUROPEAN UNION'S 'pragmatic approach' to aspects arising from the Cyprus problem in the aftermath of the Republic's accession to the EU is particularly evident in the adopted and proposed legislation concerning the Union's trade relations with northern Cyprus. After the rejection of the Annan Plan and the consequent suspension of the *acquis* in the North, the Union had to create a legislative framework which would enable it to create trade relations with the Turkish Cypriot community without recognising any authority on the island other than the only internationally recognised Government of the Republic. The lifting of the economic isolation[1] of the Union citizens residing in an area where the ports of entry have been declared closed 30 years ago has been deemed necessary in the aftermath of the ECJ judgments in the *Anastasiou* saga.[2]

In order to achieve the abovementioned scope, the EU in agreement with the Republic, has authorised the Turkish Cypriot Chamber of Commerce, through the Green Line Regulation,[3] to issue accompanying documents so that goods originat-

[1] The EU's General Affairs Council on 26 April 2004 said in its Conclusions (8566/04 (Presse 115)) that: 'The Council is determined to put an end to the isolation of the Turkish Cypriot community and to facilitate the reunification of Cyprus by encouraging the economic development of the Turkish Cypriot community'.

[2] Case C-432/92 *Regina v Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and Others* (hereafter *Anastasiou I*) [1994] ECR I-3116; Case C-219/98 *Regina v Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and Others* (hereafter *Anastasiou II*) [2000] ECR I-5241; Case C-140/02 *Regina v Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and Others* (hereafter *Anastasiou III*) [2003] ECR I-10635. According to those judgments, since the authorities in the areas not under the effective control of the Republic could not issue valid movement certificates, furnishing evidence of the Cypriot origin of the relevant goods, Turkish Cypriot goods could be imported into the (then) Community but were treated as goods from a country not associated with the EC; for an in depth analysis of those judgments see generally S Laulhé Shaelou, 'The European Court of Justice and the *Anastasiou* Saga: Principles of Europeanisation through Economic Governance' (2007) *European Business Law Review* 619; S Laulhé Shaelou *The EU and Cyprus: Principles and Strategies of Full Integration* (Leiden, Brill / Martinus Nijhoff, 2010), 32–39 and 71–83.

[3] Council Regulation (EC) No 866/2004 of 29 April 2004 on a regime under Article 2 of Protocol No 10 of the Act of Accession 2003 [2004] OJ L206/51 [hereafter Green Line Regulation].

ing in the 'Areas' may cross the line and be circulated into the Union market as EU goods.[4] In effect, by the authorisation of a Turkish Cypriot NGO, the Union got around a fundamental recognition conflict in order to allow legal bilateral trade to take place both between the parties in dispute and between the 'Areas' and EU Member States other than Cyprus.

Although the Green Line Regulation regime has provided for a viable and working framework for the development of bilateral trade relations between the parties in the conflict and thus has brought the two ethno-religious segments closer, it has not become an effective device to enable goods originating in northern Cyprus to penetrate the EU market. This is the main reason why the Commission, at every occasion, stresses the need for the adoption of a regulation that would allow direct trade relations between the 'Areas' and Union Member States other than Cyprus. The relevant proposal, however, presents some problems with regard to international and Union law.

The scope of the present chapter is to analyse the trade relations of the Union with northern Cyprus, first, before the accession of the Republic with a special emphasis on the ECJ jurisprudence; second, after 1 May 2004 through the examination of the Green Line Regulation regime; and third, in the light of a possible future adoption of the Direct Trade Regulation. Such an exercise is deemed necessary in order, on the one hand, to assess the limits of the suspension of the *acquis* and, on the other, to examine the relevant Union policies.

2. TRADE WITH THE 'AREAS' BEFORE CYPRUS' EU ACCESSION

2.1 Introduction

Before 1 May 2004, when Cyprus joined the EU,[5] an Association Agreement[6] provided for the bilateral legal basis of the relationship between Cyprus and the EEC/EU insofar as it concerned the dispute resolution, trade and accompanying provisions of services, persons and capital and other common provisions. It also provided for the bilateral legal foundation of the pre-accession strategy and the institutional basis for reviewing progress in the accession negotiations.

[4] However, we have to note that unlike the proposals for the direct trade and the financial aid regulations, the Green Line Regulation did not make specific reference to the economic isolation of the Turkish Cypriots. 'However, since the Green Line Regulation was referred to in the same Council conclusions as "a signal of encouragement to the Turkish Cypriot community", and since it was adopted only a few days after these conclusions, it gradually came to be associated with an overall package to reward Turkish Cypriots for supporting reunification'. Moreover, as the other two regulations encountered difficulties with regard to their adoption—as we shall see in the final part of this chapter—the Green Line regulation grew in relative importance. M Hatay, F Mullen and J Kalimeri, *Intra-island Trade in Cyprus: Obstacles, Oppositions and Psychological Barriers* (Oslo, PRIO, 2008), 10–11.

[5] For a more comprehensive analysis of the case law of the ECJ on the Cyprus issue until 2001 see in general S Talmon, 'The Cyprus Question before the European Court of Justice' (2001) 12 *European Journal of International Law* 727.

[6] Agreement of 19 December 1972 Establishing an Association Between the European Community and the Republic of Cyprus and the Protocols thereto [1973] OJ L133/2.

According to Article 2(1) of the Agreement, its original scope was the progressive elimination of trade obstacles through a process of reciprocal liberalisation of trade. This entailed the reduction of custom duties,[7] the abolition of any measure or practice of an internal fiscal nature with direct or indirect discriminatory effect[8] and the imposition of export duties at a level not higher than that applicable to products exported to the most favoured third country.[9] Thus, the Association Agreement provided inter alia for a system of tariff preferences benefiting agricultural and industrial products from Cyprus.

The preferential treatment was conditional on evidence being furnished that the products had originated in Cyprus in accordance with an Additional Protocol signed in 1977 (hereafter Origin Protocol).[10] Article 6(1) of the Origin Protocol required that evidence of the originating status of products was given by EUR.1 movement certificates which were to be issued by the 'customs authorities of the exporting State'.[11]

One of the most important questions arising from the de facto partition of the island was whether that system of tariff preferences could also be applied to products originating in northern Cyprus and exported to EU Member States. Neither the practice of the Member States nor of the Union institutions could offer a reliable answer to this critical issue for the trade relations between the then EEC and Cyprus. With regard to the practice of the Member States, not all of them were accepting certificates issued by Turkish Cypriot authorities. The Commission stated, in the course of the proceedings of *Anastasiou I,* that several[12] Member States recognised the certificates of origin and at least some recognised the phytosanitary certificates.[13] It added, however, that Member States were accepting those certificates provided that they were not issued in the name of the 'Turkish Federated State of Cyprus', the 'Turkish Republic of Cyprus' or other equivalent designation, which would question the sovereignty of the only internationally recognised Government on the island.[14]

In addition to the non-uniform position of the Member States, the practice of the then Community institutions was also inconsistent. In the aftermath of the TRNC 'declaration of independence' in 1983, the Government of the Republic of Cyprus addressed a 'note verbal' in which it stated that only certificates issued by its authorities satisfied the requirements of the Association Agreement. The Council,

[7] Art 3 and Annexes I and II to the Association Agreement.

[8] Art 4 of the Association Agreement.

[9] Art 7 of the Association Agreement.

[10] Council Regulation (EEC) No 2907/77 on the conclusion of the Additional Protocol to the Agreement Establishing an Association Between the Community and the Republic of Cyprus ([1977] OJ L339/1) approved the Protocol concerning the definition of the concept of 'originating products' and methods of administrative cooperation between the Community and national authorities on the one hand and Cypriot authorities on the other.

[11] Arts 7(1) and 8(1) of the Origin Protocol.

[12] Besides the UK, the following Member States were mentioned: Belgium, France, Germany, Ireland, Italy and the Netherlands.

[13] *Anastasiou I* (Opinion of Advocate General Gulmann), para 22.

[14] Talmon, 'The Cyprus Question', (above n 5) 731.

however, responded by reiterating the position that the Association Agreement was to benefit the whole population of the island in accordance with Article 5.[15] Since the Council failed to provide more precise guidance for dealing with the certificates issued by the Turkish Cypriot authorities, the Commission's line of conduct equally failed to be consistent. On the one hand, it furnished the competent authorities of the Member States with specimen seals, signatures and stamps used by the Turkish Cypriots.[16] On the other hand, the Director-General of DG-VI (Agriculture), Guy Legras, sent a letter to the Permanent Representatives of the Member States, on December 1989, stating that '[i]n the case of Cyprus, Article 12(1)(b) [of the Plant Health Directive] should be interpreted as meaning that the only authorities empowered to issue certificates are those so authorised on the basis of the laws or regulations of' the Republic of Cyprus[17] since its Government is the only internationally recognised one on the island. For that reason, goods 'accompanied by a phytosanitary certificate within the meaning of Directive 77/93/EEC originating from the northern part of the island' could be regarded as complying with the conditions of the Directive only if 'the certificate [was] issued in the name of the "Republic of Cyprus" by the competent authorities of that Republic'.[18]

This letter forced two Dutch companies—which imported and marketed citrus fruit originating in northern Cyprus within the Member States under phytosanitary certificates issued by the Turkish Cypriot authorities—to bring an action under the then Article 173(2) EEC (now 263(4) TFEU) for the annulment of the decision said to be contained in this letter and under ex Article 215(2) EEC (now Article 340(2) TFEU) for compensation for the damage resulting from the Commission's unlawful conduct. The European Court of Justice in *Sunzest* referred to its decision in *IBM v Commission*[19] and reiterated that only measures 'producing legal effects of such a kind as to affect the applicant's interests by clearly altering his legal position constitute acts or decisions open to challenge for annulment'.[20] The letter was not capable of producing legal effects since the application of the then Community provisions, in respect of the protective measures relevant to that case, is a matter solely for the national bodies designated for that purpose. No provision of the Plant Health Directive[21] confers power on the Commission to adopt decisions based on its interpretation. Thus, the letter did not constitute a decision against which an action for annulment could be brought.[22]

[15] *Ibid*, 732.

[16] *Anastasiou I* (Opinion of Advocate General Gulmann) para 19.

[17] Case C-50/90 *Sunzest (Europe) BV and Sunzest (Netherlands) v Commission* [1991] ECR I-2917 (hereafter *Sunzest*) para 5.

[18] *Ibid.*

[19] Case C-60/81 *IBM v Commission* [1981] ECR 2639.

[20] *Sunzest*, (n 17) para 12.

[21] Council Directive 77/93/EEC of 21 December 1976 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community [1977] OJ L26/20, which has been subsequently substituted by the Council Directive 2000/29/EC [2000] OJ L169/1.

[22] *Sunzest*, (n 17) paras 13 and 14.

Although, in *Sunzest,* no answer was given to the question whether products originating in northern Cyprus could come under the *ratione materiae* of the Association Agreement, the Court decided upon this issue in the *Anastasiou* saga. In those three judgments, the Court of Justice did not just decide whether the Turkish Cypriot authorities could be considered as 'customs authorities of the exporting State' for the purposes of Article 6(1) of the Origin Protocol. It also ruled on whether the criteria for the issue of phytosanitary certificates, provided by the Plant Health Directive, could be met in northern Cyprus.

2.2 *Anastasiou I*[23]

In 1992, SP Anastasiou (Pissouri) Ltd and 12 Greek Cypriot producers and exporters of citrus fruit and the national marketing board for potatoes in the Republic of Cyprus instituted proceedings against the UK Minister of Agriculture, Fisheries and Food in the High Court of Justice. They asked the Court to judicially review the practice of the UK authorities of accepting origin certificates and phytosanitary certificates issued by authorities of the self-proclaimed internationally unrecognised Turkish Republic of Northern Cyprus and not by the competent authorities of the Republic as required by EU law. The High Court of Justice referred five questions to the ECJ for a preliminary ruling on the interpretation of the Association Agreement and the Plant Health Directive. The English Court essentially asked whether, in the light of the above provisions, the UK authorities could legally permit the importation of products accompanied by 'movement and phytosanitary certificates issued by authorities other than the competent authorities of the Republic of Cyprus'.[24]

The UK, supported by the Commission, stressed the need for a pragmatic interpretation of the relevant provisions in the light of their scope and the unique situation in Cyprus rather than insistence on the technical requirements of the legislation. This is the reason why they argued that the relevant certificates issued by the authorities in northern Cyprus should be accepted as valid. To support their position, they sustained that the Association Agreement was concluded to apply to the whole territory of the Republic of Cyprus as envisaged in the Cyprus Agreements. They then relied upon the non-discrimination clause laid down in Article 5 of the Agreement to argue that to view the movement certificates issued by the authorities in northern Cyprus as invalid would be tantamount to depriving the population residing in the North from the benefits of the Agreement. Conversely, the acceptance of the certificates would not amount to recognition of the TRNC[25]

[23] For a more detailed account of that case see in general M Cremona, 'Case C-432/92 *R. v Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and Others*, Judgment of 5 July 1994' (1996) 33 *Common Market Law Review* 125; N Emiliou, 'Cypriot Import Certificates: some Hot Potatoes' (1995) 20 *European Law Review* 202; P Koutrakos, (2003) 'Legal Issues of EC-Cyprus Trade Relations' 52 *International and Comparative Law Quarterly* 489.

[24] *Anastasiou I*, para 15.

[25] On the issue of acceptance of certificates issued by unrecognised authorities, see Talmon (n 5) 742–749.

but represented the 'necessary and justifiable corollary of the need to take the interests of the whole population of Cyprus into account'.[26] The Commission, in support of this point, referred to the Advisory Opinion of the International Court of Justice on Namibia in 1970.[27]

The Court of Justice, having determined the direct effect of the 1977 Origin Protocol,[28] held that, although the Republic of Cyprus cannot fully exercise its powers in northern Cyprus, and thus problems in connection with the application of the Association Agreement have been raised, 'a departure from the clear, precise', unconditional and as such directly effective provisions of the Origin Protocol was not justified.[29] Turning to the substance of the case, the Court stressed that the system, whereby movement certificates were regarded as evidence of the origin of products, was founded on the 'principle of mutual reliance and cooperation between the competent authorities of the exporting and importing States'.[30] It also stated, in paragraph 39 of the judgment, that the relationship between the competent authorities of the exporting State and those of the importing State should be based on 'total confidence in the system of checking the origin of products as implemented by the competent authorities of the exporting State'. The importing State must be 'in no doubt that subsequent verification, consultation and settlement of any disputes in respect of the origin of products or the existence of fraud will be carried out efficiently with the cooperation of the authorities concerned'. However, the non-recognition of the de facto regime in the North 'neither by the Community nor by the Member States'[31] excluded the possibility of mutual reliance and recourse to administrative cooperation between the authorities of northern Cyprus and those of the Member States at the level envisaged under the 1977 Protocol. In those circumstances, the acceptance of movement certificates not issued by the competent authorities of 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 Origin Protocol.[32]

It is interesting that 16 years after the delivery of this landmark decision, the Court faced a similar question arising from the ramifications of another age-old

[26] *Anastasiou I*, paras 31–34.

[27] Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, [1971] International Court of Justice Reports 16, 56. The thrust of this Opinion of the ICJ was that, following the illegal administration of Namibia by South Africa, the sanctions imposed on the latter should not deprive the population of the former of any advantages derived from international cooperation.

[28] *Anastasiou I*, para 27. The Court citing Case C-12/86 *Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719 set out its standard conditions for the direct effect of Community agreements with non-Member States (para 23). It also took the view that earlier cases also supported the direct effect of rules of origin, following the Advocate General in citing Case C-218/83 *Les Rapides Savoyards and Others v Directeur des douanes et droits indirects* [1984] ECR 3105 and Case C-12/92 *Criminal Proceedings against Huygen and Others* [1993] ECR I-6381.

[29] *Anastasiou I*, para 37.

[30] *Ibid*, para 38.

[31] *Ibid*, para 40.

[32] *Ibid*, para 41.

dispute. The *Brita* case[33] concerned the interpretation of the EC-Israel Association Agreement[34] and the EC-PLO Association Agreement.[35] In fact, the German authorities had refused to grant a company called Brita preferential treatment with regard to the importation of products manufactured in the West Bank. The Court used this opportunity to reaffirm that 'the validity of certificates issued by authorities other than those designated by name in the relevant association agreement cannot be accepted' citing *Anastasiou I*.[36]

Turning back to *Anastasiou I*, the Court of Justice also rejected the argument of the Commission regarding the interpretation of the non-discrimination clause of Article 5. It stated that the acceptance of certificates issued by the authorities in the 'Areas' would be tantamount to an alteration of the obligations under the Association Agreement and the Protocol. In support of this argument, it referred to Article 3 of the Agreement, according to which the then EEC was under a duty to refrain from jeopardising the achievement of the aims of the Agreement. This entails that no means of proof of the origin of the products, other than that expressly provided for in the Origin Protocol, could be unilaterally adopted by the then Community.

> Any alternative means of proof must be discussed and decided upon by the Community and the Republic of Cyprus within the framework of the institutions established pursuant to the Association Agreement and then applied in a uniform manner by the two Contracting Parties.[37]

Interestingly enough, the Court did not address at all the argument of the Greek Government that the acceptance of certificates issued by authorities in northern Cyprus would equate to violating a number of UN Security Council Resolutions which call upon all members of the international community not to recognise the regime in the North. Nevertheless, the strict interpretation of the 1977 Protocol was essential in order to 'ensure uniform application of the Association Agreement in all Member States'.[38] After all, the existence of different practices among the Member States 'creates uncertainty of a kind likely to undermine the existence of a common commercial policy and the performance by the then Community of its obligations under the Association Agreement'.[39] According to Koutrakos, the approach outlined above illustrates that the Court seeks to ensure the uniformity and effectiveness of EU law while at the same time 'intervening as little as possible in an issue which is highly charged in political terms'.[40] Such an approach is 'consistent with the case-law in other areas of trade policy with significant foreign

[33] Case C-386/08 *Brita GmbH v Hauptzollamt Hamburg-Hafen* (judgment 25 February 2010) [not yet reported].
[34] [2000] OJ L147/3.
[35] [1997] OJ L187/3.
[36] *Brita* (above n 33) para 57.
[37] *Anastasiou I*, para 46.
[38] *Ibid*, para 54.
[39] *Ibid*, para 53.
[40] Koutrakos, 'Legal issues of EC-Cyprus Trade Relations' (above n 23) 493.

policy overtones, namely economic sanctions against third countries and exports of dual-use goods'.[41]

With regard to phytosanitary certificates, although the interpretation of the Plant Health Directive did not involve specific obligations towards a third country contained in an international agreement, the Court gave importance to the need for certainty and uniformity. More specifically, it held that the system of protection against the introduction of harmful organisms laid down in the Plant Health Directive was based essentially 'on a system of checks carried out by experts lawfully empowered for that purpose by the Government of the exporting State and guaranteed by the issue of the appropriate phytosanitary certificate'.[42] The cooperation, which was necessary to achieve the objective of the Directive, could not be established with authorities who were 'not recognised either by the Community or by the Member States'.[43] Consequently, the term 'authorities empowered', appearing in Article 12(1)(b) of the Plant Health Directive, was to be interpreted 'as referring exclusively, with regard to imports of products from Cyprus, to the authorities empowered by the Republic of Cyprus to issue phytosanitary certificates'.[44]

Finally, the Court dealt with the possibility, addressed by the UK Court's third, fourth and fifth questions, that it is not practically possible for Turkish Cypriot exporters to obtain certificates issued by the competent authorities of the Republic of Cyprus, and that there are significant barriers to exporting their products via the Government Controlled Areas. The Court, in paragraph 66 of its judgment, merely referred to these as 'hypothetical circumstances' which do not justify any alteration to the conclusions it has reached.

On those grounds, the ECJ held that the Origin Protocol and the Plant Health Directive had to be interpreted as precluding the acceptance, by the national authorities of Member States, of movement and phytosanitary certificates issued by authorities other than those of the Republic of Cyprus, when citrus fruit and potatoes were directly imported from northern Cyprus.[45] Without valid movement and phytosanitary certificates, Turkish Cypriot goods could still be imported into the then EC but were treated as goods from a country not associated with the EC, thus exposing them to import duties ranging from three per cent to 32 per cent.

2.3 *Anastasiou II*

In the aftermath of *Anastasiou I*, exporters, who had until then been shipping citrus fruit from the northern part of Cyprus to the UK under phytosanitary certificates issued by TRNC officials, concluded an agreement with a company established in Turkey. This agreement provided that the ship carrying the citrus fruit from

[41] *Ibid.*
[42] *Anastasiou I*, para 61.
[43] *Ibid*, para 63.
[44] *Ibid*, para 64.
[45] *Ibid*, para 67.

northern Cyprus would dock in the Turkish port of Mersin for less than 24 hours, where Turkish officials would inspect the cargo on board the ship and issue a Turkish certificate, before it continued its voyage to the UK.[46] Anastasiou and Others applied for an order restraining the Minister from allowing citrus fruit, imported in those circumstances, into the UK. It was the appeal against a Court of Appeal judgment that made the House of Lords refer five questions to the ECJ for a preliminary ruling on the interpretation of the Plant Health Directive.

Thus, in *Anastasiou II*, the Court was asked whether EU law permitted a Member State to allow plants originating in a non-member country into its territory where the required certificates were issued by the authorities of another non-member country and not by the authorities of the non-member country of origin.[47] Moreover, the House of Lords asked whether the reasons why a phytosanitary certificate was not issued in the plants' country of origin had to be taken into account by an importing Member State in determining whether the relevant certificate met the requirements laid down by the Directive.[48]

Anastasiou and Others, and the Greek Government, argued that the Plant Health Directive required that phytosanitary certificates should always be issued by the competent authorities of the country of origin of the products. Even though, where there were certain special requirements that could be fulfilled without difficulty elsewhere, additional certificates could be issued by the authorities of a consignor country other than the country of origin.[49] This argument was not accepted by the Court.

Interestingly enough, the judgment of the ECJ starts off with a reference to the thrust of *Anastasiou I*. In paragraph 22 of its judgment it reiterated that the system provided by the Plant Health Directive 'is based essentially on a system of checks carried out by experts lawfully empowered for that purpose by the Government of the exporting State and guaranteed by the issue of the appropriate phytosanitary certificate'.[50] It also stressed the need for cooperation between the authorities of the exporting State and those of the importing State.[51] Those considerations, however, do not necessarily

> imply that the Directive is to be interpreted as meaning that a Member State may not admit into its territory produce that is accompanied not by a phytosanitary certificate from the country of its origin but only by a certificate issued by a non-member consignor country.[52]

In support of this argument, it held that by requiring phytosanitary certificates to be issued by the 'authorities empowered for this purpose' in the exporting country, Article 12(1)(b) in no way stated that the authorities in question had to be

[46] *Anastasiou II*, para 11.
[47] *Ibid*, para 14.
[48] *Ibid*, para 39.
[49] *Ibid*, para 15.
[50] *Ibid*, para 22.
[51] *Ibid*, para 23.
[52] *Ibid*, para 24.

those of the country in which the goods originated.[53] Moreover, Annex V to the Directive, which covers the products in question, clarified that the certificate could be issued by the authorities of either the country of origin or the consignor country.[54] Furthermore, Article 9(1) of the Plant Health Directive, according to which phytosanitary certificates related to products which are subject to special requirements should be issued in the country of origin, provides for an exception in cases where the phytosanitary requirements could be satisfied elsewhere.[55]

The Court further stressed that the objective of the Directive, which was to protect the territory of the then EC from the introduction and spread of organisms harmful to plants, could also be attained without requiring plants originating outside the then Community to undergo a certification procedure in their country of origin.[56] The Court assumed that the special requirements, to which the phytosanitary certificates should attest, could be satisfied in any country where they have remained 'for such time and under such conditions as to enable the proper checks to be completed'.[57]

On those grounds, the ECJ decided that, in the absence of a certificate issued by the relevant authorities of the country of origin, the Plant Health Directive permitted Member States to admit plants originating in a non-member country into their territory, and accompanied by a certificate issued in a non-member country from which they did not originate, provided that three conditions are fulfilled. Firstly, the plants have to be imported into the territory of the country where checks had taken place before being exported from there to the EC. Secondly, they have to remain in that country for such time and under such conditions as to enable the proper checks to be completed. Thirdly, they should not be subject to special requirements that could only be satisfied in their place of origin.[58] It also held that it was not for the Member States concerned 'to take account of the reasons for which a phytosanitary certificate' had not been 'issued in the country of origin of the plants in determining whether the certificate' complied with the requirements of the Directive.[59]

The Court did not rule, however, on the question whether the special requirements applicable to the citrus fruit at issue in the main proceedings could be fulfilled at places other than the fruit's place of origin. That question, thus, remained for the House of Lords to decide.

2.4 *Anastasiou III*

When the House of Lords resumed its consideration of the case, Anastasiou and Others argued before the Court that the citrus fruit at issue in those proceedings

[53] *Ibid*, para 25.
[54] *Ibid*, para 27.
[55] *Ibid*, para 28.
[56] *Ibid*, para 32.
[57] *Ibid*, para 36.
[58] *Ibid*, para 38.
[59] *Ibid*, para 42.

was indeed subject to the special requirement, laid down in item 16.1 of Annex IV, Part A, Section I of Plant Health Directive. According to that special requirement, the packaging of the citrus fruit at issue should bear an appropriate origin mark, which, in their submission, could be satisfied only in the country of origin. Thus, the Minister of Agriculture, Fisheries and Food was not entitled to accept the phytosanitary certificate issued by the Turkish authorities.

Consequently, the House of Lords referred two questions to the Court of Justice for preliminary ruling.[60] First, it wished to ascertain whether the Plant Health Directive could be interpreted as allowing a phytosanitary certificate to be issued by the authorities of a non-member country, which was not the plants' country of origin, when the plants were subject to the special requirement that their packaging had to bear an appropriate origin mark. Second, it asked whether the amendments made to items 16.2 and 16.3 of Plant Health Directive by Commission Directive 98/2/EC[61] affect that interpretation.[62]

By referring to its judgments in *Anastasiou I* and *Anastasiou II*,[63] the ECJ reaffirmed that phytosanitary certificates issued by a non-member country, other than the country of origin, did not benefit from a presumption of accuracy comparable to that attaching to certificates in the plants' country of origin.[64] On the other hand, it stressed that the only special requirements that could be fulfilled, at places other than that of origin, within the meaning of Article 9(1) of the Plant Health Directive, were requirements which could be met under conditions for ensuring plant health as satisfactory as those at the plants' place of origin.[65]

Having noted this, the Court pointed out, in paragraph 56 of its judgment, that the analysis of items 16.1 to 16.4 highlights the importance of the special requirement 'to affix an appropriate origin mark to the packaging of products where they come from a country known to be free from harmful organisms'. Since Cyprus is considered to be one of those countries, the only special requirement that is applicable to the citrus fruit in question is the one laid down in item 16.1, according to which, on the one hand, the produce should be free from peduncles and leaves and, on the other, an appropriate origin mark should be affixed to its packaging.[66]

With regard to the former, the Court admitted that it could be satisfied on the basis of a special inspection even in a non-member country other than the one from which the products originate.[67] As far as the latter was concerned, however, the Court noted

[60] *Anastasiou III*, para 23.

[61] Commission Directive 98/2/EC of 8 January 1998 amending Annex IV to Council Directive 77/93/EEC on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community [1998] OJ L15/34. By those amendments, an official statement that citrus fruit originating in third countries was free from the harmful organisms referred to in those items was required prior to all imports into the EC, even where the products originated in a country recognised as being free from those organisms, which was the case in Cyprus (Commission Decision 98/83/EC of 8 January 1998, [1998] OJ L15/41); *Anastasiou III*, para 15.

[62] *Anastasiou III*, para 25.

[63] *Ibid*, paras 45–47.

[64] *Ibid*, para 48.

[65] *Ibid*, para 55.

[66] *Ibid*, para 57.

[67] *Ibid*, para 58.

that such a special requirement consisted of the only guarantee for the importing Member States that the produce was *a priori* free from the relevant harmful organisms. As such, it could be exempted from the requirements for an official statement in the country of origin, laid down in items 16.2 to 16.4.[68] Consequently, it would be paradoxical if such a mark, that is intended to certify the origins of the products, 'could be issued outside the country of origin, after the plants have been imported'.[69]

Furthermore, the Court of Justice rejected the argument put forward by the UK Government and the company Cypfruvex, according to which the special requirement relating to an appropriate origin mark could be fulfilled in a non-member country, other than the country of origin, on the basis of a check as to the mark's validity by the inspector empowered in that other country to draw up the phytosanitary certificate.[70] It held that such an analysis of item 16.1 was contrary to the purpose of that item which requires the actual performance of that marking requirement. Moreover, the inspector responsible for issuing the phytosanitary certificate in the non-member country is not in the same situation as his/her counterpart in the country of origin for the purpose of detecting any falsification of the origin mark designed to derive improper advantage from a satisfactory phytosanitary finding as to the country of origin since s/he would only be able to act on the basis of invoices or transport or dispatch documents. More importantly, the Court referred to its decision in *Anastasiou I* by ruling that the cooperation which the competent authorities of the importing Member State established with those of a non-member country, other than the country of origin, could not be under conditions as satisfactory as direct cooperation with the competent authorities of the country of origin.[71] Finally, the ECJ decided that the aforementioned interpretation of item 16.1 was not invalidated by the amendments which Directive 98/2/EC made to items 16.2 and 16.3 of the Plant Health Directive.[72]

On those grounds, on 30 September 2003, the Court of Justice decided that the special requirement that an appropriate origin mark be affixed to the plants' packaging, laid down in item 16.1, could be fulfilled only in the country of origin of the plants concerned and that the amendments which Directive 98/2/EC made to items 16.2 and 16.3 of the Plant Health Directive did not affect that interpretation. Consequently, the phytosanitary certificate required in order to bring those plants into the then EC should be issued in their country of origin by, or under the supervision of, the competent authorities of that country.[73] Thus, the relevant authorities of the Republic of Cyprus were the only competent authorities for affixing an origin mark to the plants' packaging. In a way, by that *dictum* the Court paved the way for the Green Line Regulation regime according to which goods produced in northern Cyprus can penetrate the Union market through Government-controlled areas.

[68] *Ibid*, para 59.
[69] *Ibid*, para 60.
[70] *Ibid*, para 62.
[71] *Ibid*, paras 63–65.
[72] *Ibid*, para 71.
[73] *Ibid*, para 75.

2.5 Remarks

In all three cases, the Court's effort to avoid any interference with the situation in Cyprus is all too apparent. In order to achieve this, the ECJ approaches the relevant legislation, as if it were to be applied in vacuum, focusing on its technicalities. In fact, the reasoning of the Court is a *par excellence* example of the pragmatic approach that the Luxembourg Court has adopted when dealing with issues arising from the conflict. As we have already seen in *Apostolides v Orams*,[74] the Court—albeit conscious about the political consequences of its decisions on a trade issue arising from the conflict—favoured a seemingly depoliticised, overly technical approach.

So, by its judgments in the *Anastasiou* saga the Court, politically speaking, banned direct trade between the EU and the secessionist entity in the North, and left the option of indirect trade through Turkey open for products that do not have to comply with certain special requirements and indicated that it is possible for goods produced in northern Cyprus to avoid being treated as third country goods through their import by and under the supervision of the competent authorities of the Republic. From a legal point of view, however, it is rather difficult to explain why direct reliance upon the authorities of a non-recognised entity would have affected the objective of the system established under the Plant Health Directive, whereas indirect reliance would have not.

In any case, although those judgments concern only citrus fruits, the *Anastasiou* decisions resulted in an even greater economic isolation of the Turkish Cypriot community given the limited exporting capacity of the breakaway State in the North[75] and that following the Turkish military invasion, the Government of the Republic of Cyprus declared all ports of entry into the Republic closed, which are situated North of the Green Line. It has lately been suggested that the ECJ, by

> its doctrinal reasoning, has established the judicial foundations towards the regularisation of the trading relationship between the northern part of Cyprus and the EU, guided by the existing political framework of the EU in this matter and by the rules of the Internal Market.[76]

In other words, it has been supported that the Court of Justice, when ruling on *Anastasiou*, in essence was calling on the communities and the Union to establish a different trading relationship and was advocating greater economic and European integration of the Turkish Cypriot community. Although this social constructivist reading of the case law of the Court is very interesting, it is rather improbable that this was the ECJ's intention, given the submissions of the parties in the proceedings and the time at which *Anastasiou III* was handed down.

[74] Case C-420/07 *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams* (Grand Chamber judgment 28 April 2009) [2009] ECR I-3571.

[75] In 1994, agricultural products accounted for 48.1 per cent of total exports. In 1996 the relevant figure was 44 per cent. Citrus fruit account for almost two-thirds of the agricultural exports—potatoes and vegetables account for much of the rest. On the Turkish Cypriot economy in general, see RJA Wilson, *Cyprus and the International Economy* (London, Macmillan/St. Martin's Press, 1992).

[76] Laulhé Shaelou, 'The European Court of Justice', (above n 2) 635.

Instead, it is far more probable that the ECJ, taking into account international law concerns and the wider political effects that a different decision would have triggered, limited the right of trade of the Turkish Cypriots even though their future status as EU citizens, at the time of *Anastasiou III*, was certain. In other words, a decision that would have upheld the Turkish Cypriot practice would have equated an 'upgrade' of the status of the regime in the North. At a time when the negotiations of the Annan Plan were taking place, that would have been far from constructive.

In the aftermath of the *Anastasiou* saga and the rejection of the Annan Plan, it was a matter for the Union political institutions to lift the economic isolation of the Turkish Cypriots. This is why the purpose of the Green Line Regulation, with regard to the crossing of goods, was to provide a legal formula according to which goods originating in the 'Areas' would cross the line and be circulated, not as third country goods following the decisions in the *Anastasiou* saga, but rather as Union goods.

3. GREEN LINE REGULATION'S PROVISIONS ON CROSSING OF GOODS[77]

3.1 Goods Arriving from Northern Cyprus

Given the situation of economic isolation that was supported by the *Anastasiou* case law of the ECJ and the failure to reach a comprehensive settlement, the EU was determined to set the rules in order to regularise trade between the two parties in the conflict and between northern Cyprus and other EU Member States via the line.[78] This scope should have been achieved, however, without recognising any other authority on the island apart from the legitimate Cypriot Government. The main tool for tackling this fundamental recognition conflict, for allowing the Turkish Cypriot goods to cross the line and also to penetrate the Union market as EU goods via the line, is the authorisation of the Turkish Cypriot Chamber of Commerce, with the agreement of the Government of the Republic, to issue accompanying documents. In other words, the authorisation of a local agency which could act as a formal agent acceptable to both sides, for the purposes of certification, is introduced by the Green Line Regulation in order to solve this Gordian knot problem.

The Green Line Regulation, together with the Commission Regulation on the implementation of Article 4 of the Green Line Regulation,[79] set out a special regime for the crossing of goods over the Green Line. More analytically, recital (4) of the Regulation reaffirms that, since the Green Line does not constitute an external border of the Union, special rules concerning the crossing of goods need

[77] For a comprehensive analysis of the crossing of goods via the Green Line see generally, N Skoutaris, 'The Application of the Acquis Communautaire in the Areas not under the Effective Control of the Republic of Cyprus: The Green Line Regulation', (2008) 45 *Common Market Law Review* 727, 740–755.

[78] See above n 4.

[79] Commission Regulation (EC) No 1480/2004 of 10 August 2004 lays 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, [2004] OJ L272/3.

to be established. The prime responsibility for those rules belongs to the Republic. According to Article 4(1) of the Green Line Regulation, goods may be introduced in the Government Controlled part of the island on the condition that they are wholly obtained in the 'Areas' or have undergone their last, substantial, economically justified processing or working, in an undertaking equipped for that purpose, in those 'Areas' within the meaning of Articles 23 and 24 of Council Regulation (EEC) No 2913/92 establishing the Union Customs Code.

According to Recital (4) and Article 4(9) of the Green Line Regulation and Article 4(1) of Commission Regulation 1480/2004, the movement across the line of live animals and animal products is prohibited until sufficient information is available with regard to the state of animal health,[80] with the exception of fresh fish and honey.[81] Hence, the term 'goods wholly obtained' in those Areas as defined in Article 23 of Regulation 2913/92 means, for the purposes of the Green Line Regulation, mainly mineral products extracted in those areas, vegetable products harvested therein and goods which are produced therein exclusively from the formerly mentioned goods or from their derivatives.

On the other hand, the ECJ has adequately defined the term 'last, substantial, economically justified processing or working' in *Brother International v Hauptzollamt Giessen*.[82] In that judgment, it ruled that the mere assembly of previously manufactured parts originating in a country, different from that in which they were assembled, is sufficient to confer on the resulting product the origin of the country in which assembly took place. The only precondition that has to be satisfied, however, is that such assembly—from a technical point of view and having regard to the definition of goods in question—represents the decisive production stage during which the use to which the component parts are to be put has become definite and the goods in question have been given their specific qualities. If the application of that criterion, however, is not conclusive, it is necessary to examine whether all the assembly operations in question result in an appreciable increase in the commercial, ex-factory value of the finished product.

The goods, which cross the line only at the crossing points listed in Annex I[83] and the crossing points of Pergamos and Strovilia under the authority of the Eastern Sovereign Base Area,[84] are subject to the requirements and undergo the checks as required by EU legislation as set out in Annex II of the Regulation.[85] According to Annex II, the goods crossing the line are subject to veterinary, phytosanitary and

[80] Art 4(9) of the Green Line Regulation further provides: 'Prohibitions in respect of specified live animals or animal products may be lifted by Commission decisions laying down the conditions applicable for trade adopted in accordance with the procedure referred to in Article 58(2) of Regulation (EC) No 178/2002'.

[81] Commission adopted Decision 2007/330/EC of 4 May 2007 lifting prohibitions on the movement of certain animal products on the island of Cyprus under Council Regulation (EC) No 866/2004 and laying down conditions for the movement of those products [2007] OJ L123/30.

[82] Case C-26/88 *Brother International v Hauptzollamt Giessen* [1989] ECR 4253.

[83] Agios Dhometios, Astromeritis—Zodhia, Kato Pyrgos—Karavostasi, Kokkina—Kato Pyrgos, Pachyammos—Kokkina, Ledra Palace and Ledra Street.

[84] Art 4(3) of the Green Line Regulation.

[85] Art 4(4) of the Green Line Regulation.

food safety requirements and checks as set out in measures adopted under Article 43 TFEU[86] and/or Article 168(4)(b) TFEU.[87] In particular, relevant plants and plant products should have undergone phytosanitary checks by authorised experts to verify that the provisions of EU phytosanitary legislation[88] are complied with before they cross the line to Government-controlled areas.

More importantly, they should be accompanied by a document issued by the Turkish Cypriot Chamber of Commerce, which was duly authorised by the Commission in agreement with the Government of Cyprus[89] by Commission Decision 2004/604/EC.[90] The accompanying document, according to Article 2(1) of Commission Regulation 1480/2004, contains all the particulars necessary for identifying the goods to which it relates. In particular, it contains a description of the goods, the item number, marks and numbers of goods, if any, the number and kind of packages, the volume and value of the goods, the name and the address of the producer of the goods and the name and the address of the consignor and the consignee. It also ensures the compliance with the Union rules of origin and unambiguously certifies that the goods to which it relates originate in northern Cyprus. After the goods have crossed the line, the competent authorities of the Republic check the authenticity of the accompanying document.[91] The only exception to this rule is provided by Article 4(10) of the Green Line Regulation. According to this provision, and in derogation from the standard rules, no accompanying document is needed for the supply of the Turkish Cypriot population of the village of *Pyla* located within the UN Buffer zone, according to Article 4(10).[92]

Article 4(2) of the Green Line Regulation provides that goods which are wholly obtained in northern Cyprus, or have undergone their last, substantial, economically justified processing or working in an undertaking equipped for that purpose in that area, are not subject to customs duties or charges having equivalent effect when they are introduced in the Government Controlled Areas. Despite the amendments introduced by Council Regulation 293/2005[93] agricultural products were largely

[86] Ex Art 37 TEC.

[87] Ex Art 152(4)(b) TEC.

[88] Council Directive 2000/29/EC of 8 May 2000 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community, [2000] OJ L169/1.

[89] Art 4(5) of the Green Line Regulation.

[90] Commission Decision 2004/604/EC of 7 July 2004 on the authorisation of the Turkish Cypriot Chamber of Commerce according to Article 4(5) of Council Regulation (EC) No 866/2004, [2004] OJ L272/12.

[91] Art 4(6) of the Green Line Regulation.

[92] The Commission has characterised the occasional practice of the 'authorities of the Eastern Sovereign Base Area of asking for accompanying documents in the case of goods destined for the traditional supply of the Turkish Cypriot population of the village *Pyla*' as an example of a barrier to the free movement of goods; Communication from the Commission Report on the implementation of Council Regulation (EC) 866/2004 of 29 April 2004 and the situation resulting from its application; Brussels, 20.9.2007, COM(2007)553 (hereafter 2007 Commission's Report), 8.

[93] Council Regulation (EC) No 293/2005 of 17 February 2005 amending Regulation (EC) No 866/2004 on a regime under Article 2 of Protocol 10 to the Act of Accession as regards agriculture and facilities for persons crossing the line, [2005] OJ L50/1. In the Council Document 6290/05 of 14 February 2005 it is noted that the Council, in its meeting on 17 February 2005, was invited to adopt the Regulation 293/2005

excluded by the abovementioned duty-free regime during the first four years of the existence of the Green Line Regulation. Given that the enhancement of trade and economic interaction on the island was deemed necessary,[94] the duties on agricultural products originating in the 'Areas' have been removed thus avoiding cumbersome procedures according to Article 1 of Council Regulation 587/2008 which has amended Article 4(2) of the Green Line Regulation. To allow for that amendment, the safeguard clause contained in the Green Line Regulation has been strengthened.[95] Although this amendment has been implemented smoothly, the Commission noted that it did not lead to a significant increase in trade.[96]

Be that as it may, it is important to note that, according to Article 4(7), goods that lawfully cross the line should be treated as not being imported to the EU by the competent authorities of the Republic of Cyprus within the meaning of Article 7(1) of Council Directive 77/388/ECC[97] or as being subject to excise duty within the meaning of Council Directive 92/12/EEC,[98] provided the goods are destined for consumption in the Republic of Cyprus. This situation is comparable to the former Protocol on German Internal Trade which allowed goods from Eastern Germany to enter into Western Germany without complying with ordinary EU formalities for third country goods.[99]

Moreover, in November 2006, following a proposal of the Government of the Republic, the Value Added Tax Committee[100] even endorsed a simplified scheme

and to insert in its minutes the unilateral statement by the Republic of Cyprus set out in the Annex of that document. According to that declaration: 'In agreeing to the amendment of Article 4(2) of Council Regulation (EC) No 866/2004, the Government of the Republic of Cyprus reiterates its position that, as sovereign authority, entitled to exercise lawful jurisdiction over the entire territory of the Republic of Cyprus, it is the sole competent authority to designate the points of entry to and exit from the territory of the Republic. The Government of the Republic of Cyprus recalls that all ports, harbours and airports situated in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control have been declared closed in accordance with the rules of international law confirmed by the International Court of Justice. Thus, ports, harbours and airports that have not been expressly declared open and duly authorised by the Government of the Republic of Cyprus as points of entry and exit for passengers and goods, may not lawfully used for inward or outward movement of goods'.

[94] Recitals (3) and (4) of Council Regulation (EC) No 587/2008 of 16 June 2008 amending Regulation (EC) No 866/2004 on a regime under Article 2 of Protocol 10 to the Act of Accession concerning rules on goods, services and persons crossing the Green Line in Cyprus, [2008] OJ L163/1.

[95] Art 11(4) of the Green Line Regulation now provides that in the event of an emergency related to a threat or risk to public or animal and plant health, the appropriate procedures set out in the Union legislation in Annex II of the Regulation apply. 'In the event of other emergencies, in particular those caused by irregularities, trade distortions or fraud, or where other exceptional circumstances arise which require immediate action, the Commission may, in consultation with the Government of the Republic of Cyprus, apply forthwith such measures as are strictly necessary to remedy the situation'.

[96] Report from the Commission to the Council, Annual Report on the implementation of Council Regulation (EC) 866/2004 of 29 April 2004 and the situation resulting from its application; Brussels, 14.09.2009, COM(2009)478 (hereafter 2009 Commission's Report) 10.

[97] Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes—Common system of value added tax: uniform basis of assessment, [1977] OJ L145/1.

[98] Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, [1992] OJ L76/1.

[99] Bundesgesetzblatt 1957 II, 984.

[100] Art. 398 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (previously Art. 29(2) of Council Directive 77/388/EEC) [2006] OJ L347/1.

applicable to Turkish Cypriot traders established in northern Cyprus who sell goods directly to end consumers in the Government Controlled Areas. According to this scheme, Turkish Cypriot traders can account for VAT directly at the line and they do not have to be registered for VAT purposes in the Government Controlled Areas.[101]

On the other hand, the competent authorities of the Republic of Cyprus should inform the Commission of cases of reasonable doubt as to the compliance of the goods with the origin criteria. In such cases, the authorities should allow the goods to cross the line under the aforementioned conditions set out in Article 4(2) of the Green Line Regulation. In case, however, it is established that the documents have been issued without the conditions having been properly fulfilled, all duties and taxes due on the release of the goods into the Union customs territory for free circulation shall be due at the rate applicable to third countries in the absence of any preferential treatment.[102]

So, in accordance with Article 4(11) of the Regulation, goods that comply with all the abovementioned conditions[103] have the status of EU goods within the meaning of Article 4(7) of Regulation (EEC) No 2913/92 and as such they can be released for free circulation into the customs territory of the EU. In other words, goods that would have been treated as third country goods if the Green Line Regulation were not in place, provided that they comply with the rules set by that Regulation, are considered EU goods.

It should be noted, however, that in the event of goods originating in northern Cyprus being transferred to other Member States, their previous entry into the Government Controlled Areas is treated as having been an importation of goods in accordance with Article 7 of Council Directive 77/388/EEC.[104] For such importation, the owner of the goods or any other person designated or accepted as being liable by the Government of the Republic is liable for the payment of import VAT in accordance with Article 21(4) of that Directive.[105]

[101] 2007 Commission's Report, 9.

[102] Art 2(4) of Commission Regulation 1480/2004 (above n 79).

[103] Where goods consist of plants, plant products and other objects covered by Part B of Annex V to Directive 200/29/EC, which contains mainly plants and plant products that are potential carriers of harmful organisms of relevance for the entire Union, independent phytosanitary experts, appointed by the Commission in coordination with the TCCoC shall inspect the goods at the stage of production and again at harvest and at the marketing stage (Art 3(1) of Commission Regulation 1480/2004). When the above experts establish that the relevant plants and plant products or other objects in the consignment comply with the relevant requirements and checks, as set out in Annex II of the Green Line Regulation, they fill in the 'Report of phytosanitary inspection' (Annex III of Commission Regulation 1480/2004), which is added as a supplement to the accompanying document (Art 3(2) of Commission Regulation 1480/2004). They consequently seal the means of transportation in such a way as to prevent any opening of the consignment until it crosses the line (Art 3(3) of Commission Regulation 1480/2004) and, upon arrival in the Government Controlled Areas, the competent authorities examine the consignment (Art 3(4) of Commission Regulation 1480/2004). It is the competent authorities of the Republic of Cyprus and of the Eastern Sovereign Base area that should ensure that goods crossing the line comply with the EU rules on health, safety, environmental and consumer protection and on the prohibition on the bringing in of counterfeit and pirated goods Art 4(2) of Commission Regulation 1480/2004.

[104] [2007] OJ L145/1.

[105] Art 6 of Commission Regulation 1480/2004 (n 79).

Finally, with regard to the crossing of goods, Article 6(1) provides that goods contained in the personal luggage of persons crossing the line are exempt from turnover tax and excise duty[106] provided they do not have any commercial character and their total value does not exceed 260 euros per person.[107] The Government of the Republic may derogate from the abovementioned provision, for a period no longer than three months, in order to address serious disturbances in a specific sector of its economy caused by the extensive use of the provision by persons crossing the line.

3.2 Temporary Introduction of Goods

Another issue of significant importance that was hindering the economic interaction between the two ethno-religious segments has been that, until June 2008, the Green Line Regulation did not allow transactions that entailed the temporary crossing of goods, such as the ones necessary for either the provision of a service, or in order for goods to be repaired or exhibited. Thus, in such cases, the Republic of Cyprus used to apply a system of *ad hoc* derogations. However, such a scheme was neither in line with the Regulation nor was it transparent.[108] Hence, *de lege ferenda*, this issue has been dealt with in Regulation 587/2008, which amended the Green Line Regulation to the effect that a new Article 4a has been added.

The main scope of the introduction of this new Article has been to encourage the provisions of services by companies established in northern Cyprus across the Green Line and also to facilitate participation by those companies in trade fairs or similar events in the Government Controlled part of the island. At the same time, this provision allows goods destined to be prepared in southern Cyprus to cross the line.[109] Thus, according to Article 4a(1) of the Green Line Regulation, apart from goods that are subject to veterinary and phytosanitary requirements, the personal effects of persons crossing the line, means of transport, professional equipment, goods destined to be repaired and goods destined to be exhibited or used at a public event may be temporarily introduced into the Government Controlled Areas for a period of up to six months. If those goods are not returned to northern Cyprus after the expiry of that period they are subject to confiscation by the relevant customs authorities.[110]

With regard to the personal effects of persons crossing the line and their means of transport, the relevant rules provided by Commission Regulation 2454/93[111] apply

[106] Art 6(2) further provides that '[t]he quantitative limits for exemptions from turnover tax and excise duty shall be 40 cigarettes and 1 litre of spirits for personal consumption'.

[107] Art 3 of Council Regulation 587/2008 (above n 94) increased the ceiling from EUR 135 to EUR 260 in order to encourage economic development of the 'Areas'.

[108] 2007 Commission's Report, 9.

[109] Recital (4) of Council Regulation 587/2008 (n 94).

[110] Art 4a(4) of the Green Line Regulation.

[111] Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code [1993] OJ L253/1.

in the event of temporary introduction in northern Cyprus.[112] For the rest, namely professional equipment, goods destined to be repaired and goods destined to be exhibited, they should be accompanied by a declaration by the person introducing them stating the purpose of their introduction.[113] In addition, the goods should be registered by the relevant customs authorities of the Republic or the UK Sovereign Base Area both when they enter and when they leave the Government Controlled Area and the Eastern Sovereign Base.[114]

3.3 Goods Sent to Northern Cyprus

Article 5 of the Green Line Regulation provides for the rules that apply with regard to goods sent to the areas not under the effective control of the Government of the Republic of Cyprus. According to paragraph 1 of that Article, goods which are allowed to cross the line should not be subject to export formalities. However, the necessary equivalent documentation should be provided upon request, in full respect of the internal legislation, by the authorities of the Republic. The breakaway State in the North, however, has passed a 'law' which makes any flow of trade from South to North subject to reciprocity on the basis of a so-called 'Charter on limitation of export from the TRNC region to South Cyprus and of import from South Cyprus to the TRNC'. Furthermore, according to that 'law', which offers a clear depiction of the competing claims of authority on the island, the Republic of Cyprus has informed the Commission that no goods are allowed to cross the line to the 'Areas' unless they are accompanied by a certificate from the Cyprus Chamber Of Commerce and Industry. In other words, 'the Turkish Cypriot community applies a licensing system which, in principle, "mirrors" the restrictions of the Green Line Regulation'.[115]

In addition, with regard to agricultural and processed agricultural goods, it is critical to note that no export refund is paid when crossing the line.[116] Moreover, Article 5(3) provides that the supply of goods is not exempt under Article 15(1) and (2) of Directive 77/338/EEC, which deal with the supply of goods dispatched or transported to a destination outside the EU. In other words, under the aforementioned provisions, crossing the line with goods into the 'Areas' does not constitute an export to a destination outside the Union. Finally, in accordance with Article 5(4), the movement, removal or export of goods from the customs territory of the EU which are prohibited or subject to authorisation, restrictions, duties, or other charges on export by EU law, is also prohibited.

[112] Art 4a(5) of the Green Line Regulation.
[113] Art 4a(5)(a) of the Green Line Regulation.
[114] Art 4a(5)(b) of the Green Line Regulation.
[115] 2009 Commission's Report, 6.
[116] Art 5(2) of the Green Line Regulation.

3.4 Implementation of the Green Line Regulation with Regard to the Crossing of Goods

Article 11 of the Green Line Regulation provides that the Commission should report to the Council on an annual basis on the implementation of the Regulation and 'the situation resulting from its application'. According to that Article, particular emphasis should be given to the application of Article 4 on goods crossing the line to northern Cyprus and the patterns of trade between the Government Controlled Areas and the Areas not under the effective control of the Republic. It is critical to study the findings in the Commission reports in order to pragmatically assess the partial application of the free movement of goods in northern Cyprus.

During the first five years of the life of the Green Line Regulation framework, an undeniable increase in the total value of goods which actually crossed the line has taken place. During the last reported period (2008–2009), the total value of goods that crossed the line was more than six million euros whereas before 2004 the crossing of goods was virtually nonexistent.[117] Nevertheless, although the TCCoC has been working effectively and professionally because of the support inter alia offered by Member State experts, mobilised through TAIEX, the volume and the value of goods crossing the line has remained limited.[118] This is partly a result of the restricted scope of the Green Line Regulation itself.[119] A World Bank study has shown that the fact that the Green Line Regulation does not allow the crossing of products, brought into northern Cyprus from other EU Member States or Turkey, to the Government Controlled Areas significantly reduces benefits to producers, service providers and consumers on both sides of the line.[120]

Apart from that, the Commission services have also noted, in all reports, the existence of many obstacles to trade across the line despite the fact that the authorities of the Republic have only rather exceptionally refused the crossing of goods.[121] For example, Turkish Cypriot commercial vehicles and, in particular, lorries and buses cannot move freely through the island. The Republic of Cyprus does not accept roadworthiness certificates of commercial vehicles and professional driving licences issued by the authorities of the regime in the North.[122] Moreover, the Commission has taken notice of complaints from Turkish Cypriot traders regarding delays in the clearing of goods and that the authorities of the Republic request additional documentation other than the obligatory accompanying documents.[123]

[117] 2009 Commission's Report, 10.

[118] Communication from the Commission Report on the implementation of Council Regulation (EC) 866/2004 of 29 April 2004 and the situation resulting from its application, Brussels, 14.07.2005 COM(2005) 320 final (hereafter 2005 Commission's Report), 3; 2007 Commission's Report, 11; 2009 Commission's Report, 10.

[119] 2009 Commission's Report, 10.

[120] World Bank, *Sustainability and Sources of Economic Growth in the Northern Part of Cyprus* (Volume I/II, Poverty Reduction and Economic Management Unit, Europe and Central Asia Region, June 8, 2006); www.quickwasp.com/kab/documents.html.

[121] See eg 2005 Commission's Report, 4; 2007 Commission's Report, 12; 2009 Commission's Report, 8.

[122] 2005 Commission's Report, 4.

[123] 2007 Commission's Report, 7–8.

There have also been some difficulties reported for Turkish Cypriot traders to stock their products in shelves of supermarkets in southern Cyprus and to advertise them in parts of the press in the Government Controlled Areas.[124] In the light of the aforementioned reports it is hardly surprising that a recent Report on the intra-island trade has noted the existence of psychological barriers that 'lead to a strong resistance to trade among Greek Cypriots and a strong resentment about trading among Turkish Cypriots'.[125]

More importantly, however, it should be noted that, during the five years of the life of the regime established by the Green Line Regulation, only in two cases were goods which had crossed the line subsequently subject to an intra-Union transaction with another Member State.[126] This proves, in the most emphatic way, that the mechanism provided by the Green Line Regulation has not become an effective device to enable goods, originating in the areas not under the effective control of the Republic, to penetrate the EU market. In other words, although the existing regime provides a workable basis for allowing the passage of goods and, as such, has rightly attracted the attention of experts working on problems in the Caucasus,[127] it needs to be strengthened.

Such a finding, however, should not overshadow the significant success of the EU in creating a legislative framework that enables trade relations between the two parties in conflict but also between the Union and an area where the *acquis* is suspended. The Green Line Regulation has managed to partially but effectively lift the economic isolation of the Turkish Cypriot community and has brought the two ethno-religious segments closer, while taking into account the legitimate concerns of the Government of the Republic. Again, as is the case with regard to the rules concerning the crossing of persons, the Union, in a seemingly neutral, depoliticised and technical way, has facilitated the exercise of a fundamental freedom of Union citizens without recognising any other authority on the island apart from the Cypriot Government.

4. THE COMMISSION'S PROPOSAL FOR A DIRECT TRADE REGULATION

4.1 The Proposal

Following the outcome of the referendums on the Annan Plan, and in view of the vote of the Turkish Cypriot community, the then UN Secretary-General Kofi Annan, reporting on his mission of good offices in Cyprus, expressed his hope that the Members of the UN Security Council 'can give a strong lead to all States to

[124] 2007 Commission's Report, 8; 2009 Commission's Report, 8.

[125] Hatay, Mullen and Kalimeri, *Intra-island Trade in Cyprus* (above n 4) 1–2 and 59–66.

[126] Communication from the Commission Annual Report on the implementation of Council Regulation (EC) 866/2004 of 29 April 2004 and the situation resulting from its application, Brussels 25.09.2006 COM(2006) 551 final (2006 Commission's Report), 5; 2007 Commission's Report, 11.

[127] M Watson, *Growing Together?—Prospects for Economic Convergence and Reunification in Cyprus* (Hellenic Observatory Papers on Greece and Southeast Europe, GreeSE Paper No 7).

cooperate both bilaterally and in international bodies to eliminate unnecessary restrictions and barriers that have the effect of isolating the Turkish Cypriots and impeding their development'.[128] Consequently, the EU Council, on 26 April 2004, invited the Commission 'to bring forward comprehensive proposals' given its declared determination to bring an end to the isolation of the Turkish Cypriot community and to facilitate the reunification of the island by encouraging the economic development of the Turkish Cypriots. Particular emphasis should be placed, according to the Council, on the economic integration of the island and on improving contact between the two communities and with the EU.[129] Thus, the Commission services drafted a proposal for a Council Regulation on special conditions for trade with the areas not under the effective control of the Republic.[130] In addition, a proposal for an instrument of financial support was also drafted, since the Council 'recommended that the 259 million euro already earmarked for the northern part of Cyprus in the event of a settlement now be used for this purpose'.[131]

The latter proposal, which in view of the political situation and with a view to allocating the financial support in the most efficient and rapid way, provided for the rules according to which the earmarked financial assistance of the 259 million euros would be supplied directly to the beneficiaries, was welcomed and eventually adopted by all the Member States. On 27 February 2006, the Council adopted the Council Regulation 389/2006 establishing an instrument for encouraging the economic development of the Turkish Cypriot community in order for the remaining 139 million euros of the money earmarked for northern Cyprus not to be lost. Despite the fact that it would have consisted of a decisive step for the economic integration of the isolated Turkish Cypriot community in the EU by offering a preferential regime for products originating in the 'Areas' entering the Customs Territory of the EU directly, and not via the line, the former proposal met fierce opposition by the Republic and hence it has not yet been adopted. The 'decoupling' of the two Regulations was a declared goal and policy of the Republic during those two years of negotiations.

The initial Commission proposal for a Direct Trade Regulation provided for specific conditions for direct trade between northern Cyprus and EU Member States. It offered a preferential regime for products originating in northern Cyprus and entering the Union Customs Territory.[132] It provided inter alia detailed rules concerning the documents that would certify the origin of goods and which would be issued

[128] Report of the Secretary-General on his mission of good offices in Cyprus of 28 May 2004, UN Doc S/2004/437, para 93.

[129] 8566/04 (Presse 115) (above n 1).

[130] 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, Brussels, 7.7.2004 COM(2004) 466 final; (hereafter proposal for a Direct Trade Regulation).

[131] Proposal for a Council Regulation establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community, Brussels, 7.7.2004 COM(2004) 465 final (hereafter proposal for a Financial Instrument Regulation), 2.

[132] Art 1 of the proposal for a Direct Trade Regulation.

by the TCCoC authorised by the Commission,[133] phytosanitary inspection,[134] food and product safety, taxation issues, communication obligations, and safeguard measures in the event of ineffective cooperation, irregularities or fraud.[135] It proposed that the preferential regime should take the form of a tariff quota system[136] which would be established with a view to encouraging economic development while avoiding the creation of artificial trade patterns or facilitating fraud.[137]

Thus, if the proposal were to have been adopted without any amendments, the direct trade between northern Cyprus and the Union Member States would function as follows. Certain goods arriving from the 'Areas' would be exempt from custom duties and charges having equivalent effect. The TCCoC would issue the necessary certificates of origin. Independent experts would be charged to carry out phytosanitary inspection and reporting so that plants and other products covered by EC Directive 2000/29/EC could also enter the common customs territory. Once those northern Cypriot products enter another Member State they could be released for free circulation into the customs territory of the EU.[138]

The political value of such a legislative device is almost undisputable. It is beyond any reasonable doubt that a direct trade regime would bring the Turkish Cypriot community closer to the Union in accordance with the guidelines of the European Council, and would also help to bridge the economic cleavages between the two ethno-religious segments on the island. To that effect, in a recent report the International Crisis Group has pointed out that the adoption of such a regime 'would give an important signal that the [peace] talks are in earnest and will end with a federal partnership between Greek and Turkish Cypriot States' and 'would also encourage the Turkish Cypriot side to build its capacity for dealing with reunification'.[139]

The Government of the Republic, however, has been particularly concerned about the legal basis of the proposal. In a 25 August 2004 opinion the European Council's Legal Service agreed with the Greek Cypriot position according to which ex Article 133 TEC [now Article 207 TFEU] is not the correct legal basis for such a measure. More significantly, the Republic fears that the arrangements provided by the Direct Trade Regulation will effectively mean the indirect recognition of any authority in the 'Areas' other than the internationally recognised Government. Thus far, the kind of compromise which allowed for the enactment of the Green Line Regulation has not been possible. However, despite being in limbo for the past six years, the measure has been automatically re-introduced to the European Parliament as a pending trade measure on 1 March and is at the moment under active consideration. Thus, it is important to assess the political 'in disguise' debate over the legal basis of the proposal for the Direct Trade Regulation.

[133] Art 5 of the proposal for a Direct Trade Regulation.
[134] Art 6 of the proposal for a Direct Trade Regulation.
[135] Art 7 of the proposal for a Direct Trade Regulation.
[136] Art 4 of the proposal for a Direct Trade Regulation.
[137] Recital (4) of the Preamble of the proposal for a Direct Trade Regulation.
[138] Art 1 of the Proposal for a Direct Trade Regulation.
[139] International Crisis Group, *Cyprus: Reversing the Drift to Partition*, ((2008) Europe Report N°190), 11.

4.2 Legal Assessment

In order to assess the aforementioned concerns of the Government of the Republic, the following legal issues will be addressed with regard to the design of a proposal for a Direct Trade Regulation: First of all, what is the appropriate legal basis for such a Regulation? Secondly, does the proposal present problems with regard to either international law or EU law and especially the principle of loyal cooperation, in view of the fact that the Government of the Republic of Cyprus has declared the closure of ports in northern Cyprus? And thirdly, is Article 2(2) of the proposal legally correct, insofar as it would allow for the Commission, on its own and without the agreement of the Government of the Republic, to designate the Turkish Cypriot Chamber of Commerce or other body as a competent authority for implementation purposes? Firstly, as far as the legal basis of the Regulation is concerned, we note that

> the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review . . . Those factors include in particular the aim and content of the measure.[140]

In the case of the Commission proposal for a Direct Trade Regulation, according to Recital (3), its aim is to 'facilitate trade between [the] areas and Member States other than Cyprus'. In addition, the essential content of the proposal is the free circulation of products originating in northern Cyprus which are transported directly from there into the EU customs territory with 'exemption from customs duties and charges having equivalent effect within the limits of annual tariff quotas' determined by the Commission[141] in accordance with Article 1(1) of the proposal. Finally, the proposal is based on ex Article 133 EC [now Article 207 TFEU].

The critical question here is whether the proposed Regulation foresees the partial 'withdrawal of the suspension' of the *acquis*. If that is the case, Article 1(2) of Protocol No 10 of the Act of Accession 2003 provides for a specific legal basis and procedure for withdrawing the suspension. According to this, '[t]he Council, acting unanimously on the basis of a proposal from the Commission, shall decide on the withdrawal of the suspension' of the *acquis*. As already mentioned in chapter two, the term *acquis* is neither a *terminus technicus* nor is it defined by Union legislation. It has been defined, however, by the Commission in texts adopted during the course of or at the end of each enlargement process.[142] For example, in a common declaration on the Common Foreign and Security Policy (CFSP) annexed to the Act on the conditions of accession of Austria, Sweden, Finland and Norway the Union has noted the confirmation by these States

[140] Case C-300/89 *Commission v Council* [1991] ECR I-2898.

[141] Art 4(1) of the Proposal for a Direct Trade Regulation.

[142] For a comprehensive analysis of the term *acquis* see C Delcourt, 'The Acquis Communautaire: Has the concept had its day?' (2001) 38 *Common Market Law Review* 829.

> of their full acceptance of the rights and obligations attaching to the Union and its institutional framework, known as the acquis communautaire, as it applies to present Member States. This includes in particular the content, principles and political objectives of the Treaties, including those of the Treaty on European Union.[143]

More recently, the Commission defined the term *acquis* in its opinion on the accession of Cyprus and the other nine then candidate States to the Union. *Acquis* comprises the Treaty on European Union and all its objectives, all decisions taken since the entry into force of the Treaties establishing the European Communities and the Treaty on European Union and the options taken in respect of the development and strengthening of those Communities and of the Union.[144]

Hoffmeister argues that since the proposed Direct Trade Regulation does not provide for a mechanism that would equate the application of ex Articles 28–30 EC TEC [now 34–36 TFEU] to northern Cyprus it does not constitute *acquis* in accordance with the aforementioned definition. To that effect, he refers to the fact that the regime does not cover all goods but exempts a substantial part. Moreover, the covered goods would be subject to tariff quotas, constituting an entry regime like the one in place for other privileged access of third country products, and would be only released for free circulation in the internal market after clearance by the respective Union Member State. Finally, the strong safeguard provision of Article 7 of the proposal and the fact that the Government of the Republic would not be responsible for the functioning of the regime demonstrate that its application would not mean the extension of the application of ex Articles 28–30 TEU [now 34–36 TFEU] to the 'Areas'. Thus, the Regulation, if adopted, would not partially withdraw the suspension of the *acquis*.

More importantly, Hoffmeister claims that even if it were to 'constitute *acquis*, . . . it would not apply "in" northern Cyprus'. 'Rather the Member States would apply it when dealing with goods from northern Cyprus'.[145] Thus, he agrees with the submission of the Commission, in its explanatory memorandum of the proposal,[146] that the then Article 133 TEC [now Article 207 TFEU] should be the legal basis for a regulation which regulates entry into the EU customs territory. In the memorandum, the Commission points out that there are precedents for cases where Article 133 TEC [now Article 207 TFEU] has been used as a basis for regulating customs duties on imports from Member States' territories that are outside the EU customs territory such as Gibraltar and Ceuta and Melilla.[147]

[143] Joint Declaration on CFSP adopted by the plenipotaries, [1994] OJ C241/381.

[144] COM(2003)79 final of 19 February 2003, point (9).

[145] F Hoffmeister, *Legal Aspects of the Cyprus Problem, Annan Plan and EU Accession* (Leiden, Martinus Nijhoff Publishers 2006) 216–217.

[146] Proposal for a Direct Trade Regulation, 3.

[147] Hoffmeister, *Legal Aspects of the Cyprus Problem* (above n 145) 217–218. See also Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences, [2001] OJ L346/1 and Council Regulation (EC) No 1140/2004 of 23 June 2004 suspending the autonomous Common Customs Tariff duties on certain fishery products originating in Ceuta and Melilla [2004] OJ L222/1.

The 'Areas', however, are outside the Union customs territory not by virtue of Articles 52 TEU and 355 TFEU but because the *acquis* has been suspended pursuant to Article 1 of Protocol No 10 of the Accession Treaty. This is important especially because paragraph 2 of this Article provides, as already mentioned, a special legal basis for withdrawing the suspension of the *acquis.* The essential content of the proposal provides, in Article 1(1), that products which 'originate in the Areas and are transported directly therefrom, may be released for free circulation into the customs territory of the EU with exemption from customs duties and charges having equivalent effect within the limits of annual tariff quotas . . .'. On the other hand, according to the then Article 3(1)(a) TEC, 'the activities of the Community shall include . . . the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect'. Although the aforementioned provision has been repealed by the Lisbon Treaty and replaced in substance by Articles 3 to 6 TFEU, Article 3(1)(a) TFEU still provides for an exclusive competence of the Union with regard to the customs union. Thus, the application of the Regulation would amount to a partial withdrawal of the suspension of the *acquis.* Given also that nothing in Article 1(2) of Protocol No 10 prevents the Council from withdrawing the suspension of the *acquis* partially, or in stages, the correct legal basis for the adoption of the Commission Proposal for a Direct Trade Regulation could be Article 1(2) of Protocol No 10, which also has the value of *lex specialis,* and not ex Article 133 TEC [now Article 207 TFEU].

To sum up this point, the appropriateness of ex Article 133 EC [now Article 207 TFEU] as the legal basis for the Direct Trade Regulation is closely connected to whether the Union foresees the withdrawal of the suspension of the *acquis* through the proposed regime. Although the case could be argued from all sides, it is my opinion that if the Direct Trade Regulation comes into force, part of the free movement of goods *acquis* will be extended to northern Cyprus. Hence, for all the aforementioned reasons, the Union should consider Article 1(2) of Protocol No 10 as the appropriate legal basis.

Although, *prima facie*, the debate over the appropriate legal basis may seem too legalistic, in reality it is a political one. It is very important for the Republic that the Union recognises, even indirectly, that it is the same political anomaly that has led to the drafting of Protocol No 10 that also leads to the adoption of such a special measure. On the other hand, it is also obvious that the political reason for the Commission to suggest Article 133 EC [now Article 207 TFEU] is that it would allow the Union to adopt such a measure through a QMV procedure.

Second, the question arises whether the proposal presents problems with regard to international law or EC law and especially the principle of loyal cooperation, in view of the fact that the Government of the Republic of Cyprus has declared the closure of ports in the 'Areas' North of the Green Line. Whereas the Green Line Regulation provided for the export of goods across the Green Line and therefore through Cypriot territory within the control of the Republic, the proposed Regulation would allow for the export of goods directly through those closed ports. The critical issue here is the need for the consent of the Republic of Cyprus. The

International Court of Justice has confirmed the rule of international law according to which every State is entitled to 'regulate access to its ports'.[148] Thus, the Government of the Republic was entitled to declare the closure of the ports in the 'Areas' and every State has a duty under international law to respect this decision. Since the Commission proposal for a Direct Trade Regulation does not require the consent of the Government of the Republic in order for goods to be exported from ports and airports in the 'Areas', given the QMV procedure, this may lead to an adoption of a regulation that is not compatible with international law. In other words, the Union cannot establish trade relations with the areas North of the Green Line, thereby disregarding the decision of the Cypriot Government to close the ports outside its control. If closing the ports could be disregarded, the Government would be exposed to a risk of incurring international liability for acts that it cannot control.

On the other hand, creating an incentive for Turkish Cypriots to use ports/airports closed by the Government is not illegal under international law. Otherwise, every State accepting products arriving from northern Cyprus would bear international responsibility just by operating its customs regime.[149] Such a thesis has not been supported by any practice. Even the Court of Justice in *Anastasiou I* did not hold that allowing privileged trade with northern Cyprus would undermine the decision of the Cypriot Government to close relevant ports and airports. However, the proposed Regulation would go further by establishing a regime that would facilitate the use of those ports. The crucial point here is that international law requires the consent of the Government of the Republic for the use of ports/airports in the North for the purposes of this Regulation. Such consent is the necessary and sufficient condition in order to ensure the full compatibility of the proposed Regulation with international law. In any case, it is noted that the consent of the Republic should be supplemented by a revision of its order declaring its ports closed, communicated to the International Maritime Organisation on 12 December 1974.

As for EU law, there is also a specific duty of sincere cooperation between the EU and the Member States enshrined in Article 4(3) TEU [ex Article 10 TEC]. Cremona argues that 'the duty of cooperation is a constitutional principle developed in the context of mixed agreements but of broader application and deriving from the requirement of unity in the international representation of the Community'.[150] Such a duty is of general application and does not depend either on whether the Union competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries.[151] The Court held, in its judgment

[148] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* International Court of Justice Reports 1986, 14, para 213.

[149] Hoffmeister, (n 145) 218–219.

[150] M Cremona, 'Defending the Community Interest: the Duties of Cooperation and Compliance' in M Cremona and B de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford, Hart Publishing, 2008) 125. See also Opinion 2/91 *(re ILO Convention No 170)* [1993] ECR I-1061, paras 36–38; Opinion 1/94 *(re WTO Agreements)* [1994] ECR I-5267, para 108.

[151] Case C-266/03 *Commission v Luxembourg* [ECR] I-4805, para 58.

in *Ireland v Commission,*[152] that 'the duty to cooperate in good faith governs relations between the Member States and the institutions'[153] and has emphasised that this obligation 'imposes on Member States and the Community institutions mutual duties to cooperate in good faith'.[154] Hence, it could be argued that insofar as the proposal ignores the sovereign right of the Government of Cyprus to declare the closure of the ports in the 'Areas', its adoption, without the consent of the Republic, would be *prima facie* contrary to EU law and especially the duty of loyal cooperation. As expressed more directly in the Treaty of Lisbon, 'The Union shall respect [the Member States'] national identities inherent in their fundamental structures . . . it shall respect their essential State functions, including ensuring the territorial integrity of the State'.[155] This argument, however, should not be read as being in favour of the 'resurrection' of the Luxembourg Compromise. This is because, in the present case, the exercise of QMV to outvote one of the Member States would not just be contrary to one of its essential interests. The opening of the ports of entry of northern Cyprus, without the consent of the Republic, would be, on the one hand, contrary to international law and, on the other, it would question the sovereignty and territorial integrity of Cyprus given the de facto division of the island.

On the other hand, it can also be suggested[156] that, since Article 3 of Protocol 10 explicitly provides that measures promoting the economic development of northern Cyprus are permitted, it would be odd if the implementation of this Article by the adoption of a Direct Trade Regulation could constitute, at the same time, a breach of loyalty vis-à-vis Cyprus. However, it is not the implementing measure *per se* that presents problems with regard to this principle but rather the legal architecture of the proposed Regulation. If the Government of Cyprus gives its consent to the opening of some ports/airports for such purposes, then the measure would be fully compatible with EU law. As argued, the duty of cooperation is a mutual one. Thus, while Union law cannot undermine a Member State's sovereign rights, each Member State is under an obligation of EU law 'to facilitate the achievement of the Community's tasks', including the implementation of Article 3 of Protocol 10 and 'to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty'.[157] A constructive approach from the Republic's side, with regard to the adoption of measures with a view to the further economic development of northern Cyprus, seems, in my opinion, sufficient to satisfy the objective of the said Article 3.

Finally, with regard to Article 2(2) of the draft Regulation which would allow the Commission to designate the TCCoC or some other body as a competent authority for implementation purposes of the future Direct Trade Regulation, without the consent of the legitimate Government of the Republic of Cyprus, the following has

[152] Case C-339/00 *Ireland v Commission* [2003] ECR I-11757.
[153] *Ibid*, para 71.
[154] *Ibid.*
[155] Art 4(2) TEU.
[156] Hoffmeister (n 145) 219–220.
[157] Opinion 1/03 *(re New Lugano Convention)* [2006] ECR I-1145, para 119; Case C-433/03 *Commission v Germany* [2005] ECR I-6985, para 63.

to be noted. As far as international law is concerned, the UN Security Council in Resolution 541 (1983) called upon 'all States not to recognise any Cypriot State other than the Republic of Cyprus' and in Resolution 550 (1984) 'not to recognise the purported State of the "Turkish Republic of Northern Cyprus"'. Equally, as mentioned earlier, it is explicitly laid down in the Treaty of Accession 2003 and Protocol No 10 that the Republic includes the whole island with a single Government, even though the latter cannot exercise effective control over the whole country. Thus, the EU or its institutions cannot recognise any authority other than the Government of the Republic. Designating a body like TCCoC, without the agreement of the Government, would constitute the explicit recognition of another authority, which would be contrary to both international and EU law. In fact, Article 4(5) of the Green Line Regulation recognises this point by providing for an agreement between the Commission and the Government in order to authorise the TCCoC, as well as the subsequent Decision 2004/604/EC by which the TCCoC was duly authorised, after the Government had given its agreement to that authorisation. Moreover, it is inherent in the system of the EU Treaties and the division of powers between the Union and the Member States that each Member State has the right to determine the competent authority which is responsible for the implementation of any act of the EU law in its own territory.

The legal debate concerning the Direct Trade Regulation, intellectually stimulating as it may be, is nevertheless a political debate in disguise, as is the case for all the debates on legal issues rising from the Cyprus conflict. The lifting of the economic isolation of the Turkish Cypriot community is one of the most important bargaining chips in the hands of the Greek Cypriot community, which cannot accept that it might lose it without gaining any benefit, through a QMV procedure. The Union has acknowledged this reality. This is the reason why the Luxembourg Presidency invited the Greek Cypriot and Turkish Cypriot communities for three rounds of confidential talks in 2005. The central idea was to allow for direct trade only through the port of Famagusta, which would be administered by the Commission services,[158] upon the authorisation of the Republic of Cyprus. Such an arrangement would have been in conformity with the Green Line regime since the EU got around the recognition conflict by means of the authorisation of the TCCoC by the Republic. In return, the Turkish Cypriots would sign a moratorium for the protection of Greek Cypriot property in the North and would engage to discuss the return of Varosha[159] and the Green Line Regulation would be amended to the effect that more goods would come under the *ratione materiae* of the preferential arrangement available under former Article 4(2), as was the case for citrus

[158] See generally, *Ελευθεροτυπία* [*Eleftherotypia* -Freedom of Press] reports on 25, 26, 27 and 28 February 2006; www.enet.gr.

[159] An unpopulated town in northern Cyprus that is not accessible by anyone except Turkish military and UN personnel. It used to be the Greek Cypriot quarter of Famagusta. Para 11.3.4 of Resolution 1628 (2008) of the Parliamentary Assembly of the Council of Europe has called upon the authorities of the Turkish Cypriot community to respect point 5 of UN Resolution 550 (1984) by placing Varosha under UN administration.

fruit under Commission Regulation 1624/2005.[160] During the second half of 2006, Finland, having assumed the presidency of the Council of the EU, made a series of proposals with regard to the adoption of the Direct Trade Regulation. According to the Finnish proposals, Turkish Cypriots would have been allowed to carry out trade with the EU though the EU-controlled port of Famagusta. Varosha, on the other hand, would be opened for resettlement under UN control for two years. In exchange, Turkey would have opened its ports for use by Greek Cypriot vessels by implementing the Ankara Agreement, together with its additional protocols.[161] Unfortunately, no such deal was struck.

In the light of the current 're-activation' of the pending trade measure, it remains to be seen whether the Direct Trade Regulation will be adopted and, if it is adopted, whether it will provide an effective device that would bring an end to the isolation of the Turkish Cypriot community, and thus facilitate the reunification of the island. It is definitely the case, however, that such an adoption would bring the Turkish Cypriot community closer to the EU by enhancing the right to trade of some EU citizens that have been isolated because of this political Gordian knot.

4.3 'Taiwan-isation?'

An issue that is often connected with the possible future adoption of a Direct Trade Regulation and the lifting of the economic isolation of the Turkish Cypriot community is what has been described as the '*Taiwan-isation*' of northern Cyprus.[162] In fact, it has been suggested that if the current bi-communal negotiations fail, the adoption of this trade measure will trigger the process of the '*Taiwan-isation*' of the secessionist entity to the North of the Green Line.[163] This neologism refers to the upgrade of the regime in the North to a de facto, not internationally recognised, State entity that would enjoy the possibility of developing economic relations and cooperation with other States without being a de jure State and without maintaining full diplomatic relations with other internationally recognised States.

The term appeared for the first time in the history of international relations in the aftermath of the historical UN General Assembly Resolution 2758 on 25 October 1971.[164] According to this Resolution, the General Assembly decided to recognise

[160] *Ελευθεροτυπία* [*Eleftherotypia*—Freedom of Press] (above n 158).

[161] E. Erçin, 'A Critical Assessment of the European Union Dynamics Prevailing in Cyprus' in A Sözen (ed), *The Cyprus Conflict: Looking Ahead* (Famagusta, Eastern Mediterranean University Printing House, 2008) 187–188.

[162] For a more detailed account of the term '*Taiwan-isation*' see generally International Crisis Group, *Cyprus: Reversing the Drift to Partition* (above n 139), 25; A Syrigos, *Σχέδιο Αννάν, Οι κληρονομιές του παρελθόντος και οι προοπτικές του μέλλοντος* [Annan Plan, the Heritage of the Past, the Perspectives of the Future] (Athens, Patakis, 2005) 440–462.

[163] See generally the reports in the Greek Cypriot Press, *Πολίτης* [*Politis*-Citizen] on 16 May 2010; www.makarios.eu/cgibin/hweb?-A=4264&-V=analysis.

[164] Resolution regarding the restoration of the lawful rights of the People's Republic of China in the United Nations, General Assembly Resolution 2758, UN GAOR, 26th Session, Suppl. No 29, UN Doc A/8429 (1971).

the People's Republic of China as the only lawful representative of China to the UN and as one of the five permanent members of the Security Council and to expel the representatives of Chiang Kai-shek (Republic of China (Taiwan)) from the place 'they unlawfully occup[ied] at the United Nations and in all the organisations related to it'.[165]

Following this Resolution, the vast majority of UN Members withdrew their recognition of the Government of Taiwan as the lawful Government of China, recognised the Government of the People's Republic of China as the lawful representative of China and broke off diplomatic relations with Taiwan.[166] Despite this, the Government of the Republic of China (Taiwan) is not isolated from the rest of the world. Apart from the 23 States that maintain diplomatic relations with Taiwan, the vast majority of the other States continue to maintain informal but strong relations with it, unlike the situation concerning the relations of the regime in northern Cyprus and the rest of the world.

For example, after breaking off diplomatic relations with Taiwan Japan founded a private 'company' called 'Interchange Association' with an office in Taipei. Equally, Taiwan founded a private 'company' called 'Association of East-Asian Relations' with offices in many Japanese cities. Although, formally speaking, the two companies are private, in reality, they function as informal consular authorities, are funded by their Governments and their staff consisted of governmental officers that appear to be on leave from their offices.[167] On the other hand, the US has gone a step further by enacting the Taiwan Relations Act.[168] The scope of this legislative act is to

[165] The Chinese Civil War resulted in 1949 with the Communists of Mao Zedong in control of mainland China and the Nationalists of Chiang Kai-sheck in control of the island of Taiwan. The Communists declared the People's Republic of China as the successor State of the Republic of China while the Nationalists championed the continued existence of the Republic of China as the sole legitimate Chinese Government. In the context of the Cold War, both sides claimed to be the only legitimate Chinese Government and each side refused to maintain diplomatic relations with countries that officially recognised the other side. Since there was no truce between the two sides, the UN continued to recognise Chiang Kai-shek's government as the lawful representative of China. This was the case until 25 October 1971 when the UN General Assembly decided (76 in favour, 35 against, 17 abstentions, one of which was the Republic of Cyprus) that the Republic of China (Taiwan) could not be represented in the UN and also to recognise the People's Republic of China as the only lawful representative of China to the UN (One China Policy). Following that, a large number of UN Members stopped recognising the Republic of China (Taiwan) and recognised the People's Republic of China as the only lawful Government of China. According to the Government Information Office Republic of China (Taiwan), on 11 May 2010, only 23 countries (Belize, Burkina Faso, Dominican Republic, El Salvador, The Gambia, Guatemala, Haiti, Holy See, Honduras, Kiribati, Marshall Islands, Nauru, Nicaragua, Palau, Panama, Paraguay, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, São Tomé and Princípe, Solomon Islands, Swaziland, Tuvalu) maintained full diplomatic relations with Taiwan; http://www.gio.gov.tw/taiwan-website/5-gp/yearbook/ch06.html.

[166] For a more detailed account, see generally Z Fu, 'China's Perception of the Taiwan Issue', (1996) 1 *UCLA Journal of International Law and Foreign Affairs* 321; T Lee, 'The International Legal Status of the Republic of China on Taiwan' (1996) 1 *UCLA Journal of International Law and Foreign Affairs* 351; P Chang and K Lim, 'Taiwan's Case for United Nations Membership', (1996) 1 *UCLA Journal of International Law and Foreign Affairs* 393.

[167] RN Clough, 'Taiwan's International Status' in H Chiu and R Downen (eds), *Multi-System Nations and International Law, International Status of Germany, Korea and China* (Baltimore, Occasional Papers Reprints, 1981).

[168] Taiwan Relations Act, 22 U.S.C. §§ 3301–3316 (1990).

'help maintain peace, security, and stability in the Western Pacific' 'by authorising the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan'. With such a legal formula, the US Government managed to establish relations with Taiwan without recognising it as a State. At the same time, it founded the American Institute of Taiwan[169] which, although it appears to be a non-profit organisation, is the authorised agency through which any agreement or transaction relative to Taiwan is entered into, performed or enforced. More importantly, section 4(c) of the Act approves the continuation in force of all treaties and other international agreements, including multilateral conventions, entered into by the US and the Government of Taiwan before the 'de-recognition' of it as the lawful Government of China. Finally, the Act recognised the capacity of Taiwan to sue and be sued in US courts.[170] In that way, the US Government has recognised the *de facto* sovereignty of Taiwan.[171]

Both those paradigms of informal relations with the regime in Taiwan carefully do not question the de jure sovereignty of the People's Republic of China on Taiwan. Most States follow the Japanese paradigm. At the same time, the internationally recognised Government of China accepts the informal existence of mainly commercial and economic relations of Taiwan with the rest of the world. To this effect, it encourages the use of terms like 'Taipei, China' or 'Taiwan, China' that imply that Taiwan is part of China.[172]

The most important proof, however, that Taiwan is not isolated from the rest of the world is its WTO membership. According to Article XII of the WTO Agreement, the WTO membership not only includes States but also includes separate customs territories possessing full autonomy in the conduct of their external commercial relations and in other matters covered by the WTO Agreement. Even the Explanatory Notes attached to the WTO Agreement stipulate that the terms 'country' or 'countries', as used in this Agreement and the Multilateral Trade Agreements, are to be understood to include any separate customs territory Member of the WTO and the term 'national' shall be read as pertaining to that customs territory, unless otherwise specified. Thus, the separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, commonly referred to as Chinese Taipei, became the 144th WTO Member on January 2002.

The question, thus, that should be addressed for the purposes of the present research is whether the adoption of such a direct trade regime would launch a '*Taiwan-isation*' process of northern Cyprus. In other words, are we close to the creation of such flexible inter-State mechanisms as the ones described above that could circumvent the fact that the regime in northern Cyprus is not internationally recognised?

[169] S 6 of the Taiwan Relations Act.

[170] S 4(b)(7) of the Taiwan Relations Act.

[171] S Lee, 'American Policy Toward Taiwan: the Issue of the De Facto and De Jure Status of Taiwan and Sovereignty', (1995–1996) 2 *Buffalo Journal of International Law* 325.

[172] 'Chinese Government White Papers: The Taiwan Question and the Reunification of China', (2003) 2 *Chinese Journal of International Law* 717.

Legally speaking, even if the Commission proposal for a Direct Trade Regulation was adopted without any amendments and thus without taking into account the legitimate concerns of the Republic, it would nevertheless not alter the status of the authorities in the North to such an extent as to amount *stricto sensu* to a '*Taiwan-isation*' of northern Cyprus. Firstly, such a Direct Trade Regime would not mean that the secessionist entity in the North would be recognised as a State by the Union Member States, a development that would go further than the meaning of '*Taiwan-isation*'. Equally, the adoption of such a regulation would not effectively amount to a full membership of the illegal de facto State entity as an international organisation as it is the case for Taiwan and WTO. It would not even create a new institutional structure that would play the role of a consular authority as it is the case for the Japanese 'Interchange Association', the 'Association of East-Asian Relations' of Taiwan and the American Institute of Taiwan. It would just create direct trade relations between the Union and one part of the EU where the *acquis* is suspended. Thus, is the academic and political debate about the '*Taiwan-isation*' of the North totally unfounded?

First of all, it should be understood that a structural stalemate *à la Taiwan* is a status quo that would not arise *ex nihilo*. It presupposes a rather long process, during which the breakaway State in the North will continue to be internationally unrecognised while the international community will gradually lift the restrictions and the isolations on the North, which eventually would '*Taiwan-ise*' the TRNC. In such a case, the international recognition of TRNC from some Muslim or Central Asian Turkic speaking countries should not be ruled out.

Secondly, it can be observed that, during recent years and especially in the aftermath of the referendums for the Annan Plan, the status of the regime in the North has been somewhat upgraded. Turkish Cypriots have two elected representatives with the right to speak, though not vote, in the Council of Europe's Parliamentary Assembly. In a recent Resolution, the Assembly asked the Republic 'not to oppose increased international contacts of Turkish Cypriots in the areas of culture, education, sport and youth exchanges, insofar as these contacts are not misused for political purposes or incompatible with the reunification of the island'.[173] The Turkish Cypriot community has quasi-diplomatic representation in Brussels and lobbying rights in the European Parliament. At the same time, several States maintain a representation in northern Cyprus, namely Australia, France, Germany, the UK and the US. They have been very careful to avoid any implied recognition of the secessionist entity by never claiming that their offices are embassies or consulates.[174] On the other hand, the EU does not have any form of representation in the North.[175] Furthermore, in July 2004, the 57 member Organisation of the Islamic

[173] Resolution 1628 (2008) of the Parliamentary Assembly of the Council of Europe, para 11.2.2.

[174] For instance, the Australians refer to their office as 'Australian place', whereas the Germans refer to their location as the 'Information Office of the German Embassy', clearly indicating that it is merely an information office linked to the official embassy in the Government Controlled part of the island. M Brus, M Akgün, S Blockmans, S Tiryaki, T van den Hoogen, W Douma, *A Promise to Keep: Time to End the International Isolation of the Turkish Cypriots* (Istanbul, Tesev Publications, 2008) 32.

[175] *Ibid.*

Conference upgraded the status of the Turkish Cypriot observer delegation from that of a 'community' to a 'State', based on the Annan Plan. In October 2007, Syria, once an advocate of Greek Cypriot interests in the Arab and Islamic worlds, allowed a ferry link from Turkish Cypriot Famagusta to Lattakia, closed since the 1970s, to resume twice weekly.[176] More importantly, the European Court of Human Rights in *Xenides-Arestis* and *Demopoulos*, as already mentioned in the previous chapter, has allowed Turkey and its 'subordinate local administration' to set up a local remedy for addressing Greek Cypriot property claims in the North.

All the aspects referred to above and pointing to the upgrade of the internationally unrecognised TRNC, combined with the effective lifting of the economic isolation of the Turkish Cypriot community through the existing Green Line framework and the possible future adoption of the Direct Trade Regulation, point to the fact that, at the moment, the process that would lead to '*Taiwan-isation*' might have started. This could lead to a normalisation of the relations between the two ethno-religious segments on the island and between the regime in the North and the Union Member States but, at the same time, there is a significant danger that such a development may lead to an absolute political *stasis* to the quest for a comprehensive settlement to the conflict.

According to conflict resolution theory, negotiation occurs along the bargaining range or the range in which the win-sets of the principal parties overlap. This includes all points of agreement which both parties prefer to their 'security point' or their 'Best Alternative to a Negotiated Agreement' (BATNA).[177] In our case, the lifting of the economic isolation of the Turkish Cypriot community through a direct trade regime, combined with all the already mentioned aspects of the recent upgrade of the regime in northern Cyprus, would raise their BATNA and thus the negotiation for a solution would become more difficult. Moreover, if, in return for the adoption of such regime, the return of Varosha to the Greek Cypriots is agreed, as the proposal of the Luxembourg Presidency was providing in 2005, the Greek Cypriot BATNA will also be raised.[178] On the other hand, it may be the case that such an agreement between the two parties would offer the necessary impetus for launching a successful procedure for a comprehensive settlement.

In any case, a distinction should be made between, on the one hand, the legal differences between the status of the regime of northern Cyprus in the aftermath of the adoption of a Direct Trade Regulation and that of Taiwan and, on the other, the political danger that the adoption of such a measure may entail. Finally, one has to point out that, although a comprehensive settlement should be the ultimate goal of both communities, the Turkish Cypriots should not remain 'hostages' of the failure to achieve one. At the end of the day, despite having expressed their clear desire for a future within the EU in the referendums of 24 April 2004, the exercise of their

[176] International Crisis Group, (n 139), 25.

[177] N Tocci, *EU Accession Dynamics and Conflict Resolution: Catalysing Peace or Consolidating Partition in Cyprus* (Aldershot, Ashgate Publishing Limited, 2004); R Fisher and W Ury, *Getting to a Yes—Negotiating an Agreement Without Giving In* (New York, Penguin Books, 1991).

[178] *Ελευθεροτυπία* [*Eleftherotypia*—Freedom of Press] reports on 25, 26, 27 and 28 February 2006.

fundamental rights and freedoms is restricted due to the suspension of the *acquis*. It is an obligation of the Union to facilitate such an exercise as much as possible.

5. CONCLUSION

As has become obvious from the analysis of the provisions of the Green Line Regulation with regard to the crossing of goods, the mechanism set by that legislative device is an important step for bringing the two communities closer but it is far from a *panacea*. It is apparent that the Union has managed to partially lift the economic isolation of the Turkish Cypriot community while taking into account the legitimate concerns of the Republic that no other authority in the North should be recognised. The Green Line Regulation, albeit a prime example of the pragmatism that the Union has shown when dealing with aspects of the conflict, has not proved particularly successful in enabling goods, originating in the areas not under the effective control of the Republic, to penetrate the Union Market. It may be the case that a future adoption of a Direct Trade Regulation[179] or a significant amendment to the legal framework of the Green Line Regulation, broadening its scope, will further the economic integration of the island. Such devices, however, can only offer partial solutions to the Cyprus issue and it is only under certain conditions that their adoption may entail a political *stasis*. The ultimate objective of the two communities must be the comprehensive settlement of the Cyprus problem through the reunification of the island under the *aegis* of a democratic and independent State in order to effectively address the various problems created by that political Gordian knot. The Union should be determined to play a positive and more active role in bringing about a just and lasting settlement within the UN framework and in line with EU principles and should remain willing to accommodate the terms of such a settlement.

[179] Para 11.2.1 of Resolution 1628 (2008) of the Parliamentary Assembly of the Council of Europe calls upon the authorities of the Republic to 'lift objections to the adoption of the Council of the European Union's Direct Trade Regulation put forward by the European Commission allowing free direct trade between Turkish Cypriots and the EU through their own ports'.

V

Taking Cyprus' EU Membership into Account for a Future Settlement Plan

April is the cruellest month, breeding
Lilacs of the dead land, mixing
Memory and desire, stirring
Dull roots with spring rain.

The Burial of the Dead

The Waste Land, TC Elliot (1922)

ESTRAGON: Let's go.
VLADIMIR: We can't.
ESTRAGON: Why not?
VLADIMIR: We're waiting for Godot.
ESTRAGON: (*despairingly*). Ah!

Waiting for Godot, Samuel Beckett (1952)

1. INTRODUCTION

THE FIRST UNSUCCESSFUL attempts to reach a settlement on the Cyprus problem that would accommodate the different concerns and demands of the two main ethno-religious communities on the island, their motherlands and the UK date back to the late 1940s.[1] However, it was not until the end of the 1950s that the parties to that conflict agreed that the status of Cyprus should be a bi-communal, independent Republic. The Cyprus Agreements that established the Republic of Cyprus reflect the political compromise between the different interests, concerns and demands of Greece, Turkey and the UK. Those different positions, with regard to the solution of the Cyprus issue, were clearly expressed during the second half of the 1950s when, on the one hand, the struggle against the British colonial powers for *Enosis* had taken place and on the other the first shy suggestions for *Taksim* were expressed.

Both communities, even after the birth of the Republic, were looking at the Zurich-London Agreements as just a step towards the accomplishment of their

[1] F Ioannou, *Έτσι άρχισε το Κυπριακό* [That's How the Cyprus Issue Started] (Athens, Filistor, 2005).

aspirations. Thus, inevitably, the constitutional structure of the Republic that was demanding the cooperation between the two segments was questioned from the very first years of its life. In the aftermath of the 1963 inter-communal conflict, which caused the establishment of the Green Line, the two communities together with the three Guarantor States and the UN started negotiating again in order to find a viable solution for Cyprus while disorder and anarchy prevailed on the island. Such efforts were intensified after the 1974 Turkish invasion.

The Atcheson Plan, the Gobbi Initiative, the First and Second Sets of Ideas, and the Galo Plaza's plan are some of the past proposals for a settlement of the Cyprus problem. Most of them, and especially the plans drafted by the UN, were largely based on the principles of bi-zonality, bi-communality and political equality of the two communities. All those principles also appeared, unsurprisingly, in the most holistic UN attempt for a solution of this ancient saga, the Annan Plan, the final version of which was presented to the two communities on 31 March 2004, a month before the Republic's accession to the EU. The new state of affairs envisaged by the Annan Plan, however, was overwhelmingly rejected by the Greek Cypriots at the referendums of 24 April 2004. A week later, Cyprus as a whole became one of the ten new EU Member States although the *acquis* can be applied only in the Government Controlled Areas.

Interestingly enough, although, as mentioned in the second chapter, the 'carrots and sticks' available in the negotiation process for the EU accession have been used by the UN in order to secure the consensus of the parties for a solution, the signing of the Act of Accession 2003, itself, had a very different impact to the dynamics of the conflict. During the last phases of the negotiations for the Annan Plan and the referendum campaign, some of the most prominent Greek Cypriot advocates of 'No' had argued that the certain future EU accession of the Republic would increase the leverage of the Greek Cypriot community. Thus, the prospects for a settlement, that would better address their interests and concerns, would be more possible after 1 May 2004. The then President of the Republic, Papadopoulos, in his dramatic speech on 7 April 2004, asked the Greek Cypriots to say 'a resounding NO on 24 April',[2] pointing out that if the Greek Cypriots rejected the Plan it would be the internationally recognised Republic of Cyprus and not the United Cyprus Republic that would 'become a full and equal member of the European Union'.[3] In the last phrase of his speech, however, he went a step further by referring to the need 'to rally together for a new and more hopeful course for the reunification of our country through the European Union'.[4] At the same time, the majority of the Turkish Cypriot community was expressing their clear desire for a future within the EU at massive demonstrations and then at the referendum. Overall, one could argue that at that moment both communities were hoping that the accession to the Union would have a 'catalyst effect' in order for a settlement to be achieved. The difference was that the Turkish Cypriots were hoping for this to happen through the Annan

[2] Press Release, Press and Information Office, Republic of Cyprus, 7 April 2004.
[3] *Ibid.*
[4] *Ibid.*

Plan on 24 April 2004 while the Greek Cypriots were convinced that the accession of Cyprus to the EU would catalyse a settlement that would better serve their interests at a later time.

However, it is not only officials coming from both sides of the Green Line that have been referring to the need for a 'European approach/solution' to the Cyprus issue before and mainly after Cyprus' EU accession. Well-known academics have also tried to trace a 'European approach/solution' to the Cyprus problem.[5] Although such terminology covers quite different notions, it could be argued that the 'European approach/solution' discourse mainly refers to two distinct but interconnected understandings of the role of the EU in such a conundrum. According to the first, since Greece and Cyprus, as a whole, are Union Member States and Turkey is a candidate State, the EU should probably replace the UN as the principal *locus* and actor in any new initiative to move towards a solution.[6] On the other hand, any future solution should be in 'strict compliance with European constitutional principles and the *acquis communautaire*, and international human rights and minority protection standards derived from international law and from the European Convention on Human Rights and other European instruments'.[7]

Undoubtedly, the 'European approach/solution' discourse has often been used by the elites of both communities in order to cover their maximalist demands, as already mentioned in the introduction of the book. It is still necessary, however, to examine the aforementioned propositions in the light of Union law given that the Republic's EU membership is a new and very important variable introduced to the conflict that should be taken into serious consideration. With regard to the first thesis, this chapter argues that there seems to be no clear-cut legal basis—even after the ratification of the Lisbon Treaty—in order for the Union to become the principal *locus* and actor in a possible future initiative. In the context of a conflict that has been so heavily judicialised that one could speak of a 'lawfare', this is not a trivial fact, especially in the light of existing political constraints to such an initiative. As far the second is concerned, it is suggested that there are possible tensions between the Union legal order and the principles upon which the two communities have agreed that any future settlement should be based. This does not, automatically mean that the agreed framework should be amended. The Union has expressed its willingness and its capability to accommodate a solution that would entail derogations from EU law in order for a viable solution to the Cyprus problem to be achieved.

[5] See generally A Auer, M Bossuyt, P Burns, A De Zayas, S Marcus-Helmons, G Kasimatis, GD Oberdoerfer, and M Shaw, *A Principled Basis for a Just and Lasting Cyprus Settlement in the Light of International and European Law* (Paper of the International Expert Panel, presented by the Committee for a European solution in Cyprus to Members of the European Parliament, 12 October 2005); *Rethinking the Cyprus Problem: A European Approach* Workshop organised by the Hauser Global Law School Program and the Jean Monnet Center for International and Regional Economic Law and Justice at New York University School of Law (Villa La Pietra, Florence 18–19 October 2006) (hereafter NYU conference).

[6] One of the main themes of the NYU conference (above n 5).

[7] Auer and others, *A Principled Basis for a Just and Lasting Cyprus Settlement* (above n 5) para 26.

2. THE UNION AS A PRINCIPAL LOCUS AND ACTOR IN A FUTURE INITIATIVE

2.1 Introduction

Since 1 May 2004, Cyprus is a Member State of the European Union. On 3 October 2005, Turkey's accession negotiations began. Those developments cannot be deemed as a trivial change of context in considering any future solution. The Union cannot merely overlook the Cyprus issue as if this were an extraneous problem. The implications of the conflict for the political life and the legal order of the EU oblige the Union to play a really 'positive role in bringing about a just and lasting settlement'[8] in a future initiative since all the parties in the conflict are either EU Member States or candidate Member States. Thus, in the aftermath of the complex political environment that the Greek Cypriot rejection of the Annan Plan and the accession of the Republic of Cyprus created, some politicians and academics suggested that the Union should replace the UN as the principal *locus* and actor in a possible future initiative, as already mentioned in the previous section of this chapter. In other words, they were calling the Union to engage in principal mediation ie to adopt a structural role in negotiations by negotiating directly with the conflict parties, thus replacing the UN.

From an international law point of view, it is critical to note that Chapter VI and especially Article 33 of the UN Charter do not prevent the Union from replacing the UN and the Secretary-General as the principal *locus* and principal actor in any possible future initiative for a solution. However, as a matter of political prudence and expedience, it is questionable whether the Union should undertake such a role. First of all, the Union has a much stronger contractual *nexus* with the Republic of Cyprus and Greece than with the other parties to the conflict and, thus, it is not an impartial mediator. Due to the Union membership of those two actors in the conflict, it is often seen by the Turkish Cypriots and Turkey as promoting the interests of the Greek Cypriots. Secondly, the well established policy of Turkey not to recognise the Cyprus Republic and the issue of representation of the Turkish Cypriots in a negotiation under the auspices of the EU, significantly limit the possibilities that the Union can successfully replace the UN in the role of principal mediator. In addition, the need to replace an actor that has acted on the issue for the last half century and is accepted by both communities as impartial, is also questionable.

However, it is not only those political constraints that prevent the Union from engaging in principal mediation. Its present institutional and legal framework also do not seem to provide a relevant competence. Neither Protocol No 10 on Cyprus of the Act of Accession 2003, nor the post-Lisbon EU Treaties envisage that the Union could play such a role. As already mentioned in chapter four, given that every legal debate on any issue arising out of this age-old dispute is political in

[8] European Commission, *Agenda 2000 Strengthening the Union and Preparing Enlargement* (July 15 1997); ec.europa.eu/agenda2000/index_en.htm.

disguise, it is important to examine the legal constraints that prevent the EU from replacing the UN as a principal mediator. It is more than probable that, should the Union ever try to assume such a role without the consent of all parties in the conflict, those constraints will be used against the procedure. In any event, it is not uncommon for the parties in the conflict to use every *forum* as another arena for their political battle, a platform for seeking international and local endorsement of their political arguments.

2.2 Protocol No 10

Cyprus became a Member State of the Union on terms provided in Protocol No 10 of the Act of Accession.[9] Back in 2003, the EU Member States and the acceding States felt that it was necessary to reaffirm their commitment to a comprehensive settlement of the Cyprus problem in the preamble of the Protocol and to declare their strong support for the efforts of the UN Secretary-General. They considered, however, that they should provide for the suspension of the *acquis* in the areas not under the effective control of the Republic until such a settlement is reached. Although the Protocol refers to the fact that measures which would promote civil peace and reconciliation should not be precluded, no other role was envisaged for the EU in the event of future negotiations.

Thus, Article 1 of the abovementioned Protocol provides that the application of the *acquis* shall be suspended in those 'Areas'.[10] The Council, however, acting unanimously on the basis of a proposal from the Commission, shall decide on the withdrawal of the suspension.[11] Article 2 of the Protocol provides for the legal basis of the Green Line Regulation. According to this Article, the Council, acting unanimously on the basis of a proposal from the Commission, shall define the terms under which the provisions of EU law shall apply to the Green Line.[12] Moreover, in the event of a settlement, the Protocol provides for the Council to unanimously decide on adaptations of the terms concerning the accession of Cyprus, with regard to the Turkish Cypriot community. This provision clearly depicts the willingness of the Union to accommodate the terms of a solution of the Cyprus issue in the Union legal order.[13] As shall be seen in the second part of this chapter such an enabling clause provides for a simplified procedure for the amendment of the Act of Accession and, thus, the relevant Council acts that would accommodate the terms of a future comprehensive settlement may consist of primary law.

[9] See generally s 7.1 The Suspension of the *Acquis* in ch 2.
[10] Art 1(1) of Protocol No 10 of the Act of Accession 2003.
[11] Art 1(2) of Protocol No 10 of the Act of Accession 2003.
[12] Art 2(1) of Protocol No 10 of the Act of Accession 2003.
[13] Art 4 of Protocol No 10 of the Act of Accession 2003. If the April 2004 referendums had approved the new state of affairs envisaged in the Annan Plan the Council of the European Union, having regard to Art 4 of Protocol No 10, would have unanimously adopted the Draft Act of Adaptation of the Terms of Accession of the United Cyprus Republic to the European Union as a Regulation, which consists of Appendix D of the Annan Plan.

More importantly for this part of the chapter, Article 3 provides that nothing in the Protocol should be read as precluding measures adopted with a view to promoting the economic development of those 'Areas' and that such measures shall not affect the application of the *acquis* in any other part of the Republic. Although this provision cannot constitute a legal basis for continued support, it clarifies that the division of the island should not rule out economic assistance from the Union to those areas. Indeed, on 27 February 2006, the Council unanimously adopted Regulation 389/2006 which establishes an instrument for encouraging the economic development of the Turkish Cypriot community (hereafter Financial Aid Regulation).[14] The legal basis for this Regulation was ex Article 308 EC [now Article 352 TFEU] although there is a reference to Article 3 of Protocol No 10 in the Preamble.

Pursuant to this Regulation, the Union provides

> assistance to facilitate the reunification of Cyprus by encouraging the economic development of the Turkish Cypriot community with particular emphasis on the economic integration of the island, on improving contacts between the two communities and with the EU, and on preparation for the *acquis communautaire*.[15]

The assistance can be used for the promotion of social and economic development including restructuring; the development and restructuring of infrastructure; reconciliation, confidence building measures, and support to civil society; bringing the Turkish Cypriot community closer to the Union, through inter alia information on the European Union's political and legal order; promotion of people to people contacts and Union scholarships; preparation of legal texts aligned with the *acquis* for the purpose of these being immediately applicable upon the entry into force of a comprehensive settlement of the Cyprus problem; and preparation for implementation of the *acquis* in view of the withdrawal of its suspension in accordance with Article 1 of Protocol No 10 to the Act of Accession.[16] It is important to note that those objectives should be realised without the recognition of any other authority. In fact, recently, the Greek Cypriots withdrew six cases filed under the Papadopoulos administration and two cases filed under the Christofias administration, over Commission aid programs in the North, after winning a change in the labelling of Turkish Cypriot participation in a way that avoided any hint of recognition of any other authority on the island.[17]

[14] Council Regulation (EC) No 389/2006 of 27 February 2006 establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community and amending Council Regulation (EC) No 2667/2000 on the European Agency for Reconstruction [2006] OJ L65/5.

[15] Art 1(1) of the Financial Aid Regulation.

[16] *Ibid* at Art 2.

[17] International Crisis Group, *Reunifying Cyprus: The Best Chance Yet* ((2008) Europe Report No 194) 2. The cases had severely hampered the European Commission's work, according to an EU official: 'We had to use a lot of resources on this . . . many man hours . . . it was a diversion of focus, very counter-productive and took away time from where we could have been more productive and pro-active'.

The aforementioned objectives of the aid programme, that have been realised through two Commission Decisions,[18] point to the limits of the Union's role in the reunification of the island under Article 3 of Protocol No 10. The EU may facilitate the reunification of the island but Article 3 does not provide for a competence in order for the EU to become the 'broker' in a future initiative.

Having said that, it should be also pointed out that the term 'measures with a view to promoting the economic development of' northern Cyprus has been defined rather widely. It includes the strengthening of the civil society and the support of reconciliation and confidence building measures including support to the Committee of Missing Persons; the facilitation of contacts between the Turkish Cypriot community and the EU through a scholarship scheme, grants, etc; and most importantly the preparation of legal texts as well as reinforcement to implement the *acquis* in view of the withdrawal of its suspension in accordance with Article 1(2) of Protocol No 10 to the Act of Accession, under the guidance of the Technical Assistance Information Exchange Instrument (TAIEX).[19]

A recent World Bank study has referred to this last measure which is close to similar arrangements during previous and current accession negotiations. The study went a step further, however, by proposing that the 'Turkish Cypriot community in close cooperation with the European Commission should implement reforms that would bring its foreign trade regime in line with the relevant provisions of the *acquis*'. Secondly, it suggested that the Union should incorporate northern Cyprus 'within its customs union with common arrangements for imports from other countries and common external tariffs provided that the Turkish Cypriot community adopts the relevant provisions of the *acquis*'.[20] It should be noted, however, that it is rather doubtful that under the present legal framework, including the wide scope of the Financial Aid Regulation, the Union has the competence to include an area where the *acquis* is suspended in its customs union. From a political point of view, it is rather improbable that such an initiative would get the consent of the Republic.

In any case, for the purposes of the present part of the chapter, it should be mentioned that the legal design of the very brief Protocol No 10 attributes a rather limited role to the Union in negotiations to reach a settlement of the Cyprus issue. The Union would play the role of an institution that, in the event of the settlement and with regard to the Turkish Cypriot community, would facilitate such a settlement. In order to achieve this role, it would adopt measures that would promote

[18] Commission Decision C(2006)5000 of 27.10.2006; Commission Decision C(2006)6533 of 15.12.2006.

[19] Communication from the Commission to the European Parliament and the Council Annual Report 2006–2007 on the implementation of Community assistance under Council Regulation (EC) No 389/2006 of 26 February establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community; Brussels, 18.9.2007 COM(2007) 536). On the preparation of the legal texts see Commission Decision C(2006)2335/4 of 26.6.2006.

[20] World Bank, *Sustainability and Sources of Economic Growth in the Northern Part of Cyprus* (Volume I/II, Poverty Reduction and Economic Management Unit, Europe and Central Asia Region, June 8, 2006) para 6.5; www.quickwasp.com/kab/documents.html.

economic development in the 'Areas'. It would also decide on the withdrawal of the suspension and on the adaptations to the terms concerning the accession of Cyprus to the Union.

The attribution of such a limited role to the Union by Protocol No 10 is not surprising. It is rather justified by the fact that, at the time the Protocol was drafted, there was huge optimism for the prospects of the proposal of the UN Secretary-General. On the other hand, the Protocol clearly reflects the pragmatic policy of minimum involvement that the Union has adopted, as seen throughout this research, with regard to the Cyprus problem mainly due to the sheer complexities of the issue. A provision that would authorise the Union to become the principal *locus* and actor, in order for a settlement to be reached, would not have been compatible with such a pragmatic policy of minimum involvement. Such a policy of minimum involvement is also foreseeable given the role of the EU in similar situations such as the conflict in Northern Ireland where the Union reduced its involvement to the funding of cross-border projects mainly through the INTERREG III programme.[21]

2.3 Common Foreign and Security Policy (CFSP)

In its relations with the wider world, the Union has to contribute inter alia to peace and security.[22] That's why the adoption of a legislative act that could allow the EU to engage in principal mediation in future negotiations for the settlement of the Cyprus issue could be *prima facie* legally based on the provisions for the Common Foreign and Security Policy. Thus, the Union could replace the UN as a mediator in order to 'safeguard its values, fundamental interests, security, independence and integrity; consolidate and support democracy [and] the rule of law, human rights and the principles of international law; preserve peace, prevent conflicts and strengthen international security'.[23]

In order to achieve this CFSP scope, the Union could adopt a decision defining the relevant actions to be undertaken.[24] The device of the CFSP decisions has been introduced by the Lisbon Treaty and, in essence, it replaces what was known in the pre-Lisbon era as joint actions.[25] The joint actions were addressing specific situations where operational action by the EU was deemed necessary.[26] They have concerned inter alia activities such as support for peace and stabilisation processes through the convening of an inaugural conference,[27] general support of a

[21] T Salmon, 'The EU's Role in Conflict Resolution: Lessons from Northern Ireland' (2002) 7 *European Foreign Affairs Review* 337; B Laffan and D Payne, 'INTERREG III and Cross-Border Cooperation in the Island of Ireland' in AK Bourne (ed), *The EU and Territorial Politics within Member States. Conflict or Co-operation?* (Leiden, Brill, 2004) 157.

[22] Art 3(5) TEU.

[23] Art 21(2) TEU.

[24] Art 25 TEU.

[25] Ex Art 12 TEU.

[26] Ex Art 14(1) TEU.

[27] Joint Action 93/728 on the inaugural conference on the stability pact [1993] OJ L339/1.

specific peace process[28] and a contribution to a conflict settlement process[29] and the appointment of a Special Representative.[30] Thus, both the current provisions of the Treaties and the Union practice in the past suggest that the role of the negotiator between the parties in a dispute could be attributed to the EU by a decision defining an action.

It is doubtful, however, that such a decision will be adopted in the near future. From a political point of view, one has to note that it is improbable that the Republic of Cyprus would consent to an initiative that would deal with the Cyprus problem under the CFSP 'label'. It is a well established policy of the Republic, accepted by the Union,[31] that the Cyprus issue should not, formally at least, be dealt within the CFSP context. Including the Cyprus conflict in the CFSP agenda would be seen from the side of the Republic as inconsistent with its long-standing policy to 'Europeanise' the conflict as much as possible and would question the political benefits of the accession. Such political concerns should be taken into consideration especially in a domain where unanimity is necessary for the adoption of any decision. On the other hand, the Turkish Cypriot community would also oppose such a development given that Greece and the Republic of Cyprus, as EU Member States, could influence any decision taken under the CFSP to the detriment of the Turkish Cypriot community. The Turkish Cypriot ethno-religious segment rightly contends that, especially after the accession of the Republic to the EU, the Union cannot be a principal mediator as it is a party in the conflict.

Apart from those political concerns, the adoption of such a decision may also be problematic from a legal point of view. If the Treaty on European Union is interpreted in accordance with the ordinary meaning to be given to its terms, following the well established rule of Article 31(1) of the Vienna Convention on the Law of the Treaties, it would be difficult to justify the use of a CFSP device for an area that is part of the Union and for mediation between two ethno-religious segments, the vast majority of the members of which are Union citizens. Although the application of the *acquis* is suspended North of the Green Line, Cyprus, as a whole, has acceded to the EU and the citizens of the Republic are EU citizens. Furthermore it should not be ignored that, until now, the Union has used either Protocol No 10 or ex Article 308 TEC [now Article 352 TFEU] as the legal bases for legislative acts concerning this unique political situation. The reason for this, among other things, is that legislating on issues concerning the Cyprus problem is not considered to be foreign policy making.

Arguendo, however, that the political concerns are accommodated and the Union decides to act on terms provided in a CFSP decision. The next question should be whether the Court could judicially review such a decision on terms previously

[28] Joint Action 94/276 in support of the Middle East process [1994] OJ L119/1.

[29] Joint Action 2001/759 regarding a contribution from the European Union to the conflict settlement process in South Osetia [2001] OJ L286/4.

[30] Joint Action 2002/211 on the appointment of the EU Special Representative in Bosnia and Herzegovina [2002] OJ L70/7.

[31] It is not irrelevant that aspects concerning the Cyprus issue are mainly dealt with in the Council by an ad hoc working party on the follow up to the Council conclusions on Cyprus of 26 April 2004.

analysed. Of course, one may wonder why an issue like the engagement of the Union in principal mediation on the Cyprus issue might be brought to the Court of Justice for judicial review. In such a hypothetical scenario, the reasons could be found in the tendency of the parties in conflict to consider every forum as yet another political arena referred to before.[32]

The ECJ—even after the ratification of the Lisbon Treaty—does not have jurisdiction with respect to either the CFSP provisions or acts adopted on the basis of those provisions. However, it does have jurisdiction to monitor compliance with Article 40 TEU.[33] Article 40 TEU provides that the implementation of the CFSP should not affect the exercise of the other Union competences that used to come under the two other Pillars in the pre-Lisbon era. Equally, the implementation of the other Union policies that are listed in Articles 3 to 6 TFEU should not affect the exercise of the Union competences under the CFSP chapter.

This amendment of the Treaties is far from a groundbreaking development in the constitutional history of the Union polity. In fact, it codifies earlier case law of the Court. The *Airport Transit Visas* case,[34] and more recently the *Small Arms and Light Weapons* case,[35] have suggested that judicial review of CFSP decisions is possible. Firstly, the *Airport Transit Visas* case concerned a Commission challenge to a Council joint action,[36] regarding visas which had been adopted under the then third pillar, on the basis of then Article K.3 EU. The objective of that joint action was the harmonisation of Member States' policies as regards the requirement of an airport transit visa in order to improve control of the air route. However, the Commission considered that such an act should have been adopted on the basis of then Article 100c EC, concerning the determination of the third countries whose nationals must be in possession of a visa to cross the external borders of the Member States. Thus, although that case concerned the delimitation of competences between the first and third pillar, it has been suggested that there is no reason why the ECJ's analysis should not be relevant also for demarcating what used to be the first from the second.[37] This was recently verified in the *Small Arms and Light Weapons* case.

Despite the fact that, unsurprisingly, the Council and one of the Member States argued that the Court had no jurisdiction to decide the case, the ECJ held that it was its task to ensure that acts which, according to the Council, fell within the scope of Article K.3 did not encroach upon the powers conferred on the Community by the EC Treaty. Hence, the Court had jurisdiction to review the content of a joint action, adopted on the basis of the then Article K.3 TEU, in the light of (then) Article 100c

[32] See eg K Özersay and Ayla Gürel, 'The Cyprus Problem at the European Court of Human Rights' in T Diez and N Tocci (eds), *Cyprus: A Conflict at the Crossroads* (Manchester, Manchester University Press, 2009) 273.

[33] Art 275 TFEU.

[34] Case C-170/96 *Commission v Council (Airport Transit Visas)* [1998] ECR I-2763.

[35] Case C-91/05 *Commision v Council (Small Arms and Light Weapons)* [2008] ECR I-3651; For an in depth analysis of the judgment, see generally B Van Vooren 'EU/EC External Competences after the Small Arms Judgment', (2009) 14 *European Foreign Affairs Review*, 7; B Van Vooren 'The Small Arms Judgment in an Age of Constitutional Turmoil', (2009) 14 *European Foreign Affairs Review*, 231.

[36] Joint Action 96/197 [1996] OJ L63/8.

[37] S Peers, 'Common Foreign and Security Policy 1998', (1998) 18 *Yearbook of European Law* 661.

TEC in order to ascertain whether the act affected the powers of the EC under that provision and to annul the act if it appeared that it should have been based on Article 100c TEC.[38] Clearly, this finding has been de facto upheld by the Lisbon Treaty.

On the other hand, on 20 May 2008, the Court of Justice delivered its much-awaited judgment in the *Small Arms and Light Weapons* case. In that case, the Commission asked the Court to annul Council Decision 2004/833/CFSP,[39] implementing Joint Action 2002/589/CFSP,[40] with a view to an EU Contribution to ECOWAS in the Framework of the Moratorium on Small Arms and Light Weapons and to declare the aforementioned Joint Action illegal and hence inapplicable. The main objective of the contested Joint Action was to offer financial support and technical assistance to ECOWAS in order to help to consolidate its initiative concerning small arms and light weapons.[41] However, in the Commission's view, this Joint Action should not have been adopted and that project should have been financed from the 9th European Development Fund—'EDF' under the Cotonou Agreement.[42]

The Court noted, in paragraph 32 of its judgment, that 'under Article 47 EU [replaced by Article 40 TEU], none of the provisions of the EC Treaty is to be affected by a provision of the Treaty on European Union'. Therefore, it reaffirmed that it is

> the task of the Court to ensure that acts which, according to the Council, fall within the scope of Title V of the Treaty on European Union and which, by their nature, are capable of having legal effects, do not encroach upon the powers conferred by the EC Treaty on the Community.[43]

It then went on to clarify that

> a measure having legal effects adopted under Title V of the EU Treaty affects the provisions of the EC Treaty within the meaning of Article 47 [replaced by Article 40 TEU] whenever it could have been adopted on the basis of the EC Treaty, it being unnecessary to examine whether the measure prevents or limits the exercise by the Community of its competences.[44]

Thus, it is irrelevant that the measure could have been adopted by the Community in an area that does not fall within its exclusive competence.[45] The critical question is whether the contested measure 'infringes Article 47 [replaced by Article 40 TEU] inasmuch as it could have been adopted on the basis of the provisions of the EC

[38] *Airport Transit Visas* (n 34 above) at paras 13–17.
[39] [2004] OJ L359/65.
[40] Council Joint Action 2002/589/CFSP of 12 July 2002 on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons and repealing Joint Action 1999/34/CFSP, [2002] OJ L191/1.
[41] *Ibid*, Recitals (3) and (4) of the Preamble.
[42] *Small Arms and Light Weapons*, (n 35 above) para 23.
[43] *Ibid*, para 32.
[44] *Ibid*, para 60.
[45] *Ibid*, para 61.

Treaty'.[46] In the *Small Arms and Light Weapons* case, given that the aim and the content of the contested measure 'contained two components, neither of which can be considered to be incidental to the other, one falling within Community development cooperation policy and the other within the CFSP',[47] the Court decided that 'the Council has infringed Article 47 EU [replaced by Article 40 TEU] by adopting the contested decision on the basis of Title V of the EU, since that decision also falls within development cooperation policy'.[48]

Hence, taking into account the case law of the Court as codified by the Lisbon Treaty, the ECJ can judicially review a CFSP decision that would authorise the Union to become the principal mediator in a peace process, as long as it could be claimed that such an act affects the exercise of the Union competences under Articles 3 to 6 TFEU. As shall be seen in the following part of the chapter, however, such an act could not come under the scope of the aforementioned Articles of the Treaty on the Functioning of the EU.

In summary, I would argue that the adoption of a CFSP decision by the Council, in order to authorise the Union to play the role of the honest broker in the Cyprus issue, is an *ultra vires* act since a CFSP device cannot be used for an area that is part of the Union and for attributing the role of the principal mediator in negotiations between two ethno-religious communities—the vast majority of the members of which are Union citizens. Even if one interprets the scope of the CFSP less restrictively, to the effect that it covers the relations of the Republic with Turkey and thus the Cyprus conflict, this would still be not enough to solve the political and legal issues of the Turkish non-recognition policy of the Republic and the Turkish Cypriot representation referred to before. However, from an EU law point of view, it should be noted that in the rather improbable case that the political concerns of the actors to that conflict are eased and the Union adopts a decision to that effect, the Court would, most probably, not find that such a decision affects the exercise of other competences of the Union as shall be seen in the following section of the present chapter.

2.4 Other Union Competences

Unsurprisingly, international dispute resolution does not appear in Title I of the Treaty on the Functioning of the EU, which deals with categories and areas of Union competence. Article 5 TEU also reaffirms that the limits of Union competences are governed by the principle of conferral. Thus, one could rightly argue that *prima facie* the TFEU cannot provide any legal basis in order for the Union to authorise itself as the principal actor in future negotiations.

However, given that action to achieve the unification of Cyprus might be deemed necessary in order to fill the *lacuna* in the EU legal order and thus to also complete

[46] *Ibid*, para 63.
[47] *Ibid*, para 108.
[48] *Ibid*, para 109.

the operation of the internal market in the 'Areas', it may be arguable that Article 352 TFEU could provide the legal basis for the Union to play the role of honest broker in future negotiations between the two communities. At the end of the day, the ethno-religious segments on the island are largely comprised of Union citizens. It should be noted, however, that the Lisbon Treaty has clarified that the aforementioned Article cannot serve as 'a basis for attaining objectives pertaining to the common foreign and security policy'.[49]

More recently, the Court of Justice in *Kadi*[50] reaffirmed that 'recourse to that provision demands that the action envisaged should, on the one hand, relate to the "operation of the common market" and, on the other, be intended to attain "one of the objectives of the Community" '.[51] 'That latter concept, having regard to its clear and precise wording, cannot on any view be regarded as including the objectives of the CFSP'.[52] As already mentioned, despite the fact that Cyprus, as a whole, has joined the Union, an act that would attribute the role of the 'broker' to the EU in peace negotiations is considered as rather serving CFSP objectives.

For the sake of argument, however, let us imagine that the Council unanimously approves a Commission proposal under Article 352 TFEU. Such a legislative act would authorise the Union to become the principal actor in the negotiations for the settlement of the Cyprus issue, since within the framework of the Union policies, such an authorisation proved necessary to attain one of its objectives set out in the Treaties. Even in this case, the *2/94 Opinion*[53] of the Court questions the legality of such a decision.

On that occasion, the Council had requested the Opinion of the ECJ, both as regards the competence, under the EC Treaty, for the Community to accede to the European Convention of Human Rights and the compatibility of such an accession with substantive provisions and principles of EC law. In particular, the Court focused on the exclusive jurisdiction of the Court of Justice and the autonomy of the Community legal order. For the purposes of the present research, it is important to note that, according to the Court, ex Article 308 TEC [now Article 352 TFEU] could not serve as a basis for widening the scope of EC powers beyond the general framework created by the Treaty provisions, as a whole, and by those that defined the tasks and the activities of the then EC.[54] Article 352 TFEU [ex Article 308 TEC] cannot be used as a basis for the adoption of provisions whose effect, in substance, would be to amend the Treaty without following the procedure provided for that purpose.[55] If that proposition applied to this case, it would mean that by attributing

[49] Art 352(4) TFEU.

[50] Joined Cases 402/05 P and 415/05 P, *Kadi and Al Barakaat v Council of the European Union*, [2008] ECR I-6351.

[51] *Ibid*, para 200.

[52] *Ibid*, para 201.

[53] Opinion 2/94, *(re Accession to the ECHR)* [1996] ECR I-1759. For a comprehensive analysis of that judgment and the use of ex Art 308 TEC, see generally R Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford, Oxford University Press, 2009) 133–143.

[54] *Ibid*, paras 27–30.

[55] *Ibid.*

the role of the principal mediator to the Union following the adoption of a legislative act under Article 352 TFEU, the scope of the Union competences contained in the TFEU would most probably be widened beyond the general framework created by the provisions of this Treaty. Therefore Article 352 TFEU should not be used as a legal basis to that effect.

On the other hand, one has to note that accession to the European Convention on Human Rights would have been, in substance, a Treaty amendment without following the procedure provided for by the Treaty. Thus, it is rather difficult to draw conclusions from this Opinion for the purposes of this research given that the constitutional significance of extending the scope of Union competences under the TFEU to include dispute resolution would have been much more trivial than the accession to the ECHR.

In any case, I would argue that neither does Article 352 TFEU provide a legal basis authorising the Union to play the role of the honest broker in future negotiations for a settlement of the Cyprus issue. Such an argument is based on the competences attributed to the Union, the delimitation of Article 352 TFEU by the Lisbon Treaty, the *Kadi* judgment and the reasoning of the Court in its *2/94 Opinion*.

Even if one argues, however, that such a legislative act would attribute the role of the principal mediator to the Union, and could have as an objective the completion of the internal market rather than international dispute resolution, the question whether such a legislative measure would encroach on CFSP competences would still remain to be answered before Article 352 TFEU could be brought into play. The reason for this would be that although the stated objective may be the completion of the single market, the real aim and content of the act would most probably be dispute resolution.[56] On the other hand, it may be the case that a Union legislative instrument may contain 'two components, neither of which can be considered to be incidental to the other, one falling within Community' competences and the other within the CFSP,[57] however, as noted in several points of the present book, for the withdrawal of the suspension of the *acquis* which would lead to the completion of the single market, there is the special provision of Article 1(2) of Protocol No 10. Thus, given the existence of a provision that is part of the Union primary law and has the value of *lex specialis*, it would be rather difficult to bring Article 352 TFEU into play, even in that case.

2.5 Ankara Agreement

Arguably, the Union could attain the role of the negotiator for a solution to the Cyprus issue in the course of Turkey's accession negotiations. According to paragraph 6 of the Negotiating Framework with Turkey,[58] the advancement of the negotiations will be guided by Turkey's progress in preparing for accession. This

[56] *Small Arms and Light Weapons*, (n 35 above) para 78.
[57] *Ibid*, para 108.
[58] ec.europa.eu/enlargement/pdf/st20002_05_tr_framedoc_en.pdf.

progress will be measured in particular against some requirements that are mentioned in that paragraph. One of them is

> Turkey's continued support for efforts to achieve a comprehensive settlement of the Cyprus problem within the UN framework and in line with the principles on which the EU is founded, including steps to contribute to a favourable climate for a comprehensive settlement, and progress in the normalisation of bilateral relations between Turkey and all Member States, including the Republic of Cyprus.

The 2008 Accession Partnership (AP) with Turkey repeats *verbatim* that requirement.[59]

Although the accession negotiations with Turkey are conducted according to the Negotiating Framework, the current pre-accession strategy, as a whole, is based upon the evolution of the bilateral relations between the EU and Turkey under the Ankara Agreement. This scheme follows the paradigm of the fifth enlargement where the Europe or Association Agreements were reoriented under the reinforced pre-accession strategy in order to provide a vehicle for accession.[60] For the purposes of the present research, it is critical to note that the Agreement remains the bilateral legal basis of the relationship insofar as it concerns the dispute resolution, trade and accompanying provisions on services, persons and capital and other common provisions. It thus provides the bilateral legal foundation of the pre-accession strategy[61] and the institutional basis for reviewing progress in the accession negotiations.[62] Otherwise, the legal and financial instruments of the pre-accession strategy, mainly the APs and the National Plans for the Adoption of the Acquis (NPAAs), run in a parallel and mutually complementary manner, between the Union and Turkey.[63]

The APs set out in a single framework both the pre-accession actions to be taken by the candidate countries as well as the policy and financial instruments to be developed by the EU to help the candidates in their preparations for accession. They are the key legal instruments in the administrative and political matrix of policy instruments that underpin the pre-accession strategy, which builds on the bilateral structures and achievements to date under the Ankara Agreement. Council Regulation 390/2001,[64] which has been modelled upon the Council Regulation 622/98,[65] has

[59] Council Decision 2008/157/EC of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with Turkey and repealing Decision 2006/35/EC, [2008] OJ L51/4.

[60] For a more detailed analysis see K Inglis, 'The Europe Agreements Compared in the Light of their Pre-accession Reorientation', (2000) 37 *Common Market Law Review* 1173.

[61] K Inglis, 'The Instruments of the Pre-accession Strategy' in A Ott and K Inglis, *Handbook on European Enlargement, a Commentary on the Enlargement Process*, (The Hague, TMC Asser Press, 2002) 104.

[62] See common Art 2 of Council Decision 2001/235/EC of 8 March 2001 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey [2001] OJ L85/13.

[63] Inglis, 'The Instruments of the Pre-accession Strategy', (above n 61).

[64] Council Regulation (EC) No 390/2001 of 26 February 2001 on assistance to Turkey in the framework of the pre-accession strategy and in particular on the establishment of an Accession Partnership, [2001] OJ L58/1.

[65] Council Regulation (EC) No 622/1998 on assistance to the applicant States in the framework of the pre-accession strategy, and, in particular, on the establishment of Accession Partnerships, [1998] OJ L85/1.

been the basis for four APs with Turkey.[66] Being unilateral decisions of the Council, the APs bind only the Council and the Member States. However, in response to the priorities and objectives laid down in those APs Turkey has adopted three NPAAs,[67] under the guidance of the relevant AP. Thus, APs and NPAAs should be seen as mutually complementing measures that run in parallel to each other. It is also crucial to note that, according to common Article 2 of the four APs with Turkey, in the event of any failure of either the EU or Turkey to meet their AP objectives or the Association Agreement's obligations, it is the Association Council in question that will step in to resolve the matter in line with the mechanism set up under Article 25 of the Ankara Agreement. According to that Article, the Contracting Parties may submit any dispute relating to the application or interpretation of the Agreement to the Association Council and then, the Association Council may either settle the dispute or submit it to the ECJ or any other existing court or tribunal.

Hence, in accordance with this sophisticated scheme, the Association Council is the responsible institution to control how Turkey is responding to the priorities linked to the Cyprus issue that are contained in the Negotiating Framework and are echoed in the most recent Accession Partnership. Those priorities have been characterised as short-term.[68] Consequently, one could rightly argue that Turkey's continued support for efforts to achieve a comprehensive settlement of the Cyprus problem has already become part of Turkey's accession conditionality.[69] This may allow the Union to become the mediator to this dispute at a later stage. In any case, the Association Council seems omnipotent to authorise the EU to that effect.

On the other hand, one should stress that such a scenario is rather difficult to realise. The reasons for that are mainly political. On the one hand, the well established policy of Turkey not to recognise the Cyprus Republic and, on the other, the issue of representation of the Turkish Cypriots in such a *forum* significantly limit the possibilities that the Association Council will become the *locus* for future negotiations for

[66] See Inglis (n 61); Council Decision 2003/398/EC of 19 May 2003 on the principles, priorities and conditions contained in the Accession Partnership with Turkey, [2003] OJ L145/40; Council Decision 2006/35/EC of 23 January 2006 on the principles, priorities and conditions contained in the Accession Partnership with Turkey [2006] OJ L22/34; Council Decision 2008/157/EC of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with Turkey and repealing Decision 2006/35/EC, [2008] OJ L51/4: 'The implementation of the Accession Partnership shall be examined and monitored in the bodies established under the Association Agreement and by the Council on the basis of annual reports by the Commission'.

[67] 2001 Turkish National Programme for the Adoption of the Acquis; 2003 Turkish National Programme for the Adoption of the Acquis; Turkey's Programme for Alignment with the Acquis (2007–2013); www.abgs.gov.tr/?p=1&l=2.

[68] Expected to be accomplished within one to two years; Part 3 of the Annex of the 2008 AP with Turkey; (above n 59).

[69] The European Parliament in para 37 of its Resolution of 10 February 2010 on Turkey's Progress Report 2009 has called on Turkey and all the other parties in the conflict to support the current negotiations, 'and to contribute in concrete terms to the comprehensive settlement of the Cyprus issue, based on a bi-zonal, bi-communal federation, in line with the relevant UN Security Council resolutions and the principles on which the EU is founded'. In fact, it went a step further with regard to Turkey by asking to facilitate 'a suitable climate for negotiations by immediately starting to withdraw its forces from Cyprus, by addressing the issue of the settlement of Turkish citizens on the island and also by enabling the return of the Famagusta . . . to its lawful inhabitants'.

a settlement. Obviously, this is a reality for almost every *forum,* with the exception of the UN, where the two ethno-religious segments negotiate as communities.

Despite this, it should be mentioned that the requirement that any settlement has to be in line with the principles on which the EU is founded seems to favour the future negotiating position of the Greek Cypriots in the inter-communal negotiations on a comprehensive settlement of the Cyprus problem. Moreover, it seems to be in marked contrast to Turkey's vision of 'a new bi-zonal partnership State' as envisaged in the Annan Plan.[70] As already mentioned and as will become clearer in the second part of the present chapter, the Annan Plan, like any solution based on the principle of bi-zonality, entailed derogations from the *acquis.* Thus, it may be the case that a reference to the principles on which the Union is founded could mean that in a future proposal such derogations should be avoided given that Cyprus is now a Member State of the Union. This will be examined in greater detail in the second part of the present chapter.

Apart from the aforementioned direct reference to the settlement of the Cyprus issue, the Negotiating Framework has acknowledged the cardinal importance of that international political problem for Turkey's accession negotiations in three other respects. As is the case for the issue concerning the support to the UN efforts, all the other references have also been echoed as short-term priorities in the most recent Accession Partnership with Turkey.[71]

Thus, according to paragraph 4, the Union 'expects Turkey to sustain the process of reform and to work towards further improvement in the respect of the principle[s] of [. . .] respect of human rights and fundamental freedoms', including the full execution of the judgments of the European Court of Human Rights.[72] This may be read inter alia as an indirect reference to the case law of the Court of Human Rights on issues arising from the conflict, as mentioned in a previous chapter.

Moreover, the Negotiating Framework has set the 'fulfilment of Turkey's obligations under the Association Agreement and its Additional Protocol extending the Association Agreement to all new EU Member States, in particular those pertaining to the EU-Turkey customs union' as a requirement against which Turkey's progress in preparing for accession will be measured.[73] Although Turkey signed the Additional Protocol on 29 July 2005, it issued a declaration, with which it clarified that its signature, ratification and implementation of the Protocol does not

[70] Turkish Ministry of Foreign Affairs, Press Statement No 123. Regarding the Additional Protocol to Extend the Ankara Agreement to All EU Members, 29 July 2005, para 1.

[71] 2008 AP with Turkey (n 59).

[72] *Ibid.*

[73] Para 6, hyphen 4. The European Parliament in para 35 of its Resolution of 10 February 2010 on Turkey's Progress Report 2009 has called 'on the Turkish Government to implement it fully without delay, in a non-discriminatory way'. The Parliamentary Assembly of the Council of Europe in para 14.2 of Resolution 1628 (2008) has also called upon Turkey to 'actively seek the establishment of good-neighbourly relations with the Republic of Cyprus, including lifting the ban against entering ports in Turkey imposed on vessels registered in the Republic of Cyprus and on vessels sailing under other flags which enter the ports of the Republic of Cyprus, and to sign a trade agreement with the Republic of Cyprus in accordance with the commitment made by Turkey to the World Trade Organisation and its obligations under its Customs Union Agreement with the European Union'.

'amount to any form of recognition of the Republic of Cyprus referred to in the Protocol'.[74] The EU, however, in its Counter-declaration of 21 September 2005, has made clear that the Turkish declaration 'is unilateral, does not form part of the Protocol and has no legal effect on Turkey's obligations under the Protocol'. It also added that '[r]ecognition of all Member States is a necessary component of the accession process'. Talmon rightly argues that the two declarations 'do not qualify as reservations but are general statements of policy or, at best, interpretative declarations that do not have any effect on the substance of the Protocol and that are not binding upon the parties'.[75]

On the other hand, it should be noted that Article 1(3) of the Additional Protocol replaces Article 29 of the Ankara Agreement with the following text: 'This Agreement shall apply to the territory to which the Treaty establishing the European Community applies under the conditions set out in that Treaty and to the territory of the Republic of Turkey'. Hence, according to that provision, the Ankara Agreement applies to the territory to which the Treaties apply including Cyprus, as a whole, under the conditions set out in Protocol No 10 ie the suspension of the *acquis* in northern Cyprus. This formula has allowed the Turkish Government to argue that it has avoided any implicit recognition of the Government of the Cyprus Republic's claim to act for the northern part of the island. Such recognition, however, seems to be a requirement for the accession of Turkey to the EU, according to the Counter-declaration.

Furthermore, paragraph 7 of the Negotiating Framework asks Turkey, in the period up to accession,

> to progressively align its policies towards third countries and its positions within international organisations (including in relation to the membership by all EU Member States of those organisations and arrangements) with the policies and positions adopted by the Union and its Member States.

Such a requirement is an indirect reference to the permanent Turkish veto to the Cypriot application to join international organisations and has been contained as a short-term priority in the 2008 AP with Turkey.[76] Although it would be possible for the EU to assess Turkey's attitude with regard to the application to international organisations of third countries and Member States, such activity 'cannot be interpreted as prejudicing the autonomy of decision-making of any of those international organisations or of their members, or of the Member States of the European Union'.[77]

[74] See Turkish Ministry of Foreign Affairs, Press Statement No 123 (above n 70) para 4.

[75] S Talmon, 'The European Union—Turkey Controversy over Cyprus or a Tale of Two Treaty Declarations' (2006) 5 *Chinese Journal of International Law* 579.

[76] Turkey has blocked the membership of the Republic in the following organisations and treaties: Missile Technology Control Regime, Wassenaar Agreement, Open Skies Treaty, Organisation of the Black Sea Economic Cooperation, Organisation for Economic Cooperations and Development, EU-NATO Cooperation ('Berlin plus' arrangements), European Centre for Medium Range Weather Forecasts, European Conference of Ministers of Transport and Conference on Disarmament.

[77] Presidency statement concerning para 7 of the Negotiating Framework; Council document 12823/1/05 REV 1, (Brussels, 12 October 2005).

As is evident, the Cyprus conflict is deeply embedded in the legal structure of the EU-Turkey relationship. In December 2006, for instance, Turkey's failure to implement the relevant obligations under the Additional Protocol, ie to open its airports and seaports to Greek Cypriot traffic, caused Brussels to freeze opening eight of the 35 negotiating chapters. So, it seems almost unavoidable that different aspects of the Cyprus problem, such as the non-recognition of the Republic, the full execution of the case law of the Court of Human Rights etc., are discussed in the course of the accession negotiations. It is highly improbable, however, due to the political constraints, referred to before, that the Association Council will become the *locus* for a new initiative for the solution of this age-old problem.

2.6 Remarks

Overall, it has been shown that there are important legal constraints in the present Union institutional framework that would make the attribution of the role of the principal mediator to the Union rather unlikely. The Union—even after the ratification of the Lisbon Treaty—does not seem to have a competence to act as the mediator between parties in intra-State conflicts within the territories of its own Member States.

However, the recent initiative of the former Commissioner for Enlargement Olli Rehn to act as an informal mediator in the Slovenia/Croatia dispute[78] might suggest that the situation is more nuanced than presented before. In fact, one might even argue that in the light of the flexibility and pragmatism which the Union has showed until now with regard to its relations with northern Cyprus, the previous analysis seems rather legalistic. Such a limited reading of the role that the Union could play in the quest for the settlement of the conflict may disregard the fact that the scope of the CFSP over the years has been defined widely and the role of the European Council has been construed broadly.

But if that is the case, how could one justify the wide consensus among the administrations of the two communities and the Union institutions that there is no clear-cut legal basis on which the Union could base such an initiative? As we have mentioned in various parts of this book, every legal debate on any issue arising out of this age-old dispute is political in disguise. The parties in the conflict have tended over the years to transform their ideological positions to legal arguments. Thus, it is important to shed light on such legal constraints that may prevent the EU from replacing the UN as a principal mediator because it is more than probable that, should the Union ever try to assume such role, the parties in the conflict will use those legal constraints against the procedure.

In any event, it is not uncommon for the parties in the conflict to use every forum as another arena for their political battle, a platform for seeking international and local endorsement of their political arguments. This might be crucial if we take

[78] www.euractiv.com/en/enlargement/slovenia-lifts-veto-croatia-eu-talks/article-185885.

into account the political constraints of the Union with regard to the assumption of such a role. It is difficult to overstate that although the Union has a great interest in a comprehensive solution on the island, politically speaking, it cannot be an official mediator. The Union is a party to the conflict by virtue of the memberships of the Republic of Cyprus, Greece and the UK. Moreover, certain aspects of Turkey's policies question the political prudence of such an initiative in the course of the accession negotiations.

To sum up this point, one has to admit that if the two communities formally ask the Union to attain such a role—as Slovenia and Croatia have done—it would be rather difficult for the EU to reject such a request. In that improbable case, the legal basis issue could be settled by dealing with the Cyprus issue within the framework of the Association Council. The adoption of a CFSP decision, albeit an *ultra vires* act, may offer another alternative, given that the Court could not judicially review such a decision. Alternatively, the Member States could draft and sign a special international treaty authorising an institution like the Commission to play such a role or appointing a special representative.

On a more pragmatic level, however, given that both communities also insist on the central role that the UN has to play in the present (and possibly future) negotiations, the Union should be determined to assist with achieving a solution, that would be as compatible as possible to the *acquis* and accommodating it within its legal order. In the meantime, the EU could provide for measures that could bring the two communities closer, such as the Green Line Regulation and the Financial Aid Regulation. At the end of the day, this is exactly the framework of the present negotiations between the leaders of the two communities.

3. ACCOMMODATING A FUTURE SOLUTION WITHIN THE UNION LEGAL ORDER

3.1 Introduction

As already mentioned in the first chapter of the book and the introduction to this chapter, the 'European approach/solution' discourse also refers to the proposition that any future settlement should be in 'strict compliance with European constitutional principles and the *acquis communautaire*'.[79] 'Strict compliance' with Union law, however, is difficult to be achieved, given the tensions between the *acquis* and a solution that will be based on the principles of bi-zonality, bi-communality and political equality of the two communities, as agreed by them on numerous occasions and as described by the UN. This part of the chapter tries to sketch such possible tensions and argues that the Union could accommodate a settlement that would even contain derogations from EU law, in accordance with Protocol No 10 to the Act of Accession and the Union practice of accepting territorial exceptions to the

[79] Auer and others (n 5) para 26.

application of the *acquis*. Finally, it examines whether there are some provisions of Union law that could not be disregarded in the design of a future settlement and thus whether strict compliance with them is a *conditio sine qua non* for the drafting of a settlement to the conflict.[80]

3.2 A Bi-zonal, Bi-communal Federation

Two years after the overwhelming rejection of the Annan Plan by the Greek Cypriot community and in the midst of a political *stasis* relating to the Cyprus issue, the then President of the Republic, Mr Tassos Papadopoulos, and the then Turkish Cypriot leader, Mr Mehmet Ali Talat, decided to confirm their 'commitment to the unification of Cyprus based on a bi-zonal, bi-communal federation and political equality, as set out in the relevant Security Council Resolutions'.[81] On 21 March 2008, the new President of the Republic, Mr Christofias, and Mr Talat reconfirmed that those principles that are contained in the 8th July Agreement will serve as a basis in their negotiations for a solution to the Cyprus issue. Two months later, and after reviewing the results achieved pursuant to the March Agreement, the leaders of the two Cypriot communities released a press statement according to which

> [t]hey reaffirmed their commitment to a bi-zonal, bi-communal federation with political equality, as defined by relevant Security Council resolutions. This partnership will have a Federal Government with a single international personality, as well as a Turkish Cypriot Constituent State and a Greek Cypriot Constituent State, which will be of equal status.[82]

On 1 July 2008, the two leaders also agreed, in principle, on the issues of single sovereignty of the new federal State and citizenship.[83] In the occasion of the resumption of the bi-communal negotiations in late May 2010—after the election of Mr Eroğlu as the 'President' of the internationally unrecognised TRNC a month earlier—the UN Secretary-General reconfirmed that 'the two leaders have agreed to continue on the basis of the UN parameters, Security Council resolutions and the joint statements made on 23 May and 1 July 2008'.[84]

The principles of bi-zonality, bi-communality and political equality, being the basic parameters of the settlement of the Cyprus issue, were first introduced by the High Level Agreements of 1977 and 1979 between Makarios and Denktash and between Kyprianou and Denktash respectively and have been part of the narrative

[80] See generally M Cremona and N Skoutaris, 'Speaking of the De . . . rogations' (2009) 11(4) *Journal of Balkan and Near Eastern Studies* 387.

[81] Agreement between the President of the Republic Mr Tassos Papadopoulos and the Turkish Cypriot leader Mr Mehmet Ali Talat (8 July 2006) para 1; www.cyprus.gov.cy/MOI/pio/pio.nsf/All/793035B13B07CD8FC225727C00353501?OpenDocument.

[82] Joint Statement by Greek Cypriot leader Demetris Christofias and Turkish Cypriot leader Mehmet Ali Talat, 23 May 2008; www.unficyp.org/nqcontent.cfm?a_id=1588.

[83] Joint Statement by Greek Cypriot leader Demetris Christofias and Turkish Cypriot leader Mehmet Ali Talat, 1 July 2008; www.unficyp.org/nqcontent.cfm?a_id=1906&tt=graphic&lang=l1.

[84] The UN Secretary-General, Message on the resumption of Cyprus Talks, 26 May 2010; http://www.uncyprustalks.org/nqcontent.cfm?a_id=2949.

of the Cyprus conflict since then. The UN and the wider international community adhere to this formula as shall be seen later to a greater extent. Nevertheless, one has to mention the differences between how the two communities interpret those concepts and envisage the application of those principles.

Such differences became clear once more on 3 September 2008 when the bi-communal negotiations were officially launched. In the Additional Comments to his Opening Statement, President Christofias stressed that the Greek Cypriot community has exhausted its limits with the major concession made by President Makarios in 1977, according to which the solution will be based on a bi-zonal, bi-communal federation, and thus they cannot go any further. 'Neither a confederation, nor a new partnership of two states through "virgin birth"[85] can be accepted. The federal solution will be a partnership of two communities'.[86] He also referred to the issues of 'settlers', properties and territory as issues outstanding.[87] At the same time, the then leader of the Turkish Cypriot community, in his Opening statement, attached great importance to

> the continuation of the 1960 Treaties of Guarantee and Alliance as an essential part of a settlement; safeguards to ensure that neither side can claim jurisdiction over the other; and maintaining the internal balance between the two sides in Cyprus as well as the external balance between Greece and Turkey over Cyprus.[88]

In a speech delivered later that day, Mehmet Ali Talat reaffirmed that the community he represents has 'no intention of giving up their rights over the island of Cyprus. We know that these rights of ours can be safeguarded by "the political equality of the two peoples and the equal status of the two constituent states"'.[89]

The differences in the way the two ethno-religious communities approach the basic parameters of the comprehensive settlement and which particular aspects they have decided to focus upon are obvious. Despite that, one has to highlight that both communities agree that the solution entails a bi-zonal, bi-communal federation with political equality, as defined by relevant Security Council resolutions,

[85] See generally, International Crisis Group, *Reunifying Cyprus*, (above n 17), 11. During the negotiations for the Annan Plan, the negotiators tried to cut the Gordian knot of the transition from two existing administrations to a new united State with an ambiguous, largely unwritten, concept that became known as the 'Virgin Birth'. To that effect Art 12(1) of the Foundation Agreement of the Annan Plan provided that: '[a]ny act, whether of a legislative, executive or judicial nature, by any authority in Cyprus whatsoever, prior to entry into force of this Agreement, is recognised as valid and, provided it is not inconsistent with or repugnant to any other provision of this Agreement or international law, its effect shall continue following entry into force of this Agreement. No-one shall be able to contest the validity of such acts by reason of what occurred prior to entry into force of this Agreement'.

It is important to note that Talat has said that he would be happiest with a concept similar to 'Virgin Birth' in which the new state would have 'no mother and no father, or both of us as mother and father'. Christofias, on the other hand, does show some flexibility by saying the new republic will have a new name.

[86] http://www.cyprus.gov.cy/moi/pio/pio.nsf/All/1D387387A73E80E5C22574B9003C8893?OpenDocument.

[87] *Ibid.*

[88] www.greeknewsonline.com/modules.php?name=News&file=article&sid=9040&mode=thread&order=0&thold=0.

[89] www.trncinfo.com/tanitmadairesi/ARSIV2008/ENGLISHarcive/SEPTEMBER/040908.htm.

with a single sovereignty, citizenship and international personality.[90] It is exactly those principles that the UN Security Council Resolutions have adequately defined.

First of all, the term 'political equality' of the two communities has been defined in Resolution 716 (1991)[91] which refers to the UN Secretary-General's Report of 8 July 1990.[92] In paragraph 11 of this Report, the then UN Secretary-General Javier Perez de Cuellar sustains that although 'political equality does not mean equal numerical participation in all federal government branches it should be reflected in various ways'.[93] Most importantly, it entails 'the effective participation of both communities in all organs and decisions of the federal government'.[94]

On the other hand, the definition of the term 'bi-zonal and bi-communal federation' appears in paragraphs 17 to 25 of the Report of Boutros Boutros-Ghali of 3 April 1992.[95] These paragraphs have been endorsed by the Security Council with Resolution 750(1992)[96] and they provide as follows:

> The federal state of Cyprus will have a single international personality and sovereignty as well as a single citizenship. The two communities reject as options union in whole or in part with any other country and any form of partition or secession.[97]
>
> The federation will be bi-communal as regards the constitutional aspects and bi-zonal as regards the territorial aspects.[98]
>
> The bi-zonality of the federation is reflected in the fact that each federated state would be administered by one community which would be guaranteed a clear majority of the population and of land ownership in its area.[99]
>
> The freedom of settlement and the right to property would be implemented in a manner consistent with the Constitution that would be based on the principle of bi-zonality.[100]
>
> The security of both communities would be guaranteed through the 1960 Treaties of Guarantee and of Alliance each of which would be appropriately supplemented.[101]

These principles have never been reversed by the Security Council.[102] Instead, they have been verified, developed and incorporated in the UN settlement proposals. The UN Security Council Resolution 1251 (1999) sums up the position as follows:

[90] In fact, on 8 March 2010, the Government of the Cyprus Republic published and distributed 200,000 leaflets which provided information about how the federal principle will apply in the reunified Cyprus: www.moi.gov.cy/moi/pio/pio.nsf/all/E2D264056F00ACB1C22576DC0034DEC5/$file/pdfomospondia.pdf?openelement.

[91] UN Security Council Resolution 715 (1991).

[92] Report of the Secretary-General of 8 March 1990, S/1990/21183, Annex I, para 11.

[93] *Ibid.*

[94] *Ibid.*

[95] Report of the Secretary-General of 3 April 1992, S/1992/23780, paras 17–25.

[96] UN Security Council Resolution 750 (1992).

[97] Report of the Secretary-General of 3 April 1992 (above n 95) para 18.

[98] *Ibid.*

[99] *Ibid*, para 20.

[100] *Ibid*, para 23.

[101] *Ibid*, para 24.

[102] UN Security Council Resolutions 789 (1992) and 1475 (2003).

> A Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded, and comprising two politically equal communities as described in the relevant Security Council Resolutions, in a bi-communal and bi-zonal federation, and that such a settlement must exclude union in whole or in part with any other country or any form of partition or secession.[103]

In the light of the current bi-communal negotiations, the UN Security Council has reaffirmed this position.[104]

However, were a settlement to be reached which did in fact conform to these principles, it would pose challenges for Union law and especially the free movement of persons and capital *acquis*. This is especially so if the bi-zonality of the new unified federal Cyprus would be reflected in the fact that each 'federated state would be administered by one community which would be guaranteed a clear majority of the population and of land ownership in its area'.[105] It is almost definite that certain permanent restrictions to the free movement of persons and capital will be deemed necessary in order for the particular national identity of the unified, bi-zonal and bi-communal Cyprus to be protected.

The Draft Act of Adaptation that was included in the Annan Plan[106] provides for a good example of the potential incompatibilities of a solution, based on the aforementioned principles, with the *acquis*. As extensively analysed in a previous chapter,[107] such incompatibilities could be summarised in three different aspects: Restrictions on the right of non-residents in the constituent States to purchase immovable property;[108] restrictions on the right of Cypriot citizens to reside in a constituent State in which they do not hold internal constituent State citizenship status;[109] restrictions on the right not only of Greek and Turkish nationals but also of Union citizens to reside in Cyprus, after the comprehensive settlement takes place, in order for the demographic ratio between permanent residents, speaking either Greek or Turkish as mother tongue, not to be substantially altered.[110]

Thus, the question that should be answered for the purposes of the present research is whether the Union membership of the Cyprus Republic means that the agreed framework for the solution of the Cyprus problem should be amended to the effect that the future settlement will not entail any derogations from Union law. The book clearly argues that both Protocol No 10 to the Act of Accession and the Union practice of accepting territorial exceptions to the application of the *acquis* suggest that the EU could accommodate a settlement that would even contain

[103] UN Security Council Resolution 1251 (1999), para 11.
[104] UN Security Council Resolution 1898 (2009), para 5.
[105] Report of the Secretary-General of 3 April 1992 (n 95) para 20.
[106] Draft Act of Adaptation on the terms of the accession of the United Cyprus Republic to the European Union (hereafter DAA), Appendix D of the Annan Plan.
[107] See generally s 4.5 The Exercise of Free Movement Rights in a Unified Cyprus in ch 3.
[108] Art 1 DAA, Appendix D of the Annan Plan.
[109] Art 2 DAA, Appendix D of the Annan Plan.
[110] Art 3 DAA, Appendix D of the Annan Plan.

derogations from the *acquis*. Thus, there is no need for the two communities to overrule the described framework.

3.3 Derogating from the Acquis

According to Article 49(2) EU, every Accession Treaty provides for the 'conditions of admission to the Treaty on which the European Union is founded' and enjoys the same rank as the founding treaties. They integrate the new Member States into the existing Union legal order but, at the same time, they incorporate agreements between the old and the acceding States to depart from certain established rules on a temporary or permanent basis. Thus, for example, a derogation was introduced, by way of Protocol No 6 to the 2003 Act of Accession, to allow Malta to maintain certain restrictive national legislation in force relating to secondary residences.[111] Derogations to the free movement of people and services, the right of establishment and the purchase or holding of real estate have also been provided in the Åland Islands, a group of Swedish-speaking Finnish islands off the Swedish coast, in accordance with Protocol No 2 of the Finnish Act of Accession 1994.[112]

The practice to agree on derogations from the *acquis* in special cases, however, is not limited to the Accession Treaties. Similarly, when Treaty amendments are negotiated, existing Member States may negotiate derogations from new provisions or developments, as Denmark has done with respect to defence policy, the UK and Denmark in relation to monetary union, and the UK and Poland, most recently, with the Protocol on the Charter of Fundamental Rights annexed to the Treaty of Lisbon.[113] In each of these cases, the derogation takes place at the level of primary law (ie the Treaties or a Protocol to the Treaties) and therefore has the force of primary law and becomes, itself, part of the *acquis*. Thus, legally speaking, it would be perfectly possible for the new unified Cypriot State to formally ask all the other Member States to agree to certain derogations, even permanent derogations, from the Union *acquis* with regard to the free movement of persons or capital, in order to accommodate a settlement in Cyprus via a Treaty amendment.

In the case of a future solution to the Cyprus problem, however, a simplified procedure that would enable the Union to accommodate the terms of a settlement, based on the principle of bi-zonality inter alia, may also be available, pursuant to

[111] Protocol No 6 of the Act of Accession 2003 on the acquisition of secondary residences in Malta [2003] OJ L236/947 provides in part: 'Bearing in mind the very limited number of residences in Malta and the very limited land available for construction purposes, which can only cover the basic needs created by the demographic development of the present residents, Malta may on a non-discriminatory basis maintain in force the rules on the acquisition and holding of immovable property for secondary residence purposes by nationals of the Member States who have not legally resided in Malta for at least five years laid down in the Immovable Property (Acquisition by Non-Residents) Act (Chapter 246)'.

[112] Act concerning the condition of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded [1994] OJ C241/21.

[113] Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom [2008] OJ C115/313.

Article 4 of Protocol No 10 to the Act of Accession of 2003. The 5th Recital of the Preamble to Protocol No 10 to the Act of Accession 2003 declares that the Union is 'ready to accommodate the terms of such a settlement in line with the principles on which the EU is founded'. The wording of the preamble is in full conformity with the conclusions of the Seville European Council in June 2002. There, the Union expressed its willingness to 'accommodate the terms of such a comprehensive settlement in the Treaty of Accession in line with the principles on which the European Union is founded: as a Member State, Cyprus will need to speak with a single voice and ensure proper application of European Union law'.[114]

More specifically, Article 4 reflects the Union's willingness to accommodate the terms of a settlement after the EU accession of the Republic, expressed both in the Preamble of the Protocol and in the Seville European Council. It provides for a simplified procedure, according to which, 'the Council, acting unanimously on the basis of a proposal by the Commission, shall decide the adaptations to the terms concerning the accession of Cyprus to the European Union with regard to the Turkish Cypriot community'. Accommodations and 'adaptations' can thus be made. Could such adaptations entail derogations from the existing *acquis*? The critical question is whether legislative acts under such an enabling clause, whose scope would be to accommodate the future settlement, may deviate from other elements of the primary *acquis* or whether those acts, as secondary law, could be challenged before the Court of Justice as to their validity, to the extent that they did not conform to existing primary law. It could be argued that, since the adoption of such acts does not follow the procedure described in Article 48 TEU, they cannot consist of primary law.

The Treaties foresee, however, special procedures for their amendment in some cases.[115] The best example, for the purposes of this case, is the Council decision on the basis of Article 2(2) of the Accession Treaty of 24 June 1994, between the Member States and Norway, Austria, Finland and Sweden, adjusting the instruments of accession after Norway's failure to ratify.[116] Several Articles of this Accession Treaty and of the Act of Accession were amended by a Council decision[117] while other provisions were declared to have lapsed.[118] Thus, in that case, the Council, itself, amended primary law in a simplified procedure without any ratification of the Member States.

[114] Council of the European Union, Seville European Council 21 and 22 June 2002, Presidency conclusions (13463/02), para 24.

[115] For instance, the Treaty of Lisbon has introduced a simplified amendment procedure, with limitations. Art 48(6) TEU allows the European Council to adopt a decision, by unanimity after consulting the European Parliament and the Commission, amending all or part of the provisions of Part Three of the TFEU, relating to the internal policies and action of the Union. Such a decision, however, cannot increase the competences conferred on the Union in the Treaties and shall enter into force only when approved by the Member States in accordance with their respective constitutional requirements.

[116] Council Decision 95/1/EC, Euratom, ECSC of the Council of the European Union of 1 January 1995 adjusting the instruments concerning the accession of new Member States to the European Union [1995] OJ L 1/1.

[117] Art 3 of the Treaty; Arts 11, 13–17, 20–28 of the Act.

[118] Part IV, Title II, Arts 32–68, 146 and Annexes III–V, VII of the Act.

With regard to Article 4, it should be noted that it provides for 'adaptations to the terms of accession of Cyprus'. Given that, at the time it was drafted, the only foreseeable option for settlement was the Annan Plan, containing a request for a substantial derogation from the *acquis* relating inter alia to property and residency rights, it is likely that the drafters of Article 4 had the possibility of derogations from the *acquis* in mind and its wording is broad enough to cover such a possibility. Thus, it could be argued that Article 4 allows the Union, by a unanimous Council Decision and with the consensus of the new unified Cyprus at a future date and 'in the event of a settlement', to alter the terms of Cyprus' EU accession that are contained in the Act of Accession 2003, which undoubtedly has the status of primary law. Those acts, that will amend *ex post facto* Union primary law, would thus be deemed to enjoy the status of primary law.[119]

If the new state of affairs had been approved in the referendums of 24 April 2004, both procedures referred to above would have been followed in a complementary manner. Hoffmeister contends that the adoption of a legislative act under Article 4, adapting the terms of Cyprus' accession, would have been the first step. As a second step those 'adaptations would have been formally incorporated into primary law in order to bring about legal security within the Union's legal system'.[120] Neither procedure, however, allows unlimited derogations. Any derogations would be limited by the principles on which the Union is founded as laid down in Articles 2, 6 and 49 of the Treaty on European Union.

3.4 Possible Limits to the Derogations

Undoubtedly, the Member States are the 'masters of the Treaties' and can amend them as they wish. In the context of accession negotiations, the Court of Justice has recognised the freedom of negotiation, stating that 'the legal conditions for such accession remain to be defined in the context of that procedure without its being possible to determine the content judicially in advance'.[121] Despite functioning as a European constitution,[122] the Treaties are still subject to the intergovernmental method of treaty-making and the will of Member States to accommodate specific economic interests has not, so far, been subject to legal limitations. The Member States have occasionally restricted the four freedoms, even permanently like in the case of the Danish prohibition for secondary residences in the Maastricht Treaty,[123]

[119] G Ziegler, 'The EU-Dimension of a Future Comprehensive Settlement of the Cyprus Problem', in A Sözen (ed), *The Cyprus Conflict: Looking Ahead* (Famagusta, Eastern Mediterranean University Printing House, 2008) 153.

[120] F Hoffmeister, *Legal Aspects of the Cyprus Problem, Annan Plan and EU Accession* (Leiden, Martinus Nijhoff Publishers, 2006), 189.

[121] Case C-93/78 *Mattheus v Doego* [1978] ECR 2203.

[122] Case C-294/83 *The Greens (Les Verts) v The Parliament* [1986] ECR 1339.

[123] Protocol (No 32) on the acquisition of property in Denmark [2008] OJ C115/318.

or with the special regime for the Åland islands.[124] This is particularly important in this research since the derogations contained in a future settlement, based on the principles of bi-zonality, bi-communality and political equality of the two communities, will mainly concern the free movement of persons and capital *acquis*, as mentioned before.

However, this freedom of the Member States to amend the Treaties may not be completely unfettered. It has recently been suggested[125] that derogations from primary law may not touch the very core of Union principles. The idea of 'untouchable' core issues is present in the constitutions of Member States[126] and in the notion of *ius cogens* in international law. In *Opinion 1/91*,[127] the ECJ gave a small hint about the existence of such a 'hard core' in holding that the establishment of the judicial organ of dispute settlement in the envisaged EEA agreement would threaten the role of the ECJ under the then Article 164 TEC[128] and thereby the 'foundations of the Community' to a degree which could not have been removed even by a Treaty amendment. This could be read as limiting the treaty-making power of the Member States.[129] On the other hand, even the supposed freedom to negotiate an Accession Treaty is bound by the procedural requirements of Article 49 TEU, and also by the requirement that a condition of Union membership is a commitment to human rights, democracy and the rule of law. Article 48 TEU, similarly, provides a specific mandatory provision for Treaty amendment.

Therefore, even if one accepts that a certain 'hard core' of Union law exists and could not be modified, even by way of a new Treaty, such 'hard core rules' would be found foremost in the characteristics of the institutional system of the EU, as a quasi-constitution, protecting democracy, rule of law, human rights and the principle of non-discrimination, as well as the supremacy and direct effect of EU law, rather than the full application of the four freedoms. Such a finding confirms that the Union is not just a common market but a polity founded on democratic principles.

[124] Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, Protocol No 2—on the Åland islands [1994] OJ C241/352.

[125] A Ott, 'The "Principle" of Differentiation in an Enlarged European Union: Unity in Diversity?' in K Inglis and A Ott, *The Constitution for Europe and an Enlarging Union: Unity in Diversity?* (Groningen, Europa Law Publishing, 2005) 103, 122. See also C Hillion, 'Negotiating Turkey's Membership to the European Union: Can the Member States Do As They Please?' (2007) 3 *European Constitutional Law Review* 269; N Lavranos, 'Revisiting Article 307: The Untouchable Core of Fundamental European Constitutional Law Values and Principles' in F Fontanelli, G Martinico and P Carrozza (eds), *Shaping Rule of Law through Dialogue* (Groningen, Europa Law Publishing, 2009) 119.

[126] Art 79(3) of the German Basic Law provides that the principles contained in Arts 1–20 may never be modified. In France, the republican principle may not be modified according to Art 89(5) of the Constitution.

[127] Opinion 1/91 *(re Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area)* [1991] ECR I-6079.

[128] Ex Article 220 TEC replaced in substance by Article 19 TEU.

[129] *Ibid*, para 72.

As already mentioned, the 5th recital of the Preamble to Protocol No 10 on Cyprus of the Act of Accession declares that the Union is 'ready to accommodate the terms of such a settlement in line with the principles on which the EU is founded'. Those principles, as already shown, do not include internal market freedoms. There can even be permanent derogations from those freedoms. The principles on which the Union is founded are clearly defined in Article 2 TEU. Article 2 TEU provides that '[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. These principles are to be regarded as part of the non-derogable Union *acquis* in any constitutional settlement for Cyprus, inasmuch as they are a prerequisite for membership of the Union and a serious breach of these principles attracts the possibility of sanctions under Article 7 TEU.

Thus, any future comprehensive settlement should be endowed with democratic institutions, respect the rule of law and effectively protect human rights and fundamental freedoms but, at the same time, it could contain some restrictions to the internal market freedoms in order for the particular national identity of Cyprus, as a bi-communal and bi-zonal federal State, to be protected. In any case, the Union has undertaken to 'respect [the Member States'] national identities inherent in their fundamental structures . . . [and] their essential State functions, including ensuring the territorial integrity of the State . . .'.[130] As long as the solution is compatible with the Union's founding principles, any legislative act, under Article 4 of Protocol No 10, that would accommodate derogations with regard to the four freedoms within the Union legal order, would be, most probably, accepted. Of course, this leaves open a large question as to how exactly these principles are to be translated into minimum standards for any Member State, including Cyprus.

With regard to democracy and the rule of law, practice shows that the margin of appreciation that the Member States enjoy is rather wide. For the purposes of the book, suffice it to say that where there is a system in which citizens enjoy equal voting rights, in accordance with Article 3 of Protocol No 1 of the European Convention of Human Rights, and where the State's decision-making body is endowed with democratic legitimacy the democratic principle would be satisfied. In the light of that, the Greek Cypriot proposal at the current negotiations for a weighted vote or cross vote for the election of the executive of the new reunified Cyprus seems largely unproblematic as long as it is accompanied by a democratically elected legislature. As far as the principle of the rule of law is concerned, where there is a constitution that secures the separation of powers, where the government is subordinated to the constitution, there are parliamentary laws and judicial review by independent courts exists, this rule of law would be in conformity with Article 2 TEU.[131]

Potentially, the biggest tensions between a solution based on the principles of bi-zonality, bi-communality and political equality of the two communities and the

[130] Art 4(2) TEU.
[131] Case C-222/84, *Jonston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

EU founding principles arise with regard to the protection of certain human rights. The reason for this is that such a solution, as shown, entails restrictions of certain human rights and fundamental freedoms, especially restriction of the right to property and the right to free internal movement and residence.

The founding principle of respect of human rights and fundamental freedoms, enshrined in Article 2 TEU, is further spelt out in Article 6 TEU. Pursuant to the latter Article, the EU recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the EU but also attains the competence to accede to the European Convention of Human Rights (ECHR). Finally, Article 2 TEU reaffirms that fundamental rights, as guaranteed by the ECHR and resulting from constitutional traditions common to the Member States, which constitute general principles of the Union's law.

Hence, respect of the rights enshrined in the ECHR is a necessary guarantee that a future settlement is in conformity with one of the principles on which the Union is founded. Generally speaking, it should be noted that, with the exception of the prohibition of torture, Convention rights may be subject to proportional restrictions. Thus, those proportionality tests must be examined.

With regard to the right to property, Article 1 of the additional Protocol No 1 to the ECHR provides that '[n]o one shall be deprived of his possessions except in the public interest and subject to conditions provided for by law and the general principles of international law'. Moreover, paragraph 2 provides that the right to property shall not 'impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'. Thus, the restrictions to the property rights of the Cypriots, caused by a scheme whose scope would be to solve the property issue, could be largely justified for reasons of an important public interest, such as the overall settlement of the conflict.

Given that the bi-zonality of the new unified federal Cyprus would be reflected in the fact that each 'federated state would be administered by one community which would be guaranteed a clear majority of the population and of land ownership in its area,' and that more than 75 per cent of the private owned land in the 'Areas' belong to Greek Cypriots,[132] it is unavoidable that the owners of property affected by the current status quo would not enjoy an absolute right to reinstatement.[133] Thus, the future restitution scheme will, most probably, combine partial reinstatement for some dispossessed owners, partial compensation for some others and may protect current users who have made significant improvements to properties or have no alternative accommodation, as was the case, for example, in the Annan Plan. The

[132] Commission Communication, (above n 19) 13.

[133] Even in the case that arrangements could be made that, in case all Greek Cypriots returned under Turkish Cypriot administration, there would still be a Turkish majority in the future Turkish Cypriot constituent State, the maintenance of the bi-zonal character of the new federal Republic of Cyprus would still entail restrictions with regard to the right to property of members of the Greek Cypriot community. For an informative analysis of the right to return in post-conflict societies from a political science point of view, see generally N Loizides and M Antoniades, 'Negotiating the Right to Return' (2009) 46 *Journal of Peace Research* 611.

recent decision of the Court of Human Rights in *Demopoulos* supports such a view since the Grand Chamber reminded that according to its well established case law where it has not been possible to restore the position of the dispossessed owners, it has imposed the alternative requirement on the violating State to pay compensation for the value of the property,[134] since 'property is a material commodity which can be valued and compensated for in monetary terms'.[135]

For reinstated owners, the situation does not raise serious issues of human rights. On the other hand, for the owners that will be compensated for the expropriation of their property, there should be a fair balance between the public and the private interest, leading to some compensation,[136] including compensation for loss of use. More importantly, for the purposes of the Cyprus' case, the Strasbourg Court, in the case of *The Former King of Greece*, held that matters of economic or political reform may call for reimbursement of less than the full market value.[137]

On the other hand, Article 2(4) of Protocol No 4 to the ECHR provides that the right to internal movement and residence 'may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society'. Thus, the right to free movement and residence may be restricted in the public interest. Such restrictions, however, shall not only have to foster a legitimate aim but should also be 'necessary in a democratic society', and hence proportional. In particular, it has to be verified that the same policy goal, in this case a settlement that would respect the principle of bi-zonality, cannot be achieved with less interfering means. In other words, it has to be ascertained that it was not possible for a higher percentage of the members of the two ethno-religious segments to have the right to reside in the other constituent State of the bi-zonal federation. Generally speaking, however, practice shows that, unless there is manifest ignorance of a certain right which would diminish its essence substantially, 'any negotiated restriction between the 2 communities must be presumed to reflect a reasonable compromise between the individual right and the need for temporary restrictions as proportional means to foster a common policy goal'.[138]

With regard to the 'settlers', it must be pointed out that Article 4 of the 4th Protocol to the Convention prohibits collective expulsion of aliens. According to the case law of the Strasbourg Court, such a measure is only allowed as long as a reasonable and objective examination of the particular case of each individual alien

[134] Joined Cases of *Takis Demopoulos and Others, Evoula Chrysostomi, Demetrios Lordos and Ariana Lordou Anastasiadou, Eleni Kanari-Eliadou and Others, Sofia (Pitsa) Thoma Kilara Sotiriou and Nina Thoma Kilara Moushoutta, Yiannis Stylas, Evdokia Charalambou Onoufriou and Others and Irini (Rena) Chrisostomou v Turkey* (Application Nos 46113/99,3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04) (Grand Chamber decision as to the admissibility 1 March 2010), para 114.

[135] *Ibid*, para 115.

[136] *Lithgow and Others v United Kingdom* (Application Nos. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81) (judgment 8 July 1986) (1986) Series A-102.

[137] *The Former King of Greece and Others v Greece* (Application No 25701/94) (judgment 28 November 2002) ECHR 2000-XII, para 78: 'Less than full compensation may be equally, if not *a fortiori*, called for where the taking of property is resorted to with a view to completing such fundamental changes of a country's constitutional system as the transition from monarchy to republic'.

[138] Hoffmeister, *Legal Aspects of the Cyprus Problem* (above n 120) 140.

in the group has taken place.[139] In other words, the new unified Cyprus can expel a number of 'settlers' from its territory as long as the future settlement plan will provide for a procedure by which individual cases will be assessed in order for a prohibited collective expulsion to be avoided.

As already mentioned, in case of a permanent and serious breach of the principles enshrined in Article 2 TEU, the Union may take sanctions against a Member State under the procedure described in Article 7 EU. Such a system of collective supervision provides for a sufficient guarantee that, on the one hand, the future settlement would respect the aforementioned principles and, on the other, that the tragic experiences of the past will not be repeated. As a matter of political prudence, one has to question whether, given this framework that the Union Membership of the new unified State provides, there is still a need for the obsolete system provided by the Treaty of Guarantee. Apart from being a relic of colonialism that has been proved an unmitigated failure, it also undermines the EU collective supervision system by attributing a right of intervention to a third party.[140] At least some readjustment to the terms of the Treaty is deemed necessary.

Overall, however, it is evident that, despite the fact that the founding principles of the EU may provide for a limitation on the EU Member States' power to agree on derogations from the *acquis*, the margin of appreciation that the two communities enjoy, in order to agree on a settlement plan that would be based on the agreed principles of bi-zonality, bi-communality and political equality and on the principles enshrined in Article 2 TEU, is rather wide. In other words, given the important public interest that is at stake, ie the reunification of the island, the expressed willingness of the Union to accommodate the terms of the settlement, as long as it is in compliance with the EU founding principles and the special legal basis of Article 4, it is almost certain that a settlement plan, based on the agreed principles of bi-zonality, bi-communality and political equality and approved by both ethno-religious segments in Cyprus, will be accommodated within the Union legal order.

3.5 'Seville' Requirements[141]

With regard to Cyprus' EU membership, it is critical to recall that the European Council, in paragraph 24 of the 2002 Seville conclusions, apart from declaring the Union's willingness to accommodate the terms of a settlement even if they deviate from the *acquis*, pointed out that as a Member State 'Cyprus will need to speak with a single voice and ensure proper application of European Union law'. This reflects both the pragmatic and the legal demands of Union membership as it affects the 'interface' between the Member State and the Union.

[139] *Čonka v Belgium* (Application No 51564/99) (judgment 5 February 2002) ECHR Reports 2002-I, paras 58 and 59 referring to earlier decisions of 23 February 1999 such as *Andric v Sweden* (Application No 45917/99), which declared a series of applications against Sweden inadmissible.

[140] Hoffmeister, *Legal Aspects of the Cyprus Problem* (n 120) 142.

[141] Council of the European Union, Seville European Council 21 and 22 June 2002, Presidency conclusions (13463/02) (above n 114).

With regard to the 'single voice' requirement, note that it would be relevant for many kinds of decision-making procedures. Ways will need to be found to ensure that Cyprus is represented in various EU *fora,* such as the European Council,[142] in conformity with its (new) Constitution. Moreover, although, Article 16 TEU provides that the Council consists 'of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote', it is not prescribed to which internal level of government that representative shall belong. A number of paradigms arising from EU Member States practices exist.[143] It is for the new Constitution of the federal Cyprus to decide which to follow. Equally, there is no rule that forces the Member States to constructively participate in Union affairs. An EU Member State is free to cast a positive or negative vote or to abstain from voting in the EU decision-making process. Thus, if the constitutional framework of the new unified Cyprus hinders the adoption of positions in some EU matters that would not be in contrast with Union law.

The conclusions of the Seville European Council also underlined that Cyprus needs 'to . . . ensure proper application of European Union law'.[144] This is a reference to Article 4 TEU according to which an EU Member State should 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the EU Treaties or resulting from the acts of the institutions of the Union'. With regard to that, firstly, note that since the 1964 *Costa v ENEL* judgment[145] of the Court of Justice, EU law enjoys supremacy over national law, including constitutional law.[146] Member States, however, including unified Cyprus, are free to decide how to integrate this principle into their national law.[147] Moreover, there is

[142] Art 15 TEU.

[143] For instance, in Belgium, the Federal Government, the Regions and the Communities entered into a Cooperation Agreement based on three principles: consensus, mixed delegation and rotation. The so-called P-11 Committee fixes the common Belgian position. It is led by the Federal Ministry of Foreign affairs and unites representatives from both the federal and the regional level and decides by consensus. If there is no agreement, the committee refers the question to the level of Ministers and, as the last resort, to the Prime Ministers of the Federation and the Regions and Communities. If no common position could be reached, no instructions are sent to the Belgian representative. As far as representation is concerned four categories are distinguished: in Category I (all Council topics relate to federal subject matters), Belgium is represented by the Federal Government; in Category II (a dominant share of Council topics is a federal subject matter), a system of 'assistance' applies. A representative of the other levels assists the head of the delegation from the Federal Government. The federal leader votes whereas the subnational 'assistant' politically controls his behaviour and has the right to speak. In Category III (a dominant share of Council topics is subnational subject matter), the same system of 'assistance' applies but the roles are reversed. In Category IV (all Council topics relate to subnational subject matters) a representative from the subnational entities represent Belgium. The representation rotates.

[144] Seville European Council 21 and 22 June 2002, Presidency conclusions (n 114), para 24.

[145] Case C-6/64, *Costa v ENEL* [1964] ECR 585.

[146] Case C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; Case C-473/93 *Commission v Luxembourg* [1996] ECR I-3207.

[147] German (Art 23 of German Basic Law) and Italy (Art 11 of the Italian Constitution) have interpreted their respective constitutional provisions, relating to the EU or international relations, as embodying the supremacy of EU law by a 'material change' of the constitution. France (Arts 54 and 55 of the French Constitution) requires a formal change of the specific constitutional provisions before ratifying a Treaty that would otherwise entail obligations that are not compatible with those provisions. Art. 29(5) of the Irish Constitution has expressly incorporated the principle of supremacy to the Constitution.

no written requirement in EU law that directly concerns the internal organisation of its Member States. The ECJ has verified this position in *Germany v Commission*[148] where it was held that 'it is not for the Commission to rule on the division of competences by the institutional rules proper to each Member State, or on the obligations which may be imposed on federal and Laender authorities respectively'.[149] It may, however, 'verify whether the supervisory and inspection procedures established according to the arrangements within the national legal system are in their entirety sufficiently effective to enable the Community requirements to be correctly applied'.[150] On the other hand, it is important to note that the ECJ repeatedly held that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time limits laid down in a directive.[151] Hence, it is essential that a central government has a mechanism at hand to ensure compliance with Union law in the case of a regional 'blocking'.

To sum up this point, it could rightly be argued that the guidance that the EU offers to the two communities for the constitutional architecture of the future federal Cyprus is rather limited. Unsurprisingly, the Union has not provided any rules for the internal organisation of its Member States. Furthermore, it can be observed that immense differences exist between the constitutional structures of the 27 Member States. Unified Cyprus can create its own Constitution based on the principles upon which the two communities have agreed on numerous occasions and, at the same time, comply with the 'Seville' requirements concerning the effective participation of Cyprus in the political life of the Union as one of its Member States.

3.6 Remarks

The Member States of the EU are bound by Union law and the norms of primary Union law may take priority even over rules of national constitutional law. Thus, any amendment to the Cypriot Constitution should, in principle, conform to the Union *acquis*. Derogations from the *acquis* are possible, and even common in the case of secondary law, but derogations to primary Union law (the Treaty rules) must be contained in primary law, either through a Treaty amendment or a specific Protocol. In the case of Cyprus, Protocol No 10 provides a possible legal base for such derogations in the event of a settlement and derogations may indeed be needed. I have argued that although, no doubt, a solution in strict compliance with the *acquis* would be preferred, the Union is capable of accommodating a constitutional framework containing deviations from Union law, as long as that framework respects the principles on which the EU is founded.

[148] Case C-8/88 *Germany v Commission* [1990] ECR I-2321.
[149] *Ibid*, para 13
[150] *Ibid.*
[151] Case C-107/96 *Commission v Spain* [1997] ECR I-3193; Case C-323/97 *Commission v Belgium* [1998] ECR I-4281.

4. CONCLUSION

During the week between 24 April and 1 May 2004, Cyprus lived its own Divine Comedy. From the 'hell' of the rejection of a reunification plan to the 'paradise' of Union accession. In the aftermath of those events that have changed the history of the Republic and the lives of its people, the debate for a 'European approach/solution' has appeared. Intellectually stimulating as it may be, the two distinct but interconnected understandings of the role of the EU, as a principal mediator in future negotiations and as a framework that requires that a comprehensive settlement plan should be in strict compliance with the *acquis*, to which the 'European approach/solution' discourse mainly refers, consist of a typical case where legal arguments could be used as a 'sword'. The reason for this is that if any of those two visions for the role of the Union to the conflict becomes dominant the agreed framework of the bi-communal negotiations that take place under the auspices of the UN, according to which the solution will be based on the principles of bi-zonality, bi-communality and political equality of the two communities, could be overruled. Thus, whatever progress has been made for the last 30 years of negotiations will be meaningless. After legally and pragmatically assessing both propositions it has been shown, on the one hand, that, apart from the political 'hurdles', there are important legal constraints that should discourage the Union from replacing the UN as a 'broker' in a new initiative that would lead to a settlement. On the other hand, the EU is capable of accommodating a settlement approved by both ethno-religious segments. In the meantime, the Union should continue playing a constructive role in bringing the two communities closer by adopting legislative measures such as the Green Line Regulation and the Financial Aid Regulation. However, it is for the parties in the conflict to show the appropriate political will if the reunification of the island, based on the agreed principles, is ever to be achieved.

VI

Conclusion

BOY: Mr. Godot told me to tell you he won't come this evening but surely tomorrow.
Waiting for Godot, Samuel Beckett (1952)

Κι ήθελε ακόμη πολύ φώς να ξημερώσει.
Ομως εγώ δεν παραδέχτηκα την ήττα.
[It was way long before dawn.
But I have not yet accepted the defeat].

Κι ήθελε ακόμη, Manolis Anagnostakis (1954)

1. A STUDY IN TIME

IN THE PREVIOUS four chapters, the suspension of Union law in northern Cyprus was set in its historical, political and legal context (chapter two), an analytical framework of the very limited application of the *acquis* in the areas not under the effective control of the Republic was provided and the seemingly depoliticised and technical approach of the Union to that long-standing international problem was explained (chapters three and four). In addition, it was argued that the Union cannot act as a principal mediator to the conflict replacing the UN not only because it lacks the competence but also because it is a party to the conflict. On the other hand, it was shown how the European Union can accommodate a solution that would entail derogations from the *acquis* (chapter five).

Although a thematic approach has largely been followed in the structure of the present book (ie the historical, political and legal context of the suspension; free movement of persons; free movement of goods; taking the Union membership into account for a future settlement plan) the book can be also read as a study of the interrelationship of the Cyprus problem and the Union legal order in time. Indeed in the previous four chapters there is an analysis of several legal issues and debates arising from the age-old dispute: first, in the pre-accession period; second, after the 1 May 2004; and third, at a future time whenever a settlement plan is approved by both communities.

In chapter two, after briefly presenting the most important legal and political debates from the birth of the Republic to the Turkish military intervention in 1974, the research mainly focused on issues arising from the membership application and the subsequent accession of the Republic to the EU. Thus, we first analysed the debate concerning the legality of the application of the Republic. Then, we

examined the basic parameters of the UN Comprehensive Settlement Plan, which was designed in order to take advantage of the 'catalyst effect' of the accession—the last version of which was presented to the two communities just a month before Cyprus became a Union Member State. Finally, we legally evaluated the suspension of the *acquis* North of the Green Line after the overwhelming rejection of the Plan by the Greek Cypriots, a week before they started enjoying the rights attached to the 'fundamental status of nationals of Member States'.[1] Overall, it could be argued that the second chapter of the book summarises the interrelationship of the Cyprus issue and the Union legal order until 1 May 2004.

Chapters three and four, on the other hand, offer an analytical framework of the status quo post-May 2004. The very limited application of the *acquis* in northern Cyprus, mainly through the Green Line Regulation, is a rare case where, instead of having derogations from Union law, derogations from its suspension can be observed. Indeed, as we have seen, the fact that the scope of the suspension is territorial allows the citizens of the Cyprus Republic, residing in the northern part of the island, to enjoy, as far as possible, the rights attached to Union citizenship that are not linked to the territory as such.[2] More importantly, the Green Line Regulation mechanism has managed to partially but effectively lift the isolation of an area where the ports of entry have been declared closed for over 30 years.

Politically speaking, the situation remains far from ideal. The existence of 'a place that does not exist'[3] inside the borders of the Union and the many problems arising from that stalemate make the search for a political solution absolutely necessary. Nevertheless, legally speaking, the post-accession legal regime of the relations of the Union with northern Cyprus is sufficiently viable and working. In a way, after the accession of the Republic, instead of pushing for the achievement of the comprehensive settlement, the Union has tried to absorb some of the stresses of the partition of the island by offering a mechanism that has enhanced the lives of most of the inhabitants on the island. Hence, it has supported the normalisation of the relations between the two ethno-religious segments but also between the Turkish Cypriot community and the Union. The landmark judgment of the Court of Justice in *Apostolides v Orams*,[4] being the first authoritative description of the limits of the suspension, has secured the viability and proper functioning of this unprecedented regime (for the Union legal order), created after the accession of the Republic without it exercising effective control over the whole island.

[1] Case C-184/99 *Rudy Grzelczyk v Centre Public d'Aide Sociale d'Ottignes-Louvain-la-Neuve (CPAS)* [2001] ECR I-6193, para 31; reaffirmed in Case C-413/99 *Baumbast, R. v Secretary of State for the Home Department* [2002] ECR I-7091, para 82.

[2] M Uebe, 'Cyprus in the European Union' (2004) 46 *German Yearbook of International Law* 375, 384.

[3] The term refers to entities that have declared independence as states, have clear borders, and governments who exercise effective control over a defined population but remain unrecognised as states (apart from by each other). Apart from the internationally unrecognised TRNC, other 'places that don't exist' are Nagorno Karabakh (Armenia/Azerbaijan), Transdniestria (Moldova), Abkhazia (Georgia) etc. The term is borrowed from C Bell, *On the Law of Peace, Peace Agreements and the Lex Pacificatoria* (Oxford, Oxford University Press, 2008) 226.

[4] Case C-420/07 *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams* (Grand Chamber judgment 28 April 2009) [2009] ECR I-3571.

However secured this legal regime is at present, nevertheless, the innumerable constraints arising from the political stalemate make the search for a comprehensive settlement in the nearest possible future an absolute necessity. The accession of the Republic to the Union is far from a trivial change of context in considering any future solution. This is the main reason why chapter five takes into account the membership of the Republic for a future comprehensive settlement. Despite the fact that I have argued that the Union cannot and should not replace the UN as the principal mediator, still, on the one hand, it could provide for measures that could bring the two communities closer, such as a financial instrument and on the other, making everything possible in order to accommodate a settlement of the Cyprus issue.

Unfortunately, the 'European approach/solution' discourse—as innocuous as it may sound—that entails the strict compliance of any solution inter alia 'with European constitutional principles and the *acquis communautaire*',[5] has been 'high-jacked' by the maximalist/rejectionist school of thought in order for the agreed parameters of the settlement to be overruled. So, it is of critical importance to understand that Protocol No 10 allows the Union to accommodate a solution that would entail derogations from the *acquis*. This is all the more important given that the Special Adviser of the UN Secretary-General in the bi-communal negotiations taking place at the moment, Mr Alexander Downer, has confirmed that there might be derogations from Union law by mentioning that a federal model entailing bi-zonality is, by itself, a derogation from the *acquis*.[6]

2. STRANGERS IN THE SAME LAND? THE COOPERATION OF THE UN AND THE EU IN RESOLVING THE CYPRUS ISSUE

If the present book is also read as a study in time of the Union policy on the Cyprus problem, one could easily observe differences in such a policy over time. Such differences could *prima facie* be explained by the different contractual relationship that the Republic enjoys with the Union in the aftermath of the 'Big-Bang' enlargement of May 2004. Other important factors that have influenced the stance of the Union on the Cyprus issue are the policies and actions of the principal mediator to the Cyprus issue, the United Nations in various phases of the conflict.[7]

More analytically, in the pre-accession period, the formal institutional cooperation of the two international organisations has been extremely limited and mainly occurred during the very last phases of the negotiations procedure. Nevertheless,

[5] A Auer, M Bossuyt, P Burns, A De Zayas, S Marcus-Helmons, G Kasimatis, GD Oberdoerfer, and M Shaw, *A Principled Basis for a Just and Lasting Cyprus Settlement in the Light of International and European Law* (Paper of the International Expert Panel, committed by the Committee for a European solution in Cyprus, presented to Members of the European Parliament, 12 October 2005) para 26.

[6] www.in.gr/news/article.asp?lngEntityID=960630.

[7] See generally, J Ker-Lindsay, 'United Nations Peace-making in Cyprus: from Mediation to Arbitration and Beyond' in T Diez and N Tocci (eds), *Cyprus: A Conflict in the Crossroads* (Manchester, Manchester University Press, 2009) 147.

the prospect of Union accession of the Republic was expected to have a catalytic effect[8] in the quest for a comprehensive settlement. The 'catalyst' rationale rested on a realist logic of conflict settlement. The Turkish and Turkish Cypriot desire to reap the conditional benefits of membership, and the high costs entailed in the absence of a solution before accession, would create the 'ripe' conditions for a settlement by generating Turkish incentives to change their positions. In other words, a conditional 'stick' both to Turkey and the breakaway State of the TRNC would raise the costs of the status quo. In addition, the EU 'carrot' would encourage the parties, including the Greek Cypriots, to support reunification within the EU.

Although such a strategy was effective enough to ensure the support of Turkey, and most importantly the Turkish Cypriots to the Annan Plan, it failed to foresee the stance of the Greek Cypriots after they signed the Treaty of Accession in 2003 and had, thereby, ensured that the Republic of Cyprus would become an EU Member State. Overall, although in the pre-accession period the Union was supposed to offer the necessary 'carrots and sticks' in order for the UN mediation to succeed, the lifting of the conditionality for the Greek Cypriots, first in the Helsinki European Council and later after signing the Act of Accession 2003, was a significant factor that led to the overwhelming rejection of the Annan Plan. Despite this, the cooperation between the two international organisations at the institutional and political level, albeit without bringing the expected results, has largely formulated the policies of the Union towards the Cyprus issue until 1 May 2004.

Later, in view of the Turkish Cypriot vote in the referendum for the Annan Plan, the UN Secretary-General, reporting on his mission of good offices in Cyprus, expressed his hope that the Members of the UN Security Council 'can give a strong lead to all States to cooperate both bilaterally and in international bodies to eliminate unnecessary restrictions and barriers that have the effect of isolating the Turkish Cypriots and impeding their development'.[9] The adoption of the instrument of financial support, Green Line Regulation and the Commission proposal for the Direct Trade Regulation prove, beyond reasonable doubt, that the Union framework is deemed to be the most effective political and legislative means in order for an end to be brought to the economic isolation of the Turkish Cypriot ethno-religious segment, without the recognition of any other authority on the island apart from the Republic—a goal set by the United Nations. Again, in the post-accession period, it can be observed that although there is no formal cooperation between the two organisations, the policy goal declared by the UN has influenced the Union's stance on the issue.

Finally, it is critical to note that any future attempt to obtain a comprehensive settlement of the Cyprus saga, including the pending bi-communal negotiations,

[8] For a detailed account of the 'catalyst effect' theory see generally T Diez (ed), *The European Union and the Cyprus Conflict. Modern Conflict, Postmodern Union* (Manchester, Manchester University Press, 2002); J Ker-Lindsay, *EU Accession and UN Peacemaking in Cyprus* (Basingstoke, Palgrave Macmillan, 2005); N Tocci, *EU Accession Dynamics and Conflict Resolution: Catalysing Peace and Consolidating Partition in Cyprus?* (Aldershot, Ashgate Publishing Limited, 2004).

[9] Report of the Secretary-General on his mission of good offices in Cyprus of 28 May 2004, UN Doc S/2004/437, para 93.

should take the realities created by the certain EU membership of the Cypriot federal State into account. Obviously, the Union cannot replace the UN as the principal *locus* and actor in any new initiative to move towards a solution. Not only does its current and future institutional framework not allow it, but also the Union memberships of Greece and Republic of Cyprus make the Turkish Cypriots extremely reluctant to accept such a perspective. At the same time, the synergy of the two international organisations is deemed necessary in the procedure for the achievement of a comprehensive settlement in order for any solution that will most probably entail derogations from the *acquis* to be accommodated within the Union legal order. Thus, not only have the Union policies on the Cyprus conflict been significantly influenced by the UN initiatives, but it is also difficult to imagine that this will change in the foreseeable future.

3. LESSONS LEARNED (?)

Two years after the accession of Cyprus to the Union, Commissioner Olli Rehn summed up his experiences in the following way:

> I have worked on the Cyprus issue now with five consecutive Presidencies, since 2004. In these two and a half years we have not been able to make progress either on the trade regulation or on the ports issue. One could say 'Sapienti sat'—or 'enough for a wise man'. The essential conclusion we must draw is that a comprehensive settlement is the best way to solve the problems . . . It is in the EU's interest to see a reunification of the island and the end of a conflict on European soil that is now more than 40 years old. Such division is unacceptable within our European Union, which is founded on the principles of peace, reconciliation and human rights. Recalling these basics is all the more justified as we approach the 50th anniversary of the Treaty of Rome.[10]

In those 137 words Rehn has managed to sum up three important lessons learned from the 'constructive engagement'[11] of the EU in the Cypriot 'Rubik's cube'. Firstly, despite the partial but effective lifting of the economic isolation of the Turkish Cypriots and the normalisation of the relations between the two communities, mainly through the adoption of the Green Line Regulation, the status quo remains far from ideal. This is underlined by the fact that since 2004 no progress had been made on the trade regulation and on the application of the Additional Protocol. Given this political *stasis*, it is hard to overstate that a comprehensive settlement is the best way to solve the issues arising from the Cyprus problem. Finally, since according to Article 2 TEU, the Union is founded 'on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights', the division of the island of Cyprus is unacceptable for the political *ethos* of the EU.

[10] Lecture at Helsinki University on 27 November 2006 under the title 'Turkey's Accession Process to the EU'; ec.europa.eu/commission_barroso/rehn/press_corner/speeches/speeches_2006_en.htm

[11] Communication from the Commission to the Council and the European Parliament, The European Union's Role in Promoting Human Rights and Democratisation in Third Countries; Brussels, 08.05.2001 COM(2001) 252.

3.1 '[W]e have not been able to make progress either on the trade regulation or on the ports issue'.

As repeatedly mentioned in several places throughout the book, the Union has managed, by a seemingly depoliticised and technical approach, to offer pragmatic solutions to certain issues arising from the particular international dispute. The Green Line Regulation mechanism has provided the rules for the crossing of the line by EU citizens and third country nationals and has also gotten around a fundamental recognition conflict to allow legal bilateral trade to take place between the parties in dispute and between the Turkish Cypriot community and the Union. Hence, it has been a significant step, not only in order for the two communities on the island to come closer and thus the cleavages of Cypriot society to be bridged, but also in order for the Turkish Cypriot ethno-religious segment to come closer to the Union.

In essence, the post-accession legal regime of northern Cyprus could be deemed to be a method of differentiated integration, albeit with the very limited application of the *acquis* in the area in question. The Union has de facto recognised that there are irreconcilable differences within the integration of the two geographically divided parts of Cyprus, arising from the partition of the island. Therefore, it has allowed for a differentiation of the integration policies applying to the two parts.

Such a 'variable geometry' within the Union membership of that Member State has been 'aimed at improving the situation of Turkish Cypriots. However, more needs to be done in order to facilitate Turkish Cypriots' integration into Cyprus and Europe'.[12] Therefore, the Assembly of the Council of Europe inter alia has recently called for

> new goodwill steps to be taken to allow increased international trade as well as educational, cultural and sporting contacts for the Turkish Cypriot community, it being understood that these activities are consistent with United Nations Security Council Resolutions 541 (1983) and 550 (1984) on Cyprus and cannot be misused for political ends incompatible with the aim of reunifying the island.[13]

Unfortunately, as it has become clear from the discussion about the Direct Trade Regulation, the Republic of Cyprus has not been convinced that such measures—as the ones described in the Parliamentary Assembly Resolution—would contribute to the reunification of the island. Instead, conventional wisdom on the Greek Cypriot side suggests that such measures would lead to the '*Taiwan-isation*' of the internationally unrecognised TRNC.

No matter when and if the Direct Trade Regulation is adopted, it should be stressed that the viability and the proper functioning of the unprecedented regime of northern Cyprus for the Union legal order has been examined by the Court of Justice in *Apostolides v Orams*.[14] The Court has followed the Opinion of Advocate

[12] Resolution 1628 (2008) of the Parliamentary Assembly of the Council of Europe, para 9.
[13] *Ibid.*
[14] *Apostolides v Orams* (above n 4).

General Kokott[15] and thus the viability of the regime is largely secured. If, the ECJ judgment had followed the rationale of the UK High Court, then, there would have been an imminent danger that consensus would have emerged on the lack of enforceability of judgments that protect the property rights of Greek Cypriots in the North. Thus, the thorny property aspect of the Cyprus problem would remain largely unresolved since the rights of the 'new owners' would be upheld. More importantly, if the Luxembourg Court had followed the *ratio decidendi* of the English court then the suspension of the *acquis*, instead of limiting the responsibilities and the liability of Cyprus as a Member State under EU law for actions and omissions of the breakaway State in the North, would pose a threat for the effective protection of the fundamental rights of Union citizens.

In the light of the differentiation of the integration policies applying to the two parts of the island that has been upheld by the Court, it is difficult to overstate that the Union has showed flexibility and pragmatism when dealing with the ramifications of this age-old dispute. The question remains, however, whether, the flexibility of the Union legal order is healthily pragmatic or value driven. The study of the interrelationship of the Cyprus issue with the legal order of the EU—unique as it may be—provides for strong evidence for both claims.

On the one hand, one could focus on the political configuration of Europe during the accession process and argue that such configuration allowed for what seemed unthinkable until the Helsinki European Council ie the accession of Cyprus without resolving its political problem. It was only in the aftermath of this strategic decision that the Union legal order had to prove its healthy pragmatism in order to accommodate the conflict.

On the other hand, one could argue that the main value that drives the flexibility of the Union legal order is a motto contained in the long-dead Constitutional Treaty: 'united in diversity'. In fact, Article 4 TEU provides that the EU should 'respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional'. In other words, there is an inherent value in the Union polity that dictates its legal order to accommodate the diversities, differences and discrepancies of its 27 Member States.

Be that as it may, this does not mean that this differentiated integration method should be used as a model in order to accommodate order international problems of future Member States within the Union legal such as the case of Serbia and Kosovo. On the contrary, the Union should clarify that the peaceful resolution of international political problems is part of its membership conditionality. This is the only way that it could play a constructive role in the resolution of the pending conflicts as shall be seen later. It is imperative that the Cyprus problem is deemed an exception to this well established rule, dictated by the political dynamics of the previous enlargement.

[15] Case C-420/07 *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams* (Opinion of AG Kokott delivered on 18 December 2008) [2009] ECR I-3571

3.2 '[A] comprehensive settlement is the best way to solve the problems'

The process of differentiated integration has clear limits. It is far from probable that it can offer solutions to all the pending thorny issues arising from the Cypriot Gordian knot. Thus, it is difficult to overstate the need for a comprehensive settlement to be achieved in the nearest possible future also given the recent developments in Kosovo and Caucasus. The former 'President' of the secessionist entity in the North, Mr Talat has referred to those developments in a speech he delivered the day that the current bi-communal negotiations were launched. Referring to the Greek Cypriot community, he mentioned that

> [t]he world has been going through quite eventful days. I am aware that the recent developments in the Balkans and the Caucasian [*sic*] are causing concern on your part. You perceive these examples as 'bad examples'. Unless we reach a just, viable and comprehensive solution for the Cyprus problem, you will continue to observe these 'bad examples' with concern.[16]

It is imperative, however, to understand that the just and viable settlement of the Cyprus issue, to which both leaders refer, should be envisaged as a mechanism for the solution of all aspects of the age-old dispute rather than as the creation of a utopia on the island. It is true that '[t]he broader the settlement project, the more it appears that peacemaking is a project of envisaging utopias recognised as elusive even in western liberal democracies'.[17] This is the reason why the future settlement plan, apart from creating a new political imagination within the citizens of the future federal Cypriot State, should also be characterised by viability and functionality.

Of course, one could reasonably wonder how to move from the existing two administrations to a new united federal State when 45 years have passed from the moment that the two communities were living together under the *aegis* of the Republic of Cyprus. Despite the obvious difficulties that the quest for a comprehensive settlement poses and the differences that have been detected in the current bi-communal negotiations,[18] the two leaders have managed to report 'important progress on the chapters of governance and power-sharing, European Union matters and the economy'.[19]

In any case, it seems that in order for the plan for the comprehensive settlement of the Cyprus issue to be successful, it should be characterised by what Christine Bell, citing Ramsbotham, calls 'Clausewitz in reverse'.[20] Claus von Clausewitz described war as 'simply a continuation of political intercourse, with the addition of other

[16] www.trncinfo.com/tanitmadairesi/ARSIV2008/ENGLISHarcive/SEPTEMBER/040908.htm.

[17] Bell, *On the Law of Peace* (above n 3), 6.

[18] For a detailed account of the differences of the two communities see International Crisis Group, *Reunifying Cyprus: The Best Chance Yet*, ((2008) Europe Report No 194), 10–16; V Morelli, *Cyprus: Reunification Proving Elusive* (Washington, Congressional Research Service, 1 April 2010).

[19] Report of the Secretary-General on his mission of good offices in Cyprus of 11 May 2010, UN Doc S/2010/238, Annex II.

[20] Bell (n 3), 200.

means'.[21] According to the 'Clausewitz in reverse' view, then, a future peace agreement on the Cyprus issue should be viewed in converse terms, as a legal document which embraces politics as the continuation of the conflict of the two communities by other means. The preservation and incorporation of all the clashing claims at the heart of the conflict would paradoxically aim to transform it away from the current stalemate, by designing political and legal institutions in which the conflict can continue to be negotiated. In other words, the future settlement plan should be recognised as a forum of metaconstitutional debate, a debate as to what type of constitutional vision will prevail at the domestic level.[22] Such an approach would be in marked contrast with the approach of the Annan Plan, which tried to resolve '*ex ante* all legal and political issues and then, critically, to set it "in stone"'.[23]

Be that as it may, one has to stress that, whatever the result of the current negotiations, it seems that the process will be 'owned' by the communities on the island. Downer, in his opening statement at the launch of the bi-communal negotiation on 3 September 2008, told the two leaders that they

> own this process and, as a result, your continuing leadership is the critical element to make it succeed. In that regard, bringing Cypriots to the conviction that reunification of the island will work for the greater happiness and prosperity of all Cypriots will, ultimately, be paramount.[24]

Christofias has also called for the need to 'safeguard the Cypriot ownership of the process and that the outcome will be a Cypriot solution by the Cypriots and for the Cypriots'.[25] It remains to be seen whether the Cypriot-owned process will lead to an end that was not reached in four decades of UN-led negotiations, the much awaited solution.

3.3 'Such division is unacceptable within our European Union . . .'

The EU's historical success as a peacemaker between France and Germany has inspired many to wonder whether the EU may also bring peace to other conflict zones, especially in Europe.[26] This query is even more justified given that the Union

[21] KM Von Clausewitz, *On War* [1876] (Princeton, Princeton University Press, 1976).

[22] Bell (n 3), 293. She further notes that '[t]he idea of the peace agreement as a site of metaconstitutional discourse follows and extends Neil Walker's conception of the post-Westphalian order "as involving an interplay between state constitutional law on the one hand and non state or cosmopolitan metaconstitutional law on the other".

[23] J Weiler in *Rethinking the Cyprus Problem: A European Approach* Workshop organised by the Hauser Global Law School Program and the Jean Monnet Center for International and Regional Economic Law and Justice at New York University School of Law (Villa La Pietra, Florence 18–19 October 2006).

[24] www.unficyp.org/nqcontent.cfm?a_id=2199&tt=graphic&lang=l1.

[25] www.mfa.gov.cy/mfa/mfa2006.nsf/All/B8C794DCED1A4937C22574B900363672?OpenDocument&highlight=opening statement.

[26] See generally E Akçali, 'The European Union's Competency in Conflict Resolution: the Cases of Bosnia, Macedonia and Cyprus' in T Diez and N Tocci (eds), *Cyprus: A Conflict in the Crossroads* (Manchester, Manchester University Press, 2009) 180; E Féron and F Güven Lisaliner, 'The Cyprus Conflict in a Comparative Perspective: Assessing the Impact of European Integration' in T Diez and N Tocci (eds), *Cyprus: A Conflict in the Crossroads* (Manchester, Manchester University Press, 2009) 198.

has pointed out that conflict resolution is a key foreign priority in its southern and eastern neighbourhoods, presenting it as an 'essential aspect of the EU's external action'.[27] The unmitigated failure, however, of the accession of the Republic to the EU to 'catalyse' the reunification of the island proves, in the most emphatic way, that, although 'the EU does represent a working peace system in its relations and may be expected to continue as such, its capacity to prevent conflict outside its borders—themselves in flux—remains much more dubious'.[28]

Tocci has pointed out, however, that the 'EU's "structural diplomacy" ie the various forms of association and integration offered by the EU, is potentially well-tailored to induce long-run structural change both within and between countries'.[29] According to that rationale, the closer the form of association is with EU, the stronger the potential to achieve the respective conflict resolution goal. Accordingly,

> Europeanisation in the field of secessionist conflict settlement and resolution should be understood as a process which is activated and encouraged by European institutions, primarily the European Union, by linking the final outcome of the conflict to a certain degree of integration of the parties involved in it into European structures.[30]

By taking the aforementioned theory at 'face value', it will be difficult to explain the results of the accession process of Cyprus. As explained above, however, the 'catalyst effect' of the accession procedure has largely failed in the Cyprus conflict mainly because conditionality was lifted for the Greek Cypriots in order for the Union to deal with the intransigence of the then Turkish Cypriot leader Denktash and Turkey. In other words, the problem was not the instruments at the EU's disposal. 'It was rather in the focus on whether and how to use them, and in service of what strategy'.[31]

However, it is going too far to argue that in the Cyprus case '[d]espite the potential in its "structure", the Union failed in the realm of "agency"'.[32] One has to note that although the EU area itself has proved remarkably free of conflict, the Union has not managed to play a significant role as an actor in the settlement of conflicts that have taken place inside its borders, such as the ones in Northern Ireland and in the Basque country.[33] The minimum (if any) involvement of the EU in the aforementioned cases, together with its failure to 'catalyse' a solution in the Cyprus issue, demonstrate that the toolbox of the Union is rather limited when dealing with conflicts and that the EU membership itself is far from a *panacea*. Instead, a robust and

[27] Communication from the Commission, European Neighbourhood Policy Strategy Paper; Brussels, 12.05.2004 COM(2004) 373, 3.

[28] C Hill 'The EU's Capacity for Conflict Prevention' (2001) 6 *European Foreign Affairs Review* 315, 326.

[29] Tocci, *EU Accession Dynamics and Conflict Resolution* (above n 8) 173; see also N Tocci 'Comparing the EU's Role in Neighbourhood Conflicts' in M Cremona (ed), *Developments in EU External Relations Law* (Oxford, Oxford University Press, 2008), 216.

[30] B Coppieters, M Emerson, M Huysseune, T Kovziridze, G Noutcheva, N Tocci and M Vahl (eds), *Europeanization and Conflict Resolution: Case Studies from the European Periphery* (Gent, Academia Press, 2004), 2.

[31] Tocci (n 8), 173.

[32] *Ibid.*

[33] Hill, 'The EU's Capacity for Conflict Prevention' (above n 28), 326.

well functioning democratic State structure is a *conditio sine qua non* for an effective EU membership. More importantly, the Union's failure to act effectively in all those cases, in order for a settlement to be achieved, shows that the complexity of the Union's multi-level decision-making framework raises difficulties in effective external action in cases such as intervention in ethno-political conflicts.

Apart from being an actor in the resolution of a given conflict through the process of Europeanisation, it is submitted that the Union is able to participate as a framework by offering alternative institutional solutions for the conflict, such as federal state arrangements, based on the EU's own model of multi-level governance. The Union's comparative advantage is in its long-term efforts to change the environments out of which conflicts spring, so as to inoculate against them.[34] Six years after the accession of the Republic to the EU, it is still too early to evaluate whether the view, according to which the EU mode of governance could move historical antagonists to new routes of cooperation, will be verified in the case of the Cyprus problem. Although progress has been made since 2004, to the effect that the two communities on the island have come closer to each other and the Turkish Cypriot community has become closer to the Union, still the idea that the post-sovereign vision of European constitutionalism can be supportive of post-sovereignty in the Cyprus conflict will be *prima facie* judged in the current negotiations. In other words, the result of the current negotiations will be the first test where, after the five years experience of the Union membership of the Republic, we can ascertain whether the two communities have moved from their traditional views of sovereignty to positions that more actively support a consociational federal model of governance, compatible with the known parameters of the solution of the problem.

If the idea is verified, it would be another case to prove that the Union is mainly a mechanism that promotes, to use Popper's terms, 'piecemeal social engineering' rather than 'Utopian'.[35] At the end of the day, Europe itself was not made all at once, or according to a single plan. It was built through concrete achievements which first created a *de facto* solidarity.[36]

In any case, it is the two communities who should, first and foremost, mobilise their resources in order to achieve a comprehensive settlement and the reunification of the island. Waiting for the European Godot to offer them the solution is meaningless . . .

[34] C Hill, 'EPC's Performance in Crisis' in R Rummel (ed), *Toward a Political Union: Planning a CFSP in the EC* (Colorado, Westview Press, 1992) 135, 146.

[35] K Popper, *The Open Society and Its Enemies (volumes 1 and 2)* (Princeton, Princeton University Press, 1971).

[36] Schuman Declaration, 9 May 1950; europa.eu/abc/symbols/9-may/decl_en.htm.

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